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HISTORIC TITLES IN INTERNATIONAL LAW.

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ABSTRACT.

This thesis deals with the problems surrounding the acquisition, on historic grounds, of a territorial title in international law.

It constitutes an attempt to show that historic titles to territory are built up through a process which is akin to that by which any new norm of customary international law is created. An historic title is thus regarded as the product of a special customary norm of international law and its legal basis is to be found, it is submitted, in its recognition by the State or States affected by the historic claim. The recognition of an historic title normally takes the form of tacit acquiescence on the part of the State or States adversely affected by the assertion of sovereignty of the claimant State.

The display of State authority - which varies according to the nature of the disputed territory - must be effective, continuous, open, unchallenged and exercised à titre de souverain. The geographical factor, the "legitimate interests" of the claimant State, as well as the time element are merely of probative value in that they may contribute towards raising or strengthening a presumption of acquiescence.

There follows an analysis of the problems related to (a)

the application of the rules of intertemporal law to the establishment of an historic claim; (b) the selection of the "critical date"; and (c) the appraisal of conflicting territorial claims. It is further submitted that, since an historic title is built up in derogation of the general rules of customary international law, the onus of proof invariably rests on the State invoking in its favour an historic title and such title, once established, must be given the strictest possible geographical interpretation.

A special chapter is devoted to a discussion of the specific legal problems attendant on the acquisition of maritime historic claims, which differ from historic claims to terrestrial areas in that they have to be acquired at the expense of the international community at large and not merely at the expense of a single State.

It is submitted that "historic bays" and "historic waters" in general are normally accorded the legal status of internal waters, subject to the preservation of traditional rights of passage and fishing ("historic rights in reverse"), which fall into the category of non-exclusive historic rights. The attempt is also made to show that the coastal States' rights over their continental shelves do not belong to the category of historic rights.

"Tempus enim ex suapte natura vim nullam effectricem habet; nihil enim fit a tempore, quamquam non fit in tempore."

(Grotius, *De Jure Belli Ac Pacis*, Liber II. Caput IV. § 1).

"Time, of its own nature, has no effective power; for nothing is done by time, though everything is done in time."

(Grotius, *De Jure Belli Ac Pacis*, Book II. Chapter IV. § 1).

CHAPTER 1: INTRODUCTION.

The rules of international law governing the acquisition of territory have been for long among the hotly contested problems of international law. The controversiality of the topic is augmented by the fact that the conception of State territory in general has undergone great changes ever since modern international law replaced the medieval con - cepts of "*jus gentium*". According to Oppenheim, "when Grotius laid the foundations of modern International Law, State territory was still, as in the Middle Ages, more or less identified with the private property of the monarch of the State." (1) In accordance with this concept of State territory being the *patrimonium* of the head of the State, it was not uncommon to sell the territory of one State to another, to transfer it as a marriage gift,(2) or to dispose of it in the will of the reigning monarch. It is therefore little surprising that doctrine and practice alike displayed a natural tendency to express issues relating to the ac - quisition of territory in terms of analogies from private law, and in particular, Roman law. Thus the rules of Roman

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1) Oppenheim, *International Law*, 8th edition (edited by Lauterpacht), 1955, vol. I, p. 545.

2) Thus the policy of territorial aggrandisement followed by the Austrian Empire has been epitomised in the phrase: "*Bella gerant alii - tu felix Austria nube*".

law regarding the acquisition of private property were applied also to the acquisition of State territory.

According to Schwarzenberger, in this primordial stage of international law "the borderline between the public and private law features of such claims [was] as blurred as might be expected during the transition from feudalism to territorial sovereignty." (1) In spite of the fact that the basic Roman-law distinction between _imperium_ (roughly corresponding to the modern concept of sovereignty) on the one hand, and _dominium_ (i.e. the Roman-law antecedent of the private-law ownership) on the other hand, was well - known, (2) its implications were not properly understood. (3) It was left to modern international law to undertake a transformation in this field. At the present stage of inter - national law a situation has been created in which no dis - tinction between the acquisition of _territory_ and the ac - quisition of _sovereignty_ can be sustained any longer.

Yet the traces of Roman law in this sphere of inter - national law can hardly be obliterated and they are clearly

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1) Schwarzenberger, _International Law_, 3rd edition, 1957, p.291

2) Thus Seneca stated that "_omnia rex imperio possidet, singuli dominio_".

3) See to this effect _The Collected Papers of John Westlake on International Law_, edited by Oppenheim, 1914, pp. 129-133.

evidenced in the terms employed to denote various modes of acquiring territory (such as accretio, avulsio, occupatio etc.). In spite of a common terminology, however, the notions underlying contemporary modes of acquisition of international titles sharply differ from private and Roman-law concepts.

The decisions rendered in recent decades by international tribunals called upon to pronounce on territorial disputes - while representing a considerable contribution towards the clarification of the process whereby a valid international title is established - have nonetheless failed to remove doubts and uncertainties in this field. This state of things is perhaps not so astonishing, bearing in mind the different motives underlying the approach to this matter of the inter - national academic lawyer and the international practising lawyer, respectively. The academic lawyer's main pre - occupation lies in the attempt to make neat doctrinal classi- fications, and he sees his chief ambition fulfilled if he succeeds in setting up a carefully planned edifice in which seemingly contradictory legal phenomena can be reconciled with each other.

The international practising lawyer, however, approaches the problems with which he is confronted from a different angle altogether. In the typical territorial controversy

he will face a concrete dispute involving the conflicting claims of usually two opponents. Thus he will not ask himself what title is good under international law (a question which is a matter of grave concern for the academic lawyer) but rather which title is the better one. Accordingly, to quote Schwarzenberger, he is "not concerned with the elaboration of the general rules governing title to territory, ... but with the relative superiority of the evidence produced by the parties." (1) Understandably, the parties to such a dispute are not unduly perturbed by problems of legal classifications worked out by writers and theoreticians, classifications, which, according to Johnson, are not in general followed by international tribunals. (2) The same writer has also drawn attention to the fact that "whereas international tribunals might be expected to indicate under which of [the] various heads they are awarding territory to State A rather than to State B, in fact they rarely do so. So much so that it is not unknown for a discussion to take place as to the appropriate head under which certain awards should be classified." (3)

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1) Schwarzenberger, op.cit. at p. 290.

2) Johnson, Consolidation as a Root of Title in International Law, in Cambridge Law Journal, (1955), p. 215, at p. 217.

3) Ibid.

Notwithstanding this hesitancy of practice to follow the classifications laid down by doctrine, it seems both pertinent and useful to mention the fact that modern inter - national law generally distinguishes five modes of acquiring territory which are classified under the following heads: occupation, accretion, cession, conquest and prescription.(1) Oppenheim, while basically adopting this classification, substitutes the term "subjugation" for "conquest". (2)

It is also usual to divide the modes of acquiring territory into original and derivative titles "according as the title they give is derived from the title of a prior owner-State or not". (3) Thus it is generally accepted that occupation and accretion are original modes of ac - quisition, whereas cession is a derivative one. The position with regard to conquest (or subjugation) and prescription is uncertain and these two modes of acquisition are occasionally

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1) For references as to writers who follow this classification, see ibid. p. 216, notes 5-11.

2) See Oppenheim, op.cit. at pp. 566-567, where it is stated that "conquest alone does not ipso facto make the conquering State the sovereign of the conquered territory .... conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory ... Such annexation makes the enemy State cease to exist and thereby brings the war to an end ... such ending of war is named subjugation." (italics in original).

3) Ibid. p. 546.

classified as belonging to the former or latter group. [1] While agreeing with Johnson that "this particular classification serves no useful purpose" and that "in so far as it leads to controversy and confusion it is probably even harmful" [2], it is felt that it might be claimed with equal justice that this lack of unanimity even in the sphere of classification is a true indication of, and reflection on, the confused state of things at present pervading this field of international law.

This study does not deal with international titles in general, and its scope is confined solely to the discussion of what has come to pass under the name of an "historic title". As will be pointed out in more detail in chapter 2, prescription has frequently been resorted to as the possible legal root of such an historic title. For the reasons which are set out in that chapter, however, it is believed that the employment of this term, giving rise as it does to certain well-defined associations springing into the jurist's mind on the basis of analogy with private law prescription, should be avoided when dealing with the validity in international law of an originally unlawful title.

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1) Johnson, loc.cit. p. 217, n. 14.

2) Ibid, p. 217.

The similarity of purpose existing between the municipal law title of prescription and the historic title in inter - national law ought not to obscure the difference of the legal foundations on which each of those titles rests. Both of them stem from a wish not to upset unduly an existing order of things. Quieta non movere. Both represent a concession made by the law to a situation of fact and the occasional subordination of the generally valid maxim of "ex injuria non oritur jus" to the principle of much more limited scope which is expressed in the rule "ex facto jus oritur". On the State and inter-State level alike the existing legal orders are, in exceptional circumstances, willing to lend their sanction - for the sake of preserving peace and stability - to certain situations of fact, even if the origins of such situations are not free from doubt.

There, however, the similarity ends between the private law title of prescription and the historic title in inter - national law. In domestic law it is the existence of the legislative machinery - and not the operation of time as such - that sets the seal of legal validity on an originally invalid claim. Since international law has no such legis - lative machinery at its disposal at present, the legal basis for the existence of an historic title has to be sought else- where and one has to revert to a more ancient and less

elaborate mechanism of law-making, namely, the formation of custom. Thus the juridical basis of an historic title is to be found - as in the case of any customary norm of international law - in the conviction of a State that a practice followed by it is a binding rule of law (the <u>opinio juris</u>). Consequently, an historic title must be regarded - as is submitted in more length in chapter 3 below - as a customary norm of international law, differing from the ordinary customary rule only in that its scope of validity and application is more limited. Both, however, share a common process of formation and maintenance.

Chapters 4 and 5 of this study are devoted to an investigation of the various elements through which the historic claim of a State manifests itself and to an analysis of questions of procedure and evidence relating to the building up and upkeep of such a claim.

Finally, chapter 6 deals with those aspects of the historic claims which are specifically related to maritime areas.

CHAPTER 2.

PRESCRIPTION IN INTERNATIONAL LAW.

I. The distinction between acquisitive prescription and extinctive prescription.

"In law prescription is of two kinds: it is either an instrument for the acquisition of property or an instrument of an exemption solely from the servitude of judicial process." (1)

The latter form of prescription is known in English law as "limitation" and is sometimes called also "extinctive prescription". (2)

"Limitation" means the extinction of stale claims and obsolete titles. This kind of prescription does not establish in favour of the possessor a new title of ownership which had not been existing before; "it simply extinguishes a former owner's rights to recover possession of the land", (3)

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1) See Corpus Juris Secundum, vol. 71, 1951, at p.490. (Italics added).

2) The corresponding expression in French is "prescription liberatoire".

3) Megarry and Wade, The Law of Real Property, 2nd edition, 1959, at p. 954.

and therefore "operates negatively by eliminating the claim of a person having a superior title." (1)

On the other hand, that kind of prescription which "is an instrument for the acquisition of property" has a different meaning: "it operates positively, like a convey - ance", (2) and is one of the modes of acquiring a new title to property. It is called accordingly "acquisitive pre - scription."

This distinction between the two forms of prescription has also been recognized in international law. But, since it is the purpose of this study only to examine the process by which historic titles are being established in accordance with international law, extinctive precription will not be dealt with any further, and any subsequent reference to pre-scription should be understood in the sense of meaning solely acquisitive prescription.

II. Prescription as a private law concept.

"Since the existence of the law of nations there has always been opposition to prescription as a mode of acquiring territory." (3) The centuries-old controversy as to the

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1) Ibid.

2) Ibid.

3) Oppenheim, op.cit. vol. I, p. 575.

applicability of prescription in international law has not yet been settled.

As will be shown later, international lawyers originating in English-speaking countries have, on the whole, endorsed the doctrine of international prescription, while continental European lawyers have been, as a rule, rather sceptical as to the admissibility of this doctrine in the sphere of inter - national law.

There seem to be two main reasons for this divergence of opinion, which follows, broadly speaking, the linguistic frontier between the English-speaking countries and the rest of the world; one of them is of general character, while the other is specifically related to the field of prescription.

(1) Private law concepts in international law.

Seen in the broad perspective, the controversy that has arisen in international law over the applicability of the doctrine of prescription cannot be isolated from the more fundamental controversy as to the place of private law con - cepts within international law. As has been shown by Lauterpacht, (1) this discussion - started centuries ago -

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1) Lauterpacht, Private Law Sources and Analogies of Inter - national Law, 1927, chap. I, pp. 3 - 42.

is basically a clash between the "positivist school" in international law and those adhering to the concepts of "natural law". "The chief postulate of the positivist school can be expressed in one word: self sufficiency. It rejects the taking over of rules and precepts from sources other than international custom or treaties." (1) Thus it views with the utmost suspicion any recourse made to private law analogies. The opponents of this positivist approach to international law, on the other hand, adopt "Roman law as a living source from which its numerous gaps may be filled."(2)

The case for the positivist school has been most clearly stated in the writings of the German school of jurisprudence,(3) but "positivism" was by no means confined to the German writers: "recent Italian positivists .... follow the German lead." (4)

On the other hand, British and American international lawyers have "never discarded the idea that Roman law is the source most likely to contain 'the reason of the thing' on

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1) Ibid. at p. 7.

2) Ibid. at p. 24.

3) Ibid. at pp. 17 - 19.

4) Ibid. at p. 30.

many a question of international law ..... The acknowledg - ment of its importance as a subsidiary source of inter - national law [has] become one of the characteristic features of British international jurisprudence." (1) The American writers share, on the whole, the view of the British publicists." (2)

Lauterpacht, though, claims that "the influence of the English conception is not confined to English-speaking countries" (3) and cites to this effect the example set by the Swiss-Belgian writer Rivier. (4) Yet he admits that "the reign of the [positivist school] at the end of the nineteenth century is undisputed ...... it is still pre - dominant today." (5)

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1) Ibid. at p. 24. It is rather extraordinary that Anglo-American international lawyers coming from countries whose municipal legal systems have been somewhat reluctant in adopting Roman law, are, on the whole, more inclined to adopt Roman-law notions for international law than jurists originating from Europe where the influence of Roman law is still strongly felt on the national legal level. A detailed analysis of this startling phenomenon would clearly go beyond the scope of this work. It is not intended here to do more than to draw attention to this intriguing problem which, no doubt, deserves a monograph of its own.

2) Ibid. at p. 29.

3) Ibid. at p. 30.

4) Ibid. at p. 31.

5) Ibid. at p. 7 (written in 1927).

It may be fairly assumed that the general views held by the "positivists" and the adherents of "natural law", re - spectively, as to the applicability of private-law concepts and analogies in the field of international law, have been shaping to a large extent their views as to the existence of international prescription.

(2) Divergence of the definition of prescription between the continental and English legal systems.

We turn now to the second and more specific reason which is believed to account for the divergence of opinion as to the applicability of prescription in the sphere of inter - national law. It should be noted that the private law notions prevailing among continental and English-speaking writers respectively, as to the exact meaning of prescription, seem to be at variance with each other (as the subsequent juxtaposition of these different concepts of prescription is intended to demonstrate). Thus it would not seem to be too bold to say that, since the views of international lawyers are inevitably coloured by the notions prevailing in their own national legal systems, this variance of concepts as to the meaning of the doctrine of prescription in municipal law should be reckoned with as one of the main reasons for the controversy relating to international prescription. It is for this reason that it is thought useful to contrast Roman

and English law in this particular field for it is believed that by doing so some of the roots of the dispute overhanging this problem in international law may be brought more clearly into light.

III. Prescription in Municipal Law.

A. Prescription in Roman Law.

Roman private law distinguishes between two forms of prescription:

a) usucapio;

b) possessio longi temporis.

"Usucapio" means "the acquisition of ownership by continued possession for a certain time" (1) and was available as a mode of acquiring title to property in cases "where a person is in possession of property as owner but without legal title." (2) According to this doctrine, the possessor justo titulo and bona fide (3) during two years of land and

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1) Jolowicz, Historical Introduction to the Study of Roman Law, 2nd edition, 1952, p. 152.

2) Lee, Elements of Roman Law, 3rd edition, 1952, p. 116.

3) The requirement of good faith was dispensed with in certain exceptional cases, such as usucapio pro herede; see Girard, Manuel Elémentaire de Droit Romain, 8th edition, 1927, p. 327.

during one year of movables acquired a property in the land or movables which had not previously belonged to him. (1)

The institution of *usucapio* was originally confined to *praedi Italica* and was available solely for Roman citizens. It was extended later to the provinces where it became known under the name of "*possessio longi temporis*". Justinian blended together these two institutions and conferred the right of property on a person who had possessed movables for three years and immovables for ten years *inter praesentes* and twenty years *inter absentes*, provided that the other requirements essential for the operation of *usucapio* or *possessio longi temporis* were complied with. (2)

Thus both *usucapio* and *possessio longi temporis* confer upon a person the right of property which he did not have previously, curing thereby an originally defective title. Both are measured by a definite period of time, the length of which is fixed by law.

In addition to these two forms of prescription there was in existence another kind of prescription, indefinite in time, which was available when the origin of possession was not capable of proof, i.e. when nobody could recollect that it had belonged to another person. This kind of prescription,

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1) Leo, op.cit. at p. 119.

2) See ibid. at p. 121.

known as "*vetustas*" or "*antiquitas*" [1] does not in itself confer a right of property on the possessor, but raises a presumption of possession in his favour, thus relying on a principle resembling the well-known legal maxim "*omnia praesumuntur rite esse acta.*" This presumption is not irrebuttable and "facts which indicate an unlawful origin, rebut the presumption of immemoriality." [2]

It should be mentioned, however, that while *usucapio* and *possessio longi temporis* were resorted to as solely private-law institutions, *vetustas*, on the other hand, found its application mainly in cases in which rights of public character were affected (e.g. rights relating to public ways or watercourses). [3] Moreover, the doctrine of *vetustas* - owing to its limited scope of application in daily life - has in fact occupied a rather subordinate place in Roman juris - prudence.

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1) Other terms used are "*immemoriale tempus*", "*possessio vel praescriptio immemorialis*".

2) Dernburg, *System des Römischen Rechts*, 8th edition, 1911, vol. I, p. 380, where the author says: "Tatsachen welche eine unrechtmässige Entstehung dartun, entkräften die Unvordenklichkeit."

3) Ibid. at p. 379.

D. Prescription in English Law.

English law distinguishes between common law prescription and prescription under the Prescription Act, 1832. At common law "the basis of prescription is that if long enjoyment of a right is shown, the Court will strive to uphold the right by presuming that it had a lawful origin." (1)

As to the length of time required for the establishment of a prescriptive title "the conclusion reached by the Courts was that [a person] must have enjoyed the right for time immemorial" (2) or, as it has been said: "during the time whereof the memory of man runneth not to the contrary."(3) "Legal memory" was related back as far as 1189 (i.e. the first year of the reign of Richard I) and, because of the impossibility of literally fulfilling such a requirement, the courts have showed themselves willing to presume that enjoyment has lasted from 1189 if proof has been forthcoming of an actual enjoyment from as far as living witnesses could speak. (4) A period of twenty years would usually be

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1) Megarry and Wade, op.cit. at p. 802.

2) Cheshire, The Modern Law of Real Property, 8th edition, 1958, at p. 471.

3) Co. Litt. 114b.

4) Cheshire, op.cit. at p. 472.

sufficient to raise such a presumption. (1)

This presumption of "regularity", on which common law prescription is based, has found its application also in the form of the legal fiction of the "lost grant", which presumed the existence of grants in certain cases of long enjoyment of right." (2)

Following the pattern set by Roman law, English law requires for the operation of prescription the user to be as of right (nec vi, nec clam, nec precario).

Owing to the deficiencies inherent in the prescription at common law - in particular the difficulty of persuading juries to presume grants to have been lost when they knew this was not true - the Prescription Act, 1832, was enacted. (3) Section 2 of the Act provides, inter alia, that an easement which had been enjoyed without interruption for a period of 40 years shall be deemed absolute and indefeasible unless it was enjoyed by some consent or written agreement. (4)

However, it should be borne in mind that "the Act is only supplementary to the common law - it provides an additional method of claiming easements .... If, for instance, the

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1) Darling v. Clue, (1864) F. and F., p. 329 at p. 334.

2) Dalton v. Angus & Co. (1881) 6 A.C. p. 740, at p. 804, per Lord Penzance.

3) Megarry and Wade, op.cit. at p. 811.

4) Cheshire, op.cit. at p. 477.

claimant is unable to show enjoyment for a statutory period ...... he may either prescribe at common law or invoke the doctrine of the lost grant." (1)

English law, therefore, still conceives two kinds of prescription, in each of which the time factor fulfils a different role. In prescription at common law the lapse of time is of probative value in that it contributes towards the strengthening of the presumption of regularity; in statutory prescription, on the other hand, the lapse of a certain period of time fixed by the Act is indispensable, since time is a constituent element of statutory prescription.

C. Conclusions.

From the foregoing comparison of prescription in Roman and English law the following conclusions may be drawn:

In Roman law the time factor is a constituent element and thus of overriding importance both in usucapio and in possessio longi temporis, while vetustas, being an instrument of the law of evidence, is only of minor significance; the reverse is true of English law. Here the common law notion of prescription still prevails. Prescription is regarded as being basically a tool of the law of evidence, and

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1) Ibid. at p. 483.

statutory prescription, which is most akin to _usucapio_ and _possessio longi temporis_ is only supplementary to common law.

Consequently, international lawyers trained in countries whose legal systems are rigidly modelled on Roman law patterns find some difficulty in reconciling the existence of prescription with a lack of a definite period of time fixed by law, since the time factor is for them an essential element for the operation of prescription. Jurists originating from common law countries, on the other hand, apparently having in mind the doctrine of prescription at common law, are less impressed by this difficulty. Thus it is not unlikely that, when reference is made to the doctrine of prescription, the minds of all lawyers are dominated by certain private law concepts drawn from their respective municipal legal systems. The result is that misunderstandings arise which tend to confuse the issues involved in this rather controversial field of international law.

It is therefore not altogether surprising that a writer and international lawyer of high distinction has gone as far as to suggest the complete abandonment of the term "prescription" and its substitution by the term "consolidation", explaining this change in terminology by saying that "to avoid useless discussion, the term 'consolidation' is

preferred to 'acquisitive prescription'". (1)

IV. Doctrinal reasons for the existence of prescription in International Law.

A variety of reasons has been advanced in the writings of publicists to justify - from the doctrinal point of view - the existence of prescription in international law. First and foremost among them is the need to preserve international order and stability, since the repudiation of the doctrine of prescription would entail, in Grotius' words, "a very inconvenient conclusion that controversies concerning kingdoms and their boundaries are not extinguished by any lapse of time." (2)

Vattel voices the same opinion by saying that "la tranquillité des Peuples, le Salut des Etats, le bonheur du Genre-humain ne souffrent point que les Possessions, l'Empire et les autres droits des Nations demeurent incertains, sujets à contestation et toujours en état d'exciter des guerres sanglantes." (3)

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1) De Visscher, Theory and Reality in Public International Law, (translated from the French by P.E. Corbett) 1957, p. 199.

2) Grotius, De Jure Belli ac Pacis, translated by Whewell, 1853, Book II, chapter IV, section I.

3) Vattel, Droit des Gens, Book II, chapter XI, section 149.

This reason is given also by Audinot, (1) Fauchille, (2) Hall, (3) Hershey, (4) Lawrence, (5) Lindley, (6) Nys, (7) Oppenheim, (8) Phillimore, (9) Verykios, (10) Westlake, (11) and Wheaton. (12)

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1) Audinot, De la Prescription Acquisitive en Droit International Public, 3 RGDIP (1896) p. 313 et seq.

2) Fauchille, Traité de Droit International Public, 8th ed. 1925, vol. I. part II, p. 757.

3) Hall, Treatise on International Law, 8th ed. 1924, p. 143.

4) Hershey, The Essentials of International Public Law, 1912, p. 180.

5) Lawrence, The Principles of International Law, 7th ed. 1923, section 78.

6) Lindley, The Acquisition and Government of Backward Territory in International Law, 1926, p. 178.

7) Nys, Le Droit International, (revised edition), 1912, vol. II, p. 40.

8) Oppenheim, op.cit., vol. I, p. 576.

9) Phillimore, Commentaries Upon International Law, 3rd ed. 1879, vol. I, pp. 361-362.

10) Verykios, La Prescription en Droit International Public, 1934, p. 25.

11) Westlake, International Law, 2nd ed. 1910, part I, p. 94.

12) Wheaton, Elements of International Law, Dana's edition, 1866, sec. 164.

For Ortolan [1] prescription is based on the theory that a State which had maintained order in a territory and developed it, was entitled to sovereignty over it against the former possessor who had neglected that territory. [2]

Grotius mentions as an additional reason the presumed voluntary abandonment of the former possessor's rights, since "silence for a length of time will always seem sufficient to imply abandonment of ownership." [3]

Among other reasons that are occasionally advanced one might mention the argument according to which prescription is "the punishment for negligence", for "time runs against the indolent and those who are careless of their rights." [4]

Others again maintain that the real reason for the

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1) Ortolan, Des Moyens d'Acquérir le Domaine International, 1851, p. 125.

2) See to the same effect Verykios op.cit. at p. 31 and Sørensen La Prescription en Droit International Public, in 3 ASJG (1932) at p. 149. A similar argument has been advanced by the United States Secretary of State Olney in a letter to Sir Julian Pauncefote, dated 12 June 1896, as reported in 88 BFSP, p. 1288.

3) Grotius, op.cit. book II, chap. IV. sec. VII; see also Vattel, op.cit. book II, chap. XI, sec. 140; see also Verykios, op.cit. at pp. 26-28 and Audinet, loc.cit. at p. 315.

4) Bracton, De Legibus et Consuetidinibus Angliae, ed. by Twiss, 1879, vol. II, p. 123; see also Verykios, op.cit. at pp. 29-30.

existence of prescription is that the lapse of time makes it increasingly difficult for a claimant to supply any positive evidence as to the origins of his title.(1)

All these arguments, while undoubtedly containing elements of practical wisdom and expediency, seem to ignore the fact that, although considerations of this kind might well underly the doctrine of prescription in any given legal system, it is not the principles referred to that in fact introduce this doctrine into the law. This reasoning has therefore met with the objection, rightly, it is believed, that those founding international prescription on such doctrinal grounds "font une confusion entre l'opportunité de la prescription, les raisons abstraites qui sont à sa faveur et sa reconnaissance positive par la volonté collective des Etats." (2) More recently Pinto has expressed a similar view by maintaining that "ces fondements philosophiques, éthiques ou politiques - seraient ils communs aux prescriptions du droit interne et aux institutions du droit international que l'on qualifie ainsi - n'autorisent pas à assimiler les unes aux autres. On les retrouve en effet à la base de très nombreuses institutions juridiques bien

1) Verykios, op.cit. at p. 36.

2) Cavaglieri, in Hague Recueil, (1929) vol. I, p. 405.

distinctes - principe de non-rétroactivité des lois, - principe Pacta sunt servanda - principe de la responsabilité internationale." (1)

The same author goes on to say that "l'institution [de prescription] suppose ...... un état social déjà avancé. Elle suppose un système juridique évolué qui comprend des procédures établies de création des règles, des actes et des titres juridiques susceptibles de transférer des droits." (2) Thus it is not the abstract ideas underlying the doctrine of prescription, but "le système juridique évolué" that enables any given law to adopt this principle. It is therefore not surprising that ancient legal systems did not recognize the institution of prescription. As has been shown by Pinto, the ancient legal systems of China, India and Rome ignored this institution. (3) It might be questioned whether inter - national law, in its present rudimentary condition, has really achieved the status of a "système juridique évolué qui comprend des procédures établies des règles, des actes

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1) Pinto, La Prescription en Droit International in 87 Hague Recueil, (1955) vol. I, p. 387 et seq. at p. 410.

2) Ibid at p. 392.

3) Ibid.

et des titres juridiques susceptibles de transférer des droits."

As for the theory of "the presumption of abandonment", it would appear that it rests on a legal inconsistency. It overlooks the fact that, if the abandonment of a disputed territory is to be presumed, that territory consequently becomes <u>res nullius</u> and is thus open to acquisition <u>by occupation</u>. Prescription, however, is based on the reverse assumption, namely, that the previous owner has <u>not</u> given up his rights. This is why "par la prescription va être acquis un titre à l'encontre de l'ancien souverain, c'est-à-dire indépendamment de l'assentiment de celui-ci." (1) In other words: prescriptive rights are acquired solely by adverse holding. (2)

The contention, according to which international prescription, like municipal prescription, amounts to "the punishment of negligence" has been commented upon by Pierre Dupuy as long ago as 1670, when he said that prescription was "une espèce de peine que la loi inflige aux négligens. Mais

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1) Beckett in <u>Hague Recueil</u>. (1934), vol. IV. p. 248.

2) The theory of the presumption of abandonment has been also severely criticized by Verykios, op.cit. at p. 27, by Cavaglieri, loc.cit. at p. 406, and by Fauchille, op.cit. at p. 757.

les princes souverains n'ont point de lois entre eux qui les lient et obligent." (1) This notion of "punishing the negligent" is closely related to the doctrine of estoppel, and as will be suggested elsewhere, the principle of estoppel also should not be invoked as the doctrinal basis for the formation of an historic title. (2)

It is submitted that the question whether or not pre - scription exists in international law should be decided in the light of purely legal - as distinct from meta-legal- considerations, as they have found expression in the works of writers, in the decisions of both national and international tribunals and in the practice of States.

V. The existence of prescription in International Law.

Opinions of writers.

"International prescription has been for centuries the favourite subject of all learned dissertations, the main battleground of pure theory and scholarly wisdom." (3) The

1) As quoted by Pinto, loc.cit. at p. 396.

2) See Chapter 4, section VII below.

3) Heimburger, Der Erwerb der Gebietshoheit, 1888, part I, p. 143, where the author says: "Die völkerrechtliche Verjährung bildete Jahrhunderte hindurch das Lieblingsthema aller gelehrten Dissertationen, den hauptsächlichen Tummelplatz der reinen Theorie und Schulweisheit."

controversial nature of the subject is well illustrated by the writings of Grotius, already containing the seeds of the arguments which were later put forward by the supporters of international prescription and their opponents alike. Grotius' views on this subject are far from being unequi - vocal. (1) In his "Mare liberum" (first published in 1609) he rejected the existence of international prescription. "Prescription", he argued, "is a matter of municipal law; hence it cannot be applied as between kings or as between free and independent nations; .... For it is impossible to acquire by usucaption or prescription things which cannot become property, that is, which are not susceptible of possession or of quasi-possession and which cannot be alienated." (2)

In his later years Grotius' views on this subject seem to have undergone some modification and in his "De Jure Belli ac Pacis" (first published in 1625) he qualified his former rejection of international prescription by saying that "here

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1) As has been already pointed out by Lauterpacht, in a different context, "this contradictory attitude ... is amazing only when we forget that some of the difficulties in the writings of Grotius which puzzle the student and commentator are due to the fact that exactitude of terminology cannot be regarded as one of the achievements of the great lawyer." (Lauterpacht, op.cit. at p. 13).

2) Grotius, Mare Liberum, transl. by Magoffin, 1916, chap. VII, p. 47.

arises a great difficulty concerning the right of usucaption. This Right is introduced by Civil Law, for time of its own nature has no effective power; for nothing is done by time, though everything is done in time ...... [It] cannot have place between two free peoples or kings." (1) Thus he rejected the idea of international usucapio, but adopted from Roman law the concept of immemorial possession. In his view, "since time beyond the memory of man is morally as if it were infinite, a silence for such a time will always suffice to establish a derelict, except there are very strong reasons on the other side." (2) He went on to argue that "a possession going beyond memory uninterrupted and not accompanied with any appeal to justice, absolutely transfers ownership." (3) In Grotius' opinion "time beyond the memory of man" was about a century, "because the common term of human life is a hundred years", (4) and he assumed that "nations have agreed upon this, since such a rule tends greatly to peace." (5)

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1) Grotius, De Jure Belli ac Pacis, translated by Whewell, 1853, book II, chap. IV, sec. I.

2) Ibid. book II, chap. IV, sec. VII.

3) Ibid. book II, chap. IV, sec. IX.

4) Ibid. book II, chap. IV, sec. VII.

5) Ibid. book II, chap. IV, sec. IX.

Thus Grotius drew a sharp distinction between <u>usucapio</u> and immemorial possession and, while rejecting the former, adopted the latter for international law. It is a matter for regret that this distinction has not been always followed since, and the widespread tendency to confound these two different aspects of prescription has undoubtedly contributed towards increasing the confusion that has ever since prevailed in this field of international law. Accordingly, these two aspects of the problem will be dealt with separately.

It may be safely maintained that the existence of immemorial possession in international law has gained general acceptance among writers. Even such fierce opponents of international <u>usucapio</u> as Heffter, (1) De Louter, (2) and Rivier (3) have espoused doctrines virtually amounting to the recognition of the existence of immemorial possession in international law. They admit that a long and undisturbed possession of a territory strongly militates in favour of

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1) Heffter, <u>Das Europäische Völkerrecht der Gegenwart</u>, 8th ed. ed. by Geffcken, 1888, p. 38.

2) De Louter, <u>Le Droit International Public Positif</u>, 1920, vol. I, p. 341.

3) Rivier, <u>Principes du Droit des Gens</u>, 1896, vol. I, pp. 182 - 183.

the presumption that the State in possession has an originally valid title over this territory. "The postulate of this form of prescription is that a state of things exists the origin of which is uncertain. It is impossible to prove whether the origin of this state of affairs is legal or illegal. It is therefore presumed to be legal." (1) Consequently, it has been argued that immemorial possession does not create new rights, but confines itself to lending its sanction to a certain state of things the origins of which it is impossible to trace and which is therefore assumed to have come into existence in conformity with the legal requirements. In other words: it does not confer a new title, it only consecrates a title which had already been in existence. (2)

However, immemorial possession in itself would be too narrow a concept - even by the widest stretch of imagination - to cope with the necessities of international order, since "there are few, very few, titles of which it can be said that they have lasted for so long, 'qu'il est impossible de fournir la preuve d'une situation différente et qu'aucune personne ne

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1) Johnson, Acquisitive Prescription in International Law, 27 BYIL (1950) p. 332 et seq. at p. 334.

2) The correctness of this view has been doubted by some writers. See e.g. Verykios, op.cit. at p. 44, n. 1.

se souvient d'en avoir entendu parler.'" (1)

Owing to the longevity of the subjects of international law, the theory of immemorial possession, if literally taken, is virtually impracticable and the time-limit of 100 years, as suggested by Grotius, would be certainly too short a period to justify the assumption that the memory of States fails them whenever they have to recollect events which lie further back. This rather arbitrary suggestion put forward by Grotius in fact transforms immemorial possession into usucapio the existence of which in the sphere of international law Grotius so strenuously denied.

Thus the correct view seems to have been stated by Johnson when he said that, from the point of view of international law, immemorial possession is of comparatively minor importance and that the real field of controversy is "whether that form of 'acquisitive prescription' which presupposes an originally defective title but which relies on possession for a reasonable period of time to cure the defect, or in other words that form of prescription which is akin to

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1) Johnson, loc.cit. at p. 339, where he quotes this definition of immemorial possession which was given by the Tribunal in the Meeraugo arbitration between Austria and Hungary concerning certain lakes in Galicia. The arbitral award can be found in 8 RDIDC (Deuxieme serie) (1906), p. 196. The passage quoted may be found at p. 207 there.

usucapio (prescription proprement dite, as some authors call it), is a recognized doctrine of international law." (1)

Grotius' negative view as to the applicability of usucapio in international law has already been indicated. Vattel, on the other hand, maintained that usucapio was part of the Natural Law, and therefore of the Law of Nations. He accepted international usucapio which he defined as "l'acquisition du domain fondée sur une longue possession non interrompue et non contestée." (2) He bluntly admitted that international law did not provide for the operation of usucapio, but he asserted that this problem could be settled by custom or by treaty. (3)

The later doctrinal developments concerning the question of the existence of international usucapio may be described as a constant struggle between the "Grotians" and the "Vattelians". It would appear that one is not wide off the mark if one says that, on the whole, writers coming from common-law countries have turned out to be "Vattelians". (4)

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1) Johnson, loc.cit. at p. 336.

2) Vattel, op.cit. book II, chap. XI.

3) Ibid.

4) Hall, op.cit. at p. 143; Hershey, op.cit. at pp. 226-227. Lawrence, op.cit. at p. 160; Phillimore, op.cit. at pp. 353-358; Lindley, op.cit. at pp. 178-180; Wheaton, op.cit. at p. 200.

whereas jurists who had been brought up by the Roman school of legal thought have displayed a strong tendency to accept "Grotianism". (1)

Thus, one is tempted to believe that a jurist coming from a common-law country has - for reasons which have been elaborated above - less difficulty in conceiving a form of prescription which is devoid of requirements relating to a specified period of time than is the case with lawyers trained elsewhere, who have been taught to believe that the time element, as expressly fixed by law, is the very essence and the prerequisite for the operation of prescription.

From the legal viewpoint the adoption of usucapio for international law encounters yet another obstacle: the requirement of good faith. This aspect of the problem will now be touched upon briefly before reverting to the exami - nation of the role of the time element in international usucapio.

Usucapio, both in Roman and in English law, assumes good faith on the part of the person claiming for himself the

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1) As to a detailed list of writers who have declared them - selves against the existence of usucapio in international law, see Verykios, op.cit. at pp. 201-203.

benefits of prescription,[1] since "le domaine de pre - scription est limité aux situations .... _subjectives_. Elle ne trouve aucune application lorsqu'il s'agit de situations _objectives_."[2] In theory Vattel too required good faith as a condition for the operation of international _usucapio_, although he was prepared to assume good faith in the absence of contrary evidence.[3] In this respect Vattel seems to be rather isolated even within the camp of the "Vattelians" who have come to realize that in the inter - national sphere the requirement of good faith, if insisted upon, would amount to virtually putting the whole machinery of prescription out of operation. Thus Fauchille - himself a "Vattelian" - admits that, at least insofar as the inhabited parts of the globe are concerned, "la prescription aura presque toujours à sa base un acte de violence."[4] Similarly, Hall states that "internationally [prescription]

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1) As will be recalled, in Roman law there were certain ex - ceptional cases in which this requirement was dispensed with generally considered as belonging to an earlier and more primitive stage of Roman law. (see p. 16, n. 3 above).

2) Pinto, loc.cit. at p. 394 (italics added).

3) Vattel, op.cit. book II, chap. XI, sec. 150.

4) Fauchille, op.cit. vol. I, part II, p. 758.

is allowed for the sake of interests which have hitherto been looked upon as supreme to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment but to establish itself permanently and solidly." (1) And Verykios went even further by asking: "A quoi bon exiger une telle condition en droit international, alors qu'elle ne sera jamais remplie? Car nous prétendons que, spécialement pour les territoires habités, l'Etat possesseur sera toujours de mauvaise foi." (2)

If then, even in the view of the "Vattelians" themselves, international usucapio has been deprived of an attribute which is regarded as an essential element of usucapio in domestic law, namely, the requirement of good faith, the additional deficiency expressing itself in the lack of a fixed period of time is felt even more strongly. "If thus there becomes evident bad faith - a thing held to be permanent in a nation as well as in an individual - then prescription fails because of a double defect." (3) In fact, the main difficulty in recognizing the existence of international usucapio stems from the fact that "dans les systèmes juridiques modernes la

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1) Hall, op.cit. pp. 143-144.

2) Verykios, op.cit. at pp. 74-75.

3) Grotius, Mare Liberum, translated by Magoffin, 1916, pp. 50-51.

prescription a reçu du législateur une 'armature technique' complexe .... Dans son mécanisme le temps est généralement considéré comme élément essentiel. Ce temps n'est pas la durée du philosophe." (1)

Audinot has attempted to meet this objection by dis - tinguishing between "le droit de prescription" and "le loi de prescription" (2), which has been explained as a dis - tinction between a principle and its technical applications.(3) Similarly, Fauchille maintains that, although the application of prescription in international law "ne peut être déterminée d'une manière uniforme, le principe en est inhérent à la nature des choses et essentiel à l'existence des nations." (4) And Sørensen follows suit by saying that "l'acquisition par prescription doit être possible .... car on admet généralement que le droit international s'appuie .... sur la nature de la chose." (5)

With due respect to the eminence of these distinguished

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1) Pinto, loc.cit. at p. 395.

2) Audinet, loc.cit. at p. 315.

3) Johnson, loc.cit. at p. 334.

4) Fauchille, op.cit. vol. I, part II, p. 755.

5) Sørensen, loc.cit. at p. 149.

writers it is felt that "la nature des choses" should not be invoked as evidence for the existence of any positive rule of law. The advancement of such an argument is, of course, perfectly legitimate as long as one is concerned with the desirability of introducing a certain rule into a given legal system, but would be utterly inappropriate as a means of proving its existence as a rule of positive law. The course advocated by Audinot, Fauchille and Sørensen is in fact tantamount to deducing the existence of lex lata from its being lex ferenda.

It now remains to be seen whether the judicial decisions and the manifestations of State practice usually relied upon as evidence for the recognition of prescription in the sphere of international law indeed endorse this doctrine.

VI. The existence of prescription in International Law.- Judicial decisions.

(A) International tribunals.

It is a fact of considerable significance that "des décisions importantes qui pour une partie de la doctrine fondent ou consacrent le droit de prescription dans le droit international n'usent pas de mot," (1) although, in some of these cases, the parties or one of them in their pleadings expressly argued on this ground. It is felt therefore that

1) Pinto, loc.cit. at p. 397.

the persistent silence observed by the tribunals on this point should not be considered as devoid of any legal meaning.

The Grisbadarna Arbitration Award of 23 October, 1909,[1] has been frequently referred to as one of the instances in which the doctrine of prescription was accorded recognition. In fact, both Sweden and Norway - the parties to that arbitration - expressly invoked the doctrine in their pleadings. The arbitral award, however, does not mention the term "prescription" at all. Notwithstanding this fact, Lauterpacht is of the opinion that "in the Grisbadarna case .... judgment was given on grounds amounting virtually to a recognition of prescription in international law, although the term itself was not mentioned by the tribunal." [2] It is thought, nevertheless, that this award should not be construed as a recognition of the principle of international usucapio, since it appears that it is based on the concept of immemorial possession. This clearly emerges from that

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1) Scott, Hague Court Reports, 1st Series, 1916, p. 121, to which subsequent references will be made. The award was also published in 4 AJIL (1910) at p. 226 and in Wilson's Hague Arbitration Cases, 1915, at p. 102.

2) Lauterpacht, op.cit. at p. 264; see also to the same effect Sørensen, loc.cit. at pp. 152-153.

passage of the award where the tribunal concludes that "from [the] various circumstances it appears so probable as to be almost certain that the Swedes utilized the banks in question much earlier and much more effectively than the Norwegians.(1) In the opinion of the tribunal Sweden succeeded in esta - blishing her rights over the Grisbadarna by utilizing that region _prior_ to the Norwegians, whereas the concept of ac - quisition by _usucapio_ would have required Norwegian utili - zation to precede that of the Swedes. It is in this context that one should analyse the tribunal's statement, according to which:

> "it is a settled principle of the law of nations that a state of things which actually exists and had existed for a long time should be changed as little as possible." (2)

The _Chamizal_ Arbitration between the United States of America and Mexico (3) is cited as another instance in which the doctrine of international prescription is purported to have been upheld. However, it would appear that the award does not lend itself to such a sweeping interpretation. In the tribunal's own words:

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1) Scott, op.cit. at p. 131.

2) Ibid. at p. 130.

3) Award of 15 June, 1911, in 5 AJIL (1911) p. 782 et seq.

> "In the countercase of the United States the contention is advanced that the United States has acquired a good title by prescription to the tract in dispute .... Without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations in the absence of any convention establishing a term of prescription, the commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title." (1)

Quite obviously the tribunal entertained serious doubts as to the applicability of prescription in the sphere of international law and preferred to deal with the American contention "under protest". In other words: the tribunal was prepared to accept the plea of prescription solely for the sake of argument and proceeded at once to refute it by showing that the United States' possession of the tract in dispute had not complied with the requirements which are enumerated by the protagonists of prescription themselves as the necessary prerequisites for the formation of a prescriptive title. Thus the award constitutes a dissociation from the notion of prescription rather than its endorsement. (2)

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1) Ibid. at pp. 805-806 (italics added).

2) See however, the opposing view held by Lauterpacht, op.cit. at pp. 276-277; see also to the same effect Johnson, loc.cit. at p. 340 and Verdross, Völkerrecht, 3rd ed. 1955, at p.212.

Nor can it be conceded that the award given in 1911 in the Walfisch Bay Arbitration between Great Britain and Germany [1] amounts to a recognition of the doctrine of international prescription. [2] All the tribunal was prepared to say in that case was that, since "exception has not been taken to the continued possession on the part of Great Britain of the territory extending to the point on the coast where the southern frontier [of the bay] commences, it is necessary to accept the fact of possession" as being "the evidence of a wish to acquire and of an effective occupation by which in any case British sovereignty could have been established over the zone in dispute before the adjacent territory was placed under the protection of Germany." [3]

Thus, in this case also, the tribunal's award was based on a principle which is the very opposite of adverse holding and it is therefore not surprising that the term "prescription" was not mentioned at all in the award.

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1) 104 BFSP at p. 50; the award is also reported in Hertslet's Treaties, vol. 26, at p. 187.

2) This view has been expressed e.g. by Lauterpacht, op.cit. at p. 277.

3) 104 BFSP, at pp. 101-102; (italics added); see also Hertslet's Treaties, vol. 26, p. 249; For some reason the italicized portion of this passage has been deleted by Lauterpacht, op.cit. at p. 277.

Similarly, the use of that term was avoided in the arbitral award rendered in 1904 in the Anglo-Brazilian Boundary dispute concerning the boundaries of British Guyana. (1) King Victor Emanuel III of Italy, in his capacity as sole arbitrator, confined himself to saying:

> "that it does not appear ..... that there are historical and legal claims on which to found thoroughly determined and well-defined rights of sovereignty in favour of either of the contending powers over the whole of the territory in dispute." (2)

He went on to say:

> "that it cannot be decided with certainty whether the right of Brazil or Great Britain is the stronger." (3)

Consequently the arbitrator decided to divide the territory in dispute "in accordance with the lines traced by nature", (4) as such course "better lends itself for a fair decision of the disputed territory." (5)

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1) 99 BFSP, pp. 930-932 to which all subsequent references will be made; the award has been printed also in 11 RGDIP (1904) Documents, p. 18.

2) Ibid. at p. 931.

3) Ibid.

4) Ibid.

5) Ibid.

As to the Meerauge Arbitration between Austria and Hungary, (1) it will be recalled that the tribunal in that case was confronted solely with the problem of immemorial possession which was defined in its award as being a possession "qui dure depuis si longtemps qu'il est impossible de fournir la preuve d'une situation différente et qu'aucune personne ne se souvient d'en avoir entendu parler." (2)

In the award rendered on 15 August, 1893, in the Fur Seal Arbitration between Great Britain and the United States of America (3) "neither the term nor the doctrine [of prescription] is mentioned in the written and oral arguments of the parties or in the pronouncements of the arbitrators - with the exception of a casual remark by Lord Hannen [one of the British members of the tribunal] ...... denying the

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1) 8 RDILC, (Deuxième Série), (1906), p. 196 at p. 207. This case has been mentioned by Fauchille among those allegedly upholding the doctrine of international prescription. (see Fauchille, op.cit. vol. I, part II, p. 756).

2) Ibid. at p. 207.

3) 95 BFSP, p. 1185. The case is known also as the Behring Sea Arbitration Case. For a detailed report of this case, see Moore's International Arbitrations, 1898, vol. I, pp. 755-961; see also Smith's Great Britain and The Law of Nations, 1935, vol. II, pp. 369-422.

existence of prescription in international law." (1)

While "it appears clearly, both from the opinions of the American arbitrators and from the oral argument, that it was on the basis of prescription that the United States originally founded one of their main contentions .... it is admitted by the Agent of the United States in his final report that early in the preparation of the case the conclusion was reached that it would be difficult to sustain the plea of prescription." (2)

The experience that had been accumulated in the course of the deliberations in the Fur Seal Arbitration caused the United States in the Alaskan Boundary Dispute between herself and the United Kingdom (3) to forsake the plea of prescription and she "expressly disclaimed the intention of availing [herself] of the plea of prescription." (4) Nevertheless, "the Canadian arbitrator and the British Counsel tried to

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1) Lauterpacht, op.cit. at p. 224.

2) Ibid. at pp. 224-225.

3) The award has been printed in 98 BFSP at p. 152; see also Hertslet's Treaties, vol. 25, at p. 1183, and Pitt-Cobbett's Cases on International Law, 4th ed. 1922, vol. I, pp. 99-107.

4) Lauterpacht, op.cit. at p. 235.

construe the United States' argument as a plea of pre - scription, which they promptly proceeded to reject .... as a rule of international law. In the course of this stage of the argument the President, Lord Alverstone, associated him- self with the view expressed by Lord Hannen in the course of the Behring Sea Arbitration, that .... prescription so called was not recognized in international law." (1)

It is therefore somewhat startling that this case as well has been cited by some writers as yet another instance for the recognition of the principle of prescription in inter- national law. (2)

The case concerning the Legal Status of Eastern Green - land (3) has also been occasionally relied upon as evidence for the recognition of international prescription. This dispute between Norway and Denmark arose as a result of certain Norwegian decrees purporting to annex parts of Green- land and affecting thereby Danish rights over the same terri- tories. However, as has been already pointed out by Beckett, the real issue involved in this case was not whether one of the parties had acquired any rights through adverse holding -

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1) Ibid. at pp. 235-236.

2) e.g. Sørensen, loc.cit. at p. 152.

3) PCIJ [illegible], Series A/B, No. 53.

which is what acquisition by prescription means - but whether the territory in question was res nullius or under Danish sovereignty.[1] Beckett went on to say that "c'est pourquoi j'ai .... déclaré que dans l'affaire du Groënland [le débat portait] sur l'occupation."[2] The same view is also held by other writers.[3]

As to the Fisheries case,[4] according to Pinto the International Court of Justice did not resort there to the doctrine of prescription. Its traces can be found, according to this writer, only in the separate and dissenting opinions.[5] The Court's reluctance to pronounce on this problem cannot be overlooked in view of the fact that, in the pleadings of the parties, both oral and written, international prescription was resorted to and dealt with at great length. In the United Kingdom's Reply of 28 November, 1950, express reference was made to this notion, and it was argued that the

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1) Beckett, in 50 Hague Recueil, (1934) vol. IV. at p. 233.

2) Ibid. at p. 248-249.

3) e.g. Hackworth, Digest of International Law, 1940, vol. I, p. 405 where this case is classified under the heading of occupation; see also Johnson, loc.cit. at p. 343.

4) ICJ Reports, 1951, p. 116 et seq.

5) Pinto, loc.cit. at pp. 397-398.

acquisition of rights over maritime territories in derogation of the generally applicable rules can be made by means of prescription only. (1) In the Rejoinder submitted by Norway on 30 April, 1951, the very existence of international prescription was challenged. It was argued by Norway, _inter alia_, that "la notion de la prescription est constamment invoquée par le Gouvernement britannique dans le présent litige .... Mais cette notion est loin d'être unanimement admise. De nombreux auteurs pensent que la prescription acquisitive n'est pas une institution du droit international et se refusent à en faire la base des titres historiques."(2) Thus, the silence observed by the Court in its Judgment on this problem can be interpreted only as meaning that the Court itself entertained some doubts as to the applicability of this doctrine in the sphere of international law. The Court contented itself with the rather obscure statement - from the doctrinal point of view - that "the general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it." (3) This cautious wording can hardly be

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1) ICJ, _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. II, pp. 649-651.

2) Ibid. vol. III. at p. 440.

3) ICJ Reports, 1951, at p. 138.

taken as an endorsement of the doctrine of prescription, which, in fact, was explicitly mentioned only in the individual opinion of Judge Alvarez. (1) For this Chilean jurist the doctrines of prescription and historic rights were identical. (2) Yet he deemed it appropriate to point out that "the concept of prescription in international law is quite different from that which it has in domestic law .... There is no prescription with regard to [the] territorial status [of States]." (3) In the dissenting opinions of Judge Sir Arnold (now Lord) McNair (4) and Judge Read (5) the problem of historic waters is dealt with without any recourse being made to the principle of prescription.

In the Minquiers and Ecrehos case (6) both sides refrained from expressly invoking the doctrine of prescription. Both the United Kingdom and France, the two parties to this dispute, pleaded a very long possession of the disputed islets and claimed to have acquired an original title to them.

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1) Ibid. at pp. 151-152.

2) Ibid. at p. 151.

3) Ibid.

4) Ibid. at pp. 158-185.

5) Ibid. at pp. 186-206.

6) ICJ Reports, (1953), p. 47 et seq.

"The much criticized, but somewhat uncertain, doctrine of prescription was not invoked by either side," (1) and it was only alternatively claimed that title had been established by long-continued "effective possession". This reluctance of the parties of expressly to avail themselves of the plea of prescription has been attributed to "the tendency to regard prescription purely as a means of acquiring title through adverse possession." (2)

The Court in its judgment found for the United Kingdom on the first ground, namely, that the United Kingdom had established an original title to the contested islets, which it had never abandoned. The Court, therefore, did not find it necessary to pronounce on the alternative argument advanced by the parties.

In the case concerning Sovereignty over certain Frontier Land (3) the International Court of Justice had to pronounce in a dispute which had arisen between Belgium and the

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1) Johnson, The Minquiers and Ecrehos Case, 3 ICLQ (1954) p. 189 at p. 208. Johnson was one of the United Kingdom Counsel before the ICJ in that case.

2) Johnson, Consolidation as a Root of Title in International Law, Cambridge Law Journal, (1955), p. 215, at p. 220.

3) ICJ Reports, 1959, p. 209.

Netherlands relating to certain portions of territory which were claimed by Belgium as part of her domain, but over which the Netherlands seem to have exercised for a century or so diverse governmental functions. The Netherlands contended, inter alia, that, even if it were to be assumed that sovereignty over the disputed areas had been originally vested in Belgium by virtue of the Boundary Convention of 1843 concluded between the two countries, the acts of sovereignty performed ever since by the Netherlands in these areas firmly established sovereignty in the Netherlands. The Court was therefore faced with the question "whether Belgium has lost its sovereignty by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands." (1) Thus the Court approached the problem from the point of view of Belgium's alleged acquiescence without resorting to the doctrine of prescription and, having reached the conclusion that Belgium's attitude should not be construed as such acquiescence, the Court found for Belgium.

In a declaration read after the pronouncement of the Court's decision Judge Sir Hersch Lauterpacht gave his reasons for having voted with the minority in favour of awarding the disputed territories to the Netherlands. Sir

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1) Ibid. at p. 227.

Hersch maintained that "at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the Government of the Nether - lands and its officials, of normal administrative authority with regards to the plots in question ..... There is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty: there is no such treaty." (1)

Judge Armand-Ugon in his dissenting opinion pointed out that "the Netherlands Government has exercised preponderant Governmental functions in respect of the disputed plots, without these having given rise on the part of the Belgian Government to any protest or any opposition. This prolonged tolerance of the Belgian Government in this respect has created an indisputable right of sovereignty in favour of the Netherlands Government." (2) Both the majority and minority judges refrained from invoking the doctrine of prescription, and the criterion applied by majority and minority alike was whether or not Belgium was presumed to have acquiesced in the Netherlands sovereignty over the disputed plots.

One of the well-known judicial decisions relating to

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1) Ibid. at p. 231.

2) Ibid. at p. 250.

acquisition of title to territory in international law is the Palmas Island Arbitration Case (1) in which Judge Huber acted as sole arbitrator. The award rendered in this case is frequently relied upon by the supporters of international prescription as yet another instance for the recognition of this doctrine by an international tribunal. The dispute in this case arose between the United States of America and the Netherlands concerning the sovereignty over the island of Palmas (or Miangas), not far off the Philippines. The United States claimed that the original title to the island - based on discovery - rested with Spain and that, following the cession of the Spanish dependencies in the region to the United States, under the Treaty of Paris, 1898, the sovereignty over the island of Palmas as well was to be vested henceforth in the United States. The Netherlands, on the other hand, maintained that they had been exercising effective control over the island for several centuries without having encountered opposition of any kind and that consequently the legal title rested with them and not with the United States. In his award, rendered on 4 April, 1928, Judge Huber accepted the Netherlands' view and found in favour of the Netherlands because "practice as well as doctrine recognises - though

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1) The award has been printed in UNRIAA, vol. II, p. 829; see also 22 AJIL (1928) p. 867.

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." (1) Thus the arbitrator evaded any reference to the notion of prescription, although the applicability of this principle was expressly put in issue by the parties. The Netherlands in their Memorandum (2) had come out strongly in favour of the existence of international prescription, while the United States in their Counter-Memorandum had vigorously opposed the invocation of this principle. (3)

The only mention of prescription in this award is by means of an oblique reference to the doctrine of "so-called prescription," (4) which can be hardly taken as an endorsement of the principle. This, however, has not prevented a distinguished author from maintaining that "dans l'affaire ....

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1) UNRIAA, vol. II, p. 839; see also 22 AJIL (1928) p. 867.

2) See Hyde, International Law Chiefly as Interpreted and Applied by the United States, 2nd ed. 1945, vol. I, p. 388.

3) Ibid.

4) UNRIAA, vol. II, p. 868; see also 22 AJIL (1928) p. 909.

de l'île de Palmas la prescription a également été admise."(1) Jessup seems to have stated the correct view when he said that "unfortunately, Judge Huber did not deal fully with [the] question of [prescription] contenting himself with the statement that the Supreme Court of the United States had applied the doctrine as between states [of the Union] and had relied on Vattel and Wheaton." (2)

In fact, Judge Huber's reference to some decisions given by the United States Supreme Court (3) has evoked criticism in some quarters who deplored such a practice from the point of view of international law. (4) It is not intended to proceed here with a more detailed analysis of this problem. It should be added, however, that, although decisions of national tribunals cannot be considered as binding pronouncements on problems of international law, they undoubtedly indicate the manner in which the judicial authorities of

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1) Sørensen, loc.cit. at p. 153.

2) Jessup, The Palmas Island Arbitration, in 22 AJIL (1928), p. 735, at p. 748; see also to the same effect Pinto, loc. cit. at pp. 436-437.

3) The relevant passages of this award can be found in UNRIAA, vol. II, p. 840 and also in 22 AJIL (1928) p. 877.

4) e.g. Bleiber, Die Entdeckung im Völkerrecht, 1933, p. 41, n. 108.

various States approach questions having a bearing on international law, (1) and this is why it is thought that those decisions too deserve to be mentioned in the present survey.

(B) Municipal Courts.

Foremost among the municipal tribunals which have been called upon to deal with territorial disputes involving questions relating to the acquisition of title in international law is the Supreme Court of the United States, and in the opinion of some writers the doctrine of international prescription was upheld in its decisions. (2)

The practice of this Court might perhaps be best summed up by saying that, on the whole, some of the early judgments did indeed recognise international prescription, (3) while

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1) On the evidentiary value of decisions of national tribunals see Lauterpacht, Decisions of Municipal Courts as a Source of International Law, 11 BYIL (1929) pp. 65-95; see also Hudson, Working Paper on Article 24 of the Statute of the International Law Commission (U.N. Document A/CN 4/16 of 3 March, 1950); see also Schwarzenberger, op.cit. vol. I, pp. 32-34.

2) Fauchille, op.cit. vol. I, part II, p. 756; see also Johnson, 27 BYIL (1950) p. 342.

3) Rhode Island v. Massachusetts, 4 How, (1846), p.591 at p.638; It should be noticed that the Court's reasoning in that case was based on the assumption that "this dispute is between two sovereign and independent States", (ibid) a conception which might appear at least questionable when applied to the States of the American Union. In fact, in later judgments the Court itself spoke of the "quasi-sovereign states of the Union" (see e.g. Michigan v. Wisconsin, 270 U.S. [1926] p. 296 at p. 308).

later judgments have displayed a tendency to substitute for this doctrine other principles of international law. Thus, in Indiana v. Kentucky (1) the Court, after quoting Vattel and Wheaton on international prescription, summed up the legal position in the following words:

> "[The] long acquiescence [of Indiana] in the exercise by Kentucky of dominion and juris-diction over the island is more potential than the recollections of all witnesses ..... Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognised that long acquiescence in the possession of territory and in the exer-cise of dominion and sovereignty over it, is con-clusive of the nation's title and rightful authority." (2)

As may be readily seen, the Court's decision in this case was founded on the doctrine of acquiescence, rather than on the principle of prescription. The same course was followed in a series of judgments delivered at later dates. In Louisiana v. Mississippi (3) the Court declared that "as between States of the Union long acquiescence in the assertion of a particular boundary and the exercise of dominion and

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1) 136. U.S. (1890) p. 479.

2) Ibid. at p. 510.

3) 202. U.S. (1906) p. 1.

sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both." (1)

Here again the Court plainly invoked the doctrine of acquiescence and did not rely upon the doctrine of inter - national prescription, as to the very applicability of which in the sphere of international law the Court had serious doubts. The Court went even further and expressly confined the application of the principle of acquiescence "as between the States of the Union", thus stressing the constitutional aspects of the matter, as distinct from the international-law aspect, which the Court did not, and did not have to, deal with.

The principle of acquiescence was relied upon also in Arkansas v. Mississippi, (2) where it was held by the Court that it was "unable to depart from [the thalweg] principle because of long acquiescence in enactments and decisions and the practice of the inhabitants of the disputed territory in recognition of a boundary which have been given weight in a number of our cases where the true boundary was difficult to

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1) Ibid. at p. 53. (italics added).

2) 250 U.S. (1919) p. 39.

ascertain." (1)

Similarly, in Michigan v. Wisconsin (2) the Court held that "the rule, long-settled and never doubted by this court is that long acquiescence by one state [of the Union] in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." (3)

More recently the issue has been again somewhat obscured by a decision given in Arkansas v. Tennessee (4) where the Court seems to have taken the view that the terms "prescription" and "acquiescence" were interchangeable. The Court pronounced in that case, inter alia, that

> "this principle of prescription and acquiescence [is] essential to the 'stability of order' as between the States of the Union." (5)

The Court, while again confining the scope of its

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1) Ibid. at p. 45.

2) 270 U.S. (1936) p. 296.

3) Ibid. at p. 308; see also to the same effect Maryland v. West Virginia, 217 U.S. p. 1, at pp. 41-44; Virginia v. Tennessee, 148 U.S. p. 503, at p. 522; New Mexico v. Colorado, 267 U.S. p. 30, at pp. 40-41; Vermont v. New Hampshire 289 U.S. p. 593, at p. 613.

4) 310 U.S. (1940) p. 563; The case has been also reported in 35 AJIL (1941) p. 154 and in A.D., 1938-1940, No. 43.

5) 310 U.S. at p. 570.

decision "as between the States of the Union", spoke in its decision of the "principle of prescription and acquiescence", but from the authorities relied upon in the judgment it clearly emerges that this case as well was in fact decided on grounds virtually amounting to the recognition of the principle of acquiescence, as conceived in earlier decisions rendered by the same Court. (1)

Thus the general trend of the United State Supreme Court's decisions- as displayed in various judgments covering a period exceeding one century - has been one of steadily drifting away from the principle of prescription and of shifting the emphasis towards the doctrine of acquiescence. It can be hardly doubted that this trend has been influenced by international practice and doctrine which have become increasingly sceptical as to the very existence of international prescription.

In comparison with the impressive number of American cases, British judicial practice is scarce indeed. The only case usually referred to as having direct bearing on the questions relating to international prescription is the Direct United States Cable Co. Ltd. v. The Anglo-American Telegraph Co. Ltd. (2) There the Judicial Committee of the Privy Council was called upon, inter alia, to pronounce on the status

1) Ibid. at pp. 569-570.

2) (1877) 2 A.C. p. 394 et seq.

of Conception Bay from the point of view of international law. The Court held:

> "that in point of fact, the British Government has for a long period exercised dominion over this bay and that their claim *has been acquiesced in by other nations*." (1)

The Court went on to enumerate the acts of legislation which, in its opinion, indicated the United Kingdom's assertion of sovereignty over the bay and concluded by saying that, since "this assertion of dominion has not been questioned by any nation from 1819 down to 1872 ...... this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain." (2)

Apparently the term "prescription" seems to have been interpreted here as well as being synonymous with "acquiescence". The judgment's reasoning, however, indicates that Great Britain's rights over Conception Bay - from the point of view of international law - were founded on the acquiescence of the international community in these rights, such acquiescence being inferred from the lack of any opposition whatsoever to various acts by which Great Britain asserted her sovereignty over the bay. The only fault that can be

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1) Ibid. at p. 420. (Italics added).

2) Ibid. at p. 421.

found with this judgment is that it tends to confound the issues by availing itself of the rather controversial term of prescription.

The same principle of acquiescence seems to have been the basis of the decision given by the German Staatsgerichtshof on 10 October, 1925, in a dispute which arose between the states of *Lübeck* and *Mecklenburg-Schwerin* concerning the exercise by Lübeck of certain rights of jurisdiction in regard to fisheries over part of the territorial waters of Mecklenburg-Schwerin in the bay of Travemünde. (1) The Court found that Lübeck had exercised since the end of the 16th century the rights which formed the subject-matter of the dispute and that she had enacted in 1896 a law in which the existence of these rights had been unmistakably asserted. Commenting on this law the Court held:

> "in view of the neighbourly relations between the states, it may be safely assumed that Mecklenburg-Schwerin was indeed aware of the promulgation and contents of this law. She has certainly not taken exception to it and has thereby *tacitly recognised* the sovereignty of Lübeck." (2)

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1) For the full text of the Court's order see Wenzel, *Die Hoheitsrechte in der Lübecker Bucht*, 1926, pp. 9-21; the case has been reported also in A.D. for 1925-1926, No. 85.

2) Wenzel, op.cit. at pp. 14-15; "Dass Mecklenburg-Schwerin vom Erlass und Inhalt dieses Gesetzes alsbald Kenntniss erhalten hat, entspricht dem nachbarlichen Verhältnis und ist ohne weiteres anzunehmen. Widerspruch hat es unstreitig nicht erhoben und damit die Hoheit Lübecks *stillschweigend anerkannt*." (italics added).

The dispute which arose in the 19th century between the Duchies of Lippe-Detmold and Schaumburg-Lippe - both members of the Confederation of the Rhine - and which was submitted in 1839 to the Supreme Court of Appeal of Baden, (1) in accordance with two resolutions passed by the German federal Diet on 27 May, 1829, and on 5 August, 1830, has been mentioned by Fauchille as yet another example for the recog - nition of international prescription. (2) The bones of contention in this case were certain plots of land which had formerly been part of the possession of Count Simon of Lippe, the founder of the House of Lippe, from which the rival houses of Lippe-Detmold and Schaumburg-Lippe took their origin. The differences between the parties touched upon the problem as to which of them was the legal heir to the disputed plots of land. The original claim was put forward by the House of Schaumburg-Lippe and a counter-claim was lodged by the House of Lippe-Detmold. The Court, accordingly, delivered two separate judgments in each of which it dwelt at some length

1) The judgments delivered in this case have been printed in Martens' Nouveau Recueil de Traités, vol. XVI, p. 432. For a history of the case and a shortened French version of the judgment see Lapradelle and Politis, Recueil des Arbitrages Internationaux, 1905, vol. I, p. 401.

2) Fauchille, op.cit. vol. I, part II, p. 756.

upon the problem of prescription, as this argument had been raised by the parties in the course of their pleadings. From a perusal of the Court's judgments, however, it emerges that it was not concerned at all with international prescription and that it examined this problem solely from the municipal law aspect. Thus the plea of prescription raised by Lippe-Detmold in opposition to Schaumburg-Lippe's claim was rejected on the ground that the conditions required by municipal private law for the operation of prescription had not been fulfilled. (1)

In the judgment delivered on Detmold-Lippe's counter-claim the Court made it plain that it was led solely by considerations based on the municipal constitutional law. Referring to the plea of prescription, the Court said:

> "As far as .... prescription is concerned, in cases where rights of sovereignty as against subjects are involved, the only recognised form of prescription is that of immemorial prescription, which has no application in the present case .... As far as prescription is being pleaded not as between the State and one of its subjects, but as between two parties to a dispute, one may speak only of acquisitive prescription and not extinctive prescription, and a claimant may successfully rely on the non-

1) Martens, op.cit. at p. 464; see Lapradelle-Politis, op.cit. at pp. 413-414. In the Court's words the dispute was "nicht zugleich um die Landeshoheit, jetzt Souverainetät, sondern nur um das Dominial - oder Privat-Eigenthum des Amtes Lipperode." (see ibid.)

> exercise of rights by his adversary only if he himself has exercised his rights during the period of prescription." (1)

Moreover, the whole dispute must be viewed against the background of the Confederation of the Rhine and its unique structure which enabled the member-States to retain some of the characteristically feudal features of public institu - tions, thus causing a good deal of confusion between the aspects of property and sovereignty. (2)

VII. The existence of prescription in International Law. Practice of States.

From the judicial decisions delivered by both national and international tribunals, it is intended now to turn to a brief survey of the practice of States relating to the problem

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1) Martens, op.cit. at p. 497; was die Verjährung betrifft, so findet bei Hoheitsrechten gegenüber den Unterthanen nur die hier überall nicht vorhandene, unfürdenkliche statt .... Insofern nur aber auch da, wo das Hoheitsrecht nicht gegenüber den Unterthanen, sondern zwei Berechtigten ein- tritt, so kann dies denn doch nur eine erwerbende und keine blos erlöschende seyn, und ein Berechtigter kann sich auf die Nichtausübung des Andern mit Erfolg nur in sofern berufen, als er selbst während der Verjährungszeit das Recht ausgeübt hat." The above-quoted passage has not been re- produced in its entirety by Lapradelle-Politis and the mis- leading impression created by this omission may well account for Fauchille's attitude towards this judgment.

2) See the doctrinal note of Laband in Lapradelle-Politis, op. cit. pp. 423-438.

of the existence of international prescription, such practice being manifested in both oral and written statements emanating from the duly authorized agents and representatives of the States.(1) This practice, which seems to be rather meagre,(2) hardly warrants the conclusion that the community of nations or even any given nation have irrevocably committed themselves in favour of one attitude or another. The practice of the different States in this field is indeed not marked by an uncompromising consistency and is obviously

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1) One of the main reasons for the relative scarcity of State practice in this field seems to be the fact that any reliance by a State on the doctrine of prescription implies its admission that its rights over the territory in question are adverse rights and that the original title to that territory rests with another State, which, in most cases, would be the rival party to the dispute. For reasons which are not difficult to understand, States are not prone to make such admissions and to concede that the opposing party had acquired any rights prior to the emergence of their own rights. Thus they prefer not to rely - as far as possible - on a prescriptive title.

Similarly, States are hesitant to rely on the doctrine of immemorial possession, because the invocation of this doctrine may be construed as an admission on their part that the origins of their titles to the territories in question are uncertain. In order to avoid any possible misapprehension, States refrain, therefore, from invoking, as far as possible, international prescription and immemorial possession alike.

2) Various instances of the application of the doctrine of prescription in State practice have been already cited while dealing with judicial decisions rendered by municipal courts and international tribunals and will not be gone into again in this section.

dependent - as elsewhere - on the real or imaginary political interests of the States in question. Attention to this fact has been drawn by Hyde, who has rightly pointed out that "in the Chamizal Arbitration with Mexico .... the United States invoked without success the principle of prescription. In the Island of Palmas Arbitration it vigorously opposed the applicability and invocation of that principle by the Netherlands." (1)

Similarly, the United Kingdom seems to have supported the principle of international prescription in the Arbi - tration Treaty concluded in 1897 between herself and Venezuela concerning the settlement of the Boundary Dispute between British Guiana and Venezuela (2) and in the course of her pleadings in the Fisheries case, (3) while she rejected the applicability of the same doctrine in the Alaskan Boundary Dispute. (4)

It has been alleged that article III of the treaty concluded between the United States and Great Britain on 20

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1) Hyde, op.cit. vol. I, p. 388.

2) 89 BFSP, p. 57.

3) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. I, pp. 649-650.

4) Lauterpacht, op.cit. at p. 235.

October, 1818, and article I of the treaty concluded between the same countries on 6 August, 1827, relating to Oregon, impliedly recognized the doctrine of international prescription "one of their objects .... being to negative the inference of title from long-continued possession, by either party, of a particular portion of such territory." (1) It is thought, however, that these and similar treaty stipulations should be construed rather as aiming at the removal of any doubts as to one party having acquiesced in the possession of a given territory by the other. (2)

Nor would it appear justified to maintain that the British Agent's argument before the Commission constituted under art. IV. of the Treaty of Ghent of 1794, relating to the Title to the Islands in Passamaquoddy Bay amounts to having put forward the plea of presription. Mr. Chipman, the British Agent, in his Memorial of 11 June, 1817, confined himself to saying that "the United States ..... 'remained silent spectators' ..... of the settlements and improvements upon these islands .... during a period of more than thirty

1) Moore, International Law Digest, 1906, vol. I, p. 296.

2) This aspect of the problem will be dealt with more extensively when the requirements for the formation of an historic title will be elaborated upon, and in particular the requirement for the possession being à titre de souverain.

years" (1) and that this uncontroverted fact "will justly furnish an argument that the United States have no claim at this day to any of those islands." (2)

This passage, it is submitted, does not intend to say more than that the United States' silence raises against her the presumption of her acquiescence in a certain state of things.

The notion of international prescription was, however, expressly mentioned by Mr. Olney, the United States Secretary of State, in a letter written on 22 June, 1896, to Sir Julian Pauncefote, the British Ambassador, (3) although he admitted that there was no fixed period for the operation of inter - national prescription. On the other hand it is difficult to construe the letter sent on 5 January, 1818 by Don Luis de Onis, the Spanish Minister, to Mr. Adams, the United States Secretary of State, concerning the disputed boundary of

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1) Moore, International Adjudications (Modern Series), 1933, vol. VI, p. 213.

2) Ibid.

3) 88 BFSP, p. 1238. This letter was part of the correspon - dence which preceded the Venezuelan Boundary Arbitration to which reference will be made presently.

Florida [1] as an endorsement of international prescription. The Spanish Minister justified the Spanish claim on the ground that "the French themselves never disputed the rights of the Spaniards to possession and property, nor laid claim to these parts of the Territories of the Spanish Monarchy." [2]

One of the best known instances in which the doctrine of international prescription is alleged to have been recog - nized, is the Arbitration Treaty signed on 2 February, 1897, between Great Britain and the United States of Venezuela respecting the <u>Settlement of the Boundary between British Guyana and Venezuela.</u> [3] The first of the rules laid down in art. IV of the Treaty stipulates that "adverse holding or prescription during a period of fifty years shall make a good title." [4]

While this provision appears at first sight to be an express acknowledgment of the notion of international

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1) 5 BFSP, p. 425.

2) Ibid. at p. 436.

3) 89 BFSP, pp. 57-65. For the diplomatic correspondence preceding the conclusion of this treaty see 87 BFSP pp. 1061-1107 and 88 BFSP pp. 1242-1327.

4) 89 BFSP p. 60.

prescription, it may also be contended that it impliedly indicates the lack of recognition of this principle rather than its existence and that it constitutes a sort of "contracting out" from the general rules of international law. This argument seems to find some support in the second rule enumerated in art. IV. which authorizes the arbitrators "to give effect to rights and claims resting on any ground whatever valid according to international law." (1) Had the doctrine of prescription really been part and parcel of international law, there would not have arisen the need of inserting a specific rule to this effect into the treaty, and the express stipulation contained in the first rule would appear to be superfluous in view of the more general provisions of the second rule. (2)

Whatever the correct interpretation of this treaty may be, the fact cannot be ignored that, in the arbitral award

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1) Ibid.

2) It could, however, be argued, that the first rule was concerned not with the principle of prescription as such, but solely with the fixing of the period of 50 years for the operation of prescription. Such an argument would have had more to commend it had the first rule been inserted <u>after</u> the second rule and not before it.

rendered by the tribunal on 22 May, 1899, [1] the doctrine of prescription was not resorted to (in fact, the tribunal refrained from giving the reasons for its decision) and "unfortunately .... the actual award added little to the law of prescription." [2]

In the case concerning the Legal Status of Eastern Greenland which has been already mentioned in a different context, Professor de Visscher, representing Denmark before the Permanent Court of International Justice in that case, expressly refuted the allegation made earlier by the agent of Norway that Denmark was founding her rights over the disputed territories upon the principle of prescription.

Moreover, Professor de Visscher found it appropriate to question the very existence of this institution in international law, by expressing the view that "la détermination d'un délai fixe est, dans l'institution de la prescription une condition de caractère technique que le droit international positif n'a pas encore consacrée jusqu'à présent." [3]

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1) 92 BFSP p. 160.

2) Johnson, 27 BYIL (1950) p. 340.

3) PCIJ, Series C, No. 66, p. 2873.

CHAPTER 3.

ACQUIESCENCE AS THE JURIDICAL BASIS OF AN HISTORIC TITLE.

I. General.

Although "it cannot be denied that the traditional development of custom is ill suited to the present pace of international relations", (1) it is true to say that customary rules of international law still occupy a pro - minent place among the binding rules of international law. In fact, custom is still one of the chief formal sources of international law, standing alongside treaties at the apex of the hierarchy of the law-determining agencies of inter - national law. (2)

In view of the fact that historic claims put forward by different States cannot be founded on international treaties - if this were feasible, there would not arise the need to invoke the theory of historic titles - the attempt has to be made to find the legal basis of such claims in the field of customary international law. Accordingly, a brief analysis

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1) De Visscher, Reflections on the Present Prospects of International Adjudication, 50 AJIL (1956) p. 467 at p. 472.

2) See Art. 38 of the Statute of the International Court of Justice.

of the process of formation of customary rules of inter - national law has to be undertaken. A thorough and compre - hensive investigation of this problem is not intended, since such an analysis of the mechanism by which customary rules of international law are shaped and developed would be clearly beyond the compass of this work. The present excursion into one of the most fundamental - and also one of the most con - troversial - fields of international law, which has been the subject of a voluminous literature, is meant only to facili - tate a comparison of the processes by which general rules of customary international law and historic rights, respectively, are formed. In this study particular emphasis will be placed on the doctrine of acquiescence, which, it is sub - mitted, underlies not only the process of formation of general customary rights under international law, but is also the very pillar of the mechanism with the aid of which special or historic rights take shape.

II. The creation of a customary rule of International Law.

A. The generality of practice and the time element.

The nature of customary law is a general problem of law. The reasons for the pre-eminence of this problem in the sphere of international law are not far to seek. They are derived from the fact that while, on the one hand, in the

municipal legal order the impact of custom has been steadily on the decline, as a result of the rigid structure of the modern State, in the international legal order, on the other hand, owing to the deficiencies and shortcomings inherent in the present structure of international society, custom is still a vital and fundamental factor in the growth and development of the law.

Article 38(1)(b) of the Statute of the International Court of Justice defines international custom as "evidence of a general practice accepted as law." This wording is far from being free of ambiguity and has frequently given rise to difficulties. (1) Oppenheim, in an apparent attempt to evade the controversial issues pertaining to the definition of international custom, describes it as "a clear and continuous habit of doing certain actions ..... under the aegis

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1) It would appear that this drafting was meant to evade the controversy as to whether the consensual element in the creation of custom - which will be elaborated upon in the next section - is creative of the customary rule or merely cognitive of it, i.e. a recognition of a rule as being already established. In the opinion of Kunz, the reason for what he calls "the extremely bad drafting of Article 38 (1) of the Statute of the International Court of Justice" is the idea of seeing in custom not a procedure for creating norms of international law, but merely the "proof", "evidence", "la constatation" of a "pre-existing rule of law. This is the typical approach of the natural-law doctrine." (see Kunz, The Nature of Customary International Law, 47 AJIL (1953), p. 662 at p. 664). As to references for the said concept, among whose exponents Kunz mentions Duguit, Scelle, François and Lauterpacht, see ibid. n. 13-16.

of the conviction that these actions are, according to International Law, obligatory or right." (1) This definition, in spite of its presumably intentional vagueness, clearly bears out the twofold nature of the process which brings an international custom into being, namely,

(a) the habit must be continuous; and

(b) it must spring from the conviction that the course of action taken is obligatory or right (the so-called opinio juris sive necessitatis).

Thus, first of all, there is an element of repetition. Historically, says Tunkin, "a 'customary' norm of inter - national law arises out of repeated actions of States." (2) This element of repetition, continuity or the element of time usually plays, according to Tunkin, an important role in the process of creation of a customary rule. It is, however, essential to remember, he goes on to say, that "though time plays historically, as a matter of fact, a considerable role in the process of formation of a customary rule of conduct, it is juridically irrelevant." (3)

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1) Oppenheim, op.cit. vol. I, p. 26.

2) Tunkin, Co-existence and International Law, 95 Hague Recueil, (1958) vol. III, p. 5, at p. 9.

3) Ibid. at pp. 9-10; see also to the same effect Lauterpacht, in 27 BYIL (1950) at p. 393, and Fitzmaurice in 30 BYIL (1953) at p. 31.

Commenting on the juridical irrelevance of the time factor in the establishment of a new customary norm of international law, MacGibbon observes that "the judgments and Advisory Opinions of the Permanent Court of International Justice provide no exact criterion with regard to the length of time which must pass before a usage becomes a custom." (1) On this point MacGibbon echoes the views put forward earlier by Sørensen, who had drawn attention to the fact that, in the jurisprudence of the Permanent Court of International Justice, the element of time or repetition seems to be fused with the problem of the generality of practice. According to Sørensen, a practice followed by a great majority of States will be deemed sufficient for the creation of a new custom, in spite of its recent origin; an ancient norm of conduct, on the other hand, will require fewer adherents for its being regarded as a binding rule of law. (2)

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1) MacGibbon, Customary International Law and Acquiescence, 33 BYIL (1957) p. 115, at p. 120.

2) Sørensen, Les Sources du Droit International, 1946, p. 102, where the author writes: "C'est un trait caractéristique de la jurisprudence de la Cour [Permanente de Justice Internationale] que l'élément de temps ou de durée n'est pas considérée indépendamment de la généralité de la pratique en question. L'envergure et l'ancienneté de la pratique semblent se fondre en une unité, de sorte que la pratique suivie par une grande majorité d'Etats suffit pour la création d'une coutume, même d'origine assez récente; d'un autre côté, une pratique de grande ancienneté n'a peut être besoin d'autant d'adhérents."

In Sørensen's view, the time factor in the creation of a new customary norm of international law is closely and inextricably linked up with the question of the generality of practice. It is not intended to give here a definite answer to the question under what circumstances a practice may be considered as being a "general" practice. All that can be said in this connection is that international law does not require the practice to be unanimous. As has been pointed out by Kunz, "the practice must be 'general', not universal; but a mere majority of States is not enough. The practice must have been applied by the overwhelming majority of States which hitherto had an opportunity of applying it." (1)

Lauterpacht explains the readiness of international law to dispense with the requirement of universality of practice as a condition for the application of customary rules by pointing out that any insistence on the requirement of

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1) Kunz, loc.cit. at p. 666; Similarly it has been maintained in the Norwegian Counter-Memorial in the _Fisheries_ case that "la notion de généralité est relative. On n'exige pas que l'existence de la règle soit attestée par la pratique de tous les Etats. Il faut cependant qu'un grand nombre d'Etats aient manifesté par leur attitude l'acceptation de cette règle."(ICJ Fisheries case, _Pleadings, Oral Arguments, Documents_, vol. I, p. 380).
In the United Kingdom Reply it was pointed out, likewise, that "it is common ground that ..... a customary practice invoked as law must be general but that generality does not connote universality." (ibid. vol. II, p. 427).

universality would render doubtful the existence of numerous rules of law. "To say", he argues, "... that with regard to any particular matter no rule of international law exists unless practice is unanimous or approaching unanimity, may result in giving judicial imprimatur to the existence of wide gaps in international law." (1)

B. Opinio juris and acquiescence.

The element of time, repetition and continuity of practice usually raises questions of fact which can be ascertained with relative ease by examining the practice of States and international case law. This element is therefore sometimes called the "objective factor" in the formation of a customary norm of international law, as distinct from the second element, the so-called "subjective factor", or "psychological factor", which makes it necessary to investigate whether or not the States concerned acted in the belief that their actions were "obligatory or right".

The necessity of introducing this second element into the process of formation of a customary norm of international law springs from the fact that a rule of conduct does not become law by its mere repetition. According to Tunkin,

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1) Lauterpacht, The Development of International Law by the International Court, 1958, p. 370.

"only a recognition on the part of States of such a rule as legally binding, i.e. recognition of such a rule as a rule of international law, has decisive influence and consummates the process of creating a customary norm of international law." (1)

The essence of this recognition or acceptance by a State of a certain international practice as a rule of law is for Tunkin "the expression of the will of a State; it is a consent to consider this customary rule as a rule of inter - national law and therefore as a juridically obligatory rule ..... It is a tacit offer, there are no conferences or nego- tiations; this offer is implied in actions of [a] State implying its recognition of a certain rule as a legal norm."(2)

Thus for Tunkin, whose approach reflects a rather wide- spread concept, the psychological element in the formation of a customary norm of international law might be looked upon as yet another manifestation of the general device of recog - nition. For him, and for those who share his view, inter - national custom gains its ultimate legal validity from the recognition granted to it by the community of nations.

For the sake of completeness it should be noted, however,

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1) Tunkin, loc.cit. at p. 12.

2) Ibid. at p. 13.

that the above-mentioned interpretation of the term "opinio juris", though presumably governing the field, is by no means the only one in existence. According to another theory "it suffices if [the practice] is regarded as something which it is morally incumbent (as opposed merely to convenient, ex - pedient or correct)." (1)

Both these theories share the belief that, for the States acting as they do, there arises an obligation to behave as others would behave under similar circumstances, and that this obligation is not merely a rule of courtesy. It is this subjective element that distinguishes a binding customary rule from a usage followed from mere convenience or comity.

There is, however, a third theory which maintains that the subjective element in the formation of international custom may be dispensed with altogether. In the view of Guggenheim, who is one of the leading exponents of this trend, "la doctrine du 18e siècle, examinée plus haut, ignore l'élément de l'opinio juris .... La formule, en effet, ne remonte pas plus haut qu'au début de 18e siècle ..... C'est en Allemagne, qu'est née l'idée que la répétition des mêmes faits n'était pas le seul élément constitutif de la coutume et qu'il fallait

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1) Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 Hague Recueil (1957) vol. II, pp. 101-102.

également considérer comme tel l'*opinio juris*." (1) Yet, while himself denying the necessity of this element in the formation of international custom, he admits that "selon l'opinion dominante, cette *opinio juris sive necessitatis* serait l'élément spécifique de la coutume, l'élément qui permet de distinguer la coutume obligatoire de l'usage simplement facultatif." (2)

In fact, both the Permanent Court of International Justice and the International Court of Justice seem to have upheld the traditional and commonly accepted doctrine which lays stress on the existence of the subjective element in the formation of an international customary norm. In the well-known *Lotus* case (3) the Permanent Court of International Justice held that "even if the rarity of the judicial

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1) Guggenheim, *Contribution à l'Histoire des Sources du Droit des Gens*, 94 *Hague Recueil* (1958) vol. II, pp. 52-53; (italics in original); see also to the same effect Kopelmanas in 18 BYIL (1937) pp. 127-151 and Kelsen, *Théorie du Droit International Coutumier*, Revue Internationale pour la *Théorie du Droit* (1953) p. 253 et seq.

2) Ibid.(italics in original). For a rejection of this theory denying the necessity of *opinio juris* see Fitzmaurice, loc. cit. at pp. 103-105; see also Lauterpacht, op.cit. at pp. 379-381.

3) PCIJ, Series A, No. 10.

decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom." (1)

In the *Asylum* case (2) the International Court of Justice re-affirmed this principle by stating that "the party which relies on a custom .... must prove that this custom is established in such a manner that it has become binding on the other party ..... that the rule invoked is in accordance with a constant and uniform usage practised by the States in question and that this usage is the expression of a right appertaining to the State and a duty incumbent on the territorial State." (3)

This idea was further re-iterated in the *Morocco* case (4)

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1) Ibid. at p. 28.

2) ICJ Reports, 1950, p. 266.

3) Ibid. at p. 276.

4) ICJ Reports, 1952, p. 176.

where the International Court of Justice, after quoting the relevant passage from the judgment delivered in the Asylum case, found that "there has not been sufficient evidence to enable the Court to reach the conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco." (1)

More recently the International Court of Justice had to concern itself again with the same problem in the case concerning Right of Passage over Indian Territory. (2) Judge Chagla, in his dissenting opinion, pointed out that for the establishment of a custom under international law "it is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing something the parties must feel that they are doing or forbearing out of a sense of obligation. They must look upon it as something which has the same force as law ...... There must be an overriding feeling of compulsion - not physical but legal. That is what the jurisprudence on the subject calls the conviction of

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1) Ibid. at p. 200.

2) ICJ Reports, 1960, p. 6.

necessity." [1]

The distinction made by the Court in the _Asylum_ case between "a right appertaining to a State and a duty incumbent on the territorial State" [2] is significant in that it focuses attention on the basically twofold aspect of the customary norm: it emphasizes the fact that, with the emergence and development of a customary right, a correlative customary duty also develops. This same idea was expressed again by the Court in its judgment in the case concerning _Right of Passage over Indian Territory_, where it found, "that the practice [allowing free passage between the various Portuguese possessions] was accepted as law by the parties and has given rise to a right and a correlative obligation." [3] Similarly, Judge Spender in his dissenting opinion pointed out that "a right of passage having been established, there was a correlative obligation on India not to prevent the exercise of that passage." [4]

This distinction seems to have prompted one author to

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1) Ibid. at p. 120 (italics added); see also the definition of _opinio juris_ as given by Judge Armand-Ugon in his dissenting opinion, at p. 82.

2) Supra, p. 84 note 3.

3) ICJ Reports, 1960, at p. 40.

4) Ibid. at p. 110.

make it the starting-point of a theory aiming at reconciling the seemingly irreconcilable concepts concerning the role of opinio juris in the formation and growth of international custom. In an article published in 1957, (1) MacGibbon voiced the opinion that a distinction should be drawn between the processes of formation of customary rights and customary obligations. In his view "generalizations concerning the process by which rules of customary international law are formed do not always acknowledge that a rule may be expressed in terms either of a right or of an obligation and that it may involve both the protection of the right in question and the acknowledgment of the correlative duty. Considerations which apply to a rule expressed as a right or as a liberty may well be inappropriate to a rule expressed as a duty or as a prohibition." (2) This contention is warranted by the fact which had been observed by McDougal that, in the sphere of international relations, the same nation-state officials are alternatively in a process of reciprocal interaction both claimants and external decision-makers, passing upon the claims of others. (3) According to the same writer, this

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1) MacGibbon, Customary International Law and Acquiescence, 33 BYIL (1957), p. 115.

2) Ibid. at p. 116.

3) McDougal, The Hydrogen Bomb Tests and the International Law of the Sea, 49 AJIL (1955) p. 356, at pp. 357-358.

duality of function "merely reflects the present lack of specialization and centralization of policy functions in international law generally." (1) MacGibbon therefore offers the following explanation concerning the growth of a new customary obligation of international law:

> "In the early stages of the development of a customary right other States are faced with the choice of objecting or remaining passive. From their inaction the inference of consent in and acceptance of the validity of the claim may be drawn and ...... strengthened by the passage of time, the growth in the number of States participating in the claim and the extent to which the claim is enforced. So far, the conduct of States other than participants in the claim and practice may amount but not exceed voluntary acquiescence and this may remain the position while the possibility of simple passivity is open to them. However, at the same time as the right is developing its correlative duty is developing .... The right claimed may be such that its fulfilment may continue to require no more than passive submission on the part of other States. If that is so, the validity of the claim .... may be gauged solely by reference to the continued acquiescence of other States. On the other hand, once the correlative duty involves for its implementation a course of positive action, as opposed to simple tolerance, then the opinio juris may become an essential element in the absence of which that course of action cannot become endowed with the binding force of a customary obligation. If the practice continues with uniformity and is asserted as of right and if the States assuming the obligation share the conviction that the action taken to give effect to the objection is enjoined by law, the latter course of action has

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1) Ibid.

at that stage ripened into a definitive customary obligation." (1)

As a result of the foregoing considerations MacGibbon is led to the conclusion that <u>opinio juris</u> is to some degree distinct from acquiescence, although it is nothing more than its logical outcome, and "acquiescence would have permitted the right correlative to the obligation to be perfected in any event." (2) He suggests, however, that "in the case of a customary obligation expressed in terms of prohibition it is not unreasonable that emphasis should be placed on the <u>opinio juris</u> rather than on acquiescence." (3) On the other hand, "the part which that concept plays in the acquisition of customary rights is ...... indirect ..... and its place is taken in this context by the doctrine of acquiescence." (4)

The explanation offered by MacGibbon would appear to remove the theoretical difficulty which puzzles the scholar who devotes more than cursory attention to this problem. On the one hand, it is said that usage coupled with <u>opinio juris</u> leads to the creation of a customary norm of international law, while on the other hand it is claimed that, in order to

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1) MacGibbon, loc.cit. at p. 130; (italics in original).

2) Ibid.

3) Ibid. at p. 131; (italics in original).

4) Ibid. at p. 126.

enable the creation of such a norm, the States involved must initiate such practice because of the opinio juris. In other words, the coming into being of a new norm would pre-suppose that the States acted in legal error. As suggested, the emphasis placed by MacGibbon on the distinction between customary rights and customary obligations might provide the answer to this theoretical challenge.

In fact, some writers appear to have formulated the requirements for the establishment of an international custom so as to embrace both the notion of opinio juris and the doctrine of acquiescence within a single definition. Hudson requires for the international custom "the concordant and recurring action of numerous States in the domain of inter-national relations, the conception in each case that such action was enjoined by law and the failure of other States to challenge that conception at the time." (1) Similarly, Kunz expressed the view that "not only must the States which applied the practice have had the conviction, but this con-viction must not have been challenged by other States." (2) However, the inadequacy of these and similar formulations of the requirements necessary for the formation of international

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1) Hudson, The Permanent Court of International Justice, 1920-1942, 1943, p. 609.

2) Kunz, loc.cit. at p. 667.

custom stems from the fact that "failure to protest against the conviction that the practice is enjoined by law .... is not equivalent to acquiescence in the practice itself." (1)

III. The consensual basis of customary International Law.

The assertion, according to which acquiescence is the prerequisite for the coming into existence of the opinio juris, and consequently for the establishment of a customary norm of international law, would appear to be tantamount to upholding the consensual basis of customary international law. In fact, Scelle expressly equated opinio juris with consent when he wrote that "le second élément essentiel de la coutume est d'ordre psychologique: c'est le consensus ou l'opinio necessitatis, c'est à dire le faisceau des consentements individuels prêts à reconnaître et à subir la règle de Droit ainsi découverte et extériorisée." (2)

Similarly, it has been pointed out by Morelli that international custom is, according to the traditional doctrine, nothing more than an agreement, differing from international treaties in only one respect, namely, that it is a tacit

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1) MacGibbon, in 31 BYIL (1954) at p. 151.

2) Scelle, Droit International Public, 1944, p. 398; the same idea has been voiced less explicitly by Sørensen, op.cit. at p. 104.

agreement.[1] From this assumption it follows, in the view of Morelli, that customary international rules can legally bind only those States which participated in the creation of such norms and persistently followed them as binding rules of conduct. Their validity in respect of other States can, however, be based solely on their voluntary acts, i.e. on their recognition of the customary norms.[2] (Morelli though, does not approve of this concept and proceeds to refute the consensual theory of the binding force of customary international law).[3]

The concept of the consensual and essentially voluntarist basis of customary international law has found support in the judgment delivered by the Permanent Court of

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1) Morelli, Cours Général de Droit International Public, 89 Hague Recueil, (1956) vol. I, p. 441 et seq, at pp. 453-454, where he says: "La coutume internationale d'apres la doctrine traditionnelle n'est qu'un accord. La caracteristique pour laquelle la coutume configurée comme un accord se distingue des autres accords internationaux (c'est-à-dire des traités) consiste seulement dans le fait qu'il s'agit d'un accord tacite." (italics in original).

2) Ibid. at p. 455, where the author states: "La coutume internationale, en tant qu'accord, ne peut produire des regles de droit que pour les Etats qui ont pris part a l'accord, a savoir pour les Etats qui ont effectivement suivi une certaine ligne de conduite. La valeur de la regle coutumière pour les autres Etats ..., que personne ne saurait nier, ne pourrait être expliquee qu'au moyen d'un acte de volonté de ces Etats, c'est-a-dire que l'on appelle la reconnaissance de la coutume." (italics in original).

3) Ibid. at pp. 455-458.

International Justice in the Lotus case [1] where the majority of the Court took the view that "the rules binding upon States .... emanate from their own free will as expressed in conventions or by usages generally as expressing principles of law." [2]

This concept is not unchallenged [3] and, although it is not intended to enlarge here on this subject, one of the objections raised against the consensual basis of the binding force of customary international law appears to deserve mention, since it seems to be directly relevant to the subject-matter of this work. Kelsen has objected to this theory by pointing out the apparent fact that "general international law is binding upon many States which never, expressly or tacitly, consented to it" [4] and which had been in existence long before those States were established. He therefore insists that the assumption, according to which international law draws its binding force from the recognition of all States, is fictitious and cites to this effect the case of a

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1) Supra, p. 83 note 3.

2) Ibid. at p. 18.

3) For a detailed discussion and rejection of the objections raised against this concept see MacGibbon in 33 BYIL (1957) pp. 131-138; see also Fitzmaurice in 92 Hague Recueil (1957) vol. II, pp. 101-105.

4) Kelsen, Principles of International Law, 1952, p. 316.

newly-established community in respect of which "international law becomes applicable ..... when the latter is recognized as a state by other States." (1) This contention, however, had been met by Lauterpacht who argued that the consent of States was essential and indispensable merely in the process of the formation of new rules of international law but "has no reference to the question of whether or not a new State is bound by the already existing rules of customary inter - national law." (2) The only conclusion that follows from the adoption of the consensual basis of customary inter - national law is, according to Lauterpacht, that "new obligations cannot be imposed upon an unwilling State by any international legislature", (3) but the contention that existing rules of international law are binding upon newly recognized States independently of their consent does not exclude the propriety of insisting on a consensual basis for the formation of new customary rules. (4)

A State is therefore entitled to dissociate itself from a new customary rule during its process of formation. Such

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1) Ibid. at p. 154.

2) Lauterpacht, The Function of Law in the International Community, 1933, p. 419.

3) Ibid. at p. 420.

4) MacGibbon in 33 BYIL (1957) p. 137.

dissociation will as a rule manifest itself by the recalci - trant State declaring itself not to be bound by the new rule. A State cannot, however, dissociate itself from an already existing rule of international law, i.e. it cannot "contract out" from the applicability of that rule once such a norm has become a general norm of customary international law. This point was vividly illustrated by the arguments of the parties in the Fisheries case and will be dealt with in detail in due course. In her pleadings in that case Norway contended that certain alleged rules of international law were not general rules at all, and that, even if they were, they could not be applied as against Norway, because she had consistently and unequivocally manifested her refusal to accept them from the time those rules were taking shape. In Norway's opinion, if a State "a manifesté, soit expressément, soit par l'attitude constante et non-équivoque la volonté de ne pas soumettre à la règle, alors que celle-ci n'avait pas encore pris à son égard le caractère d'une règle obligatoire, il reste en dehors de son champ d'application." (1) In the United Kingdom's Reply the Norwegian contention was not basically questioned, although it was deemed appropriate to point out that "the right of a State to dissent from a customary rule cannot be

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. I, pp. 382-383.

regarded as absolute ..... Where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle." (1) It was conceded, however, that a State might "acquire an exceptional position with regard to some general rule of customary law by some process which is analogous to that of acquiring a historic title." (2) Sir Gerald Fitzmaurice takes the view that "the position jointly taken up by Norway and the United Kingdom on this point (for their disagreement regarding it related to the facts rather than to the principle) must be regarded as correct." (3)

IV. Recognition and acquiescence.

The adoption of the consensual basis as the source of the binding force of international law amounts practically to introducing into this field the well-known and much-contested doctrine of recognition, which is one of the main means of expressing consent in international relations. It has by now become common ground that the scope of the concept of

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1) Ibid. vol. II. pp.428-429.

2) Ibid. at p. 429.

3) Fitzmaurice in 92 Hague Recueil (1957) vol. II at p. 100.

recognition is by no means confined to the topics of recognition of States and Governments; this device of international law is, in fact, of a general character and has, according to Schwarzenberger, a "wide actual and a still greater potential scope." (1) As has been pointed out by the same writer, it is only through recognition that the principle of sovereignty - the very pillar of international society - acquires any meaning, and it would be non-existent in practice "unless at least two sovereign States had established legal relations with each other and recognised each other as independent communities." (2) The same author further points out that "the manifoldness of the functions of recognition in the sphere of international law must not obscure the fact that in each case this device serves one and the same legal purpose. It is a means by which States express their willingness to acknowledge _vis-à-vis_ themselves the existence and legal effect of a situation or transaction which in the absence of such recognition would not be _opposable_ to them." (3) He goes on to say that "a sovereign

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1) Schwarzenberger, _The Fundamental Principles of International Law_, 87 _Hague Recueil_ (1955) vol. II, p. 195, at p. 228.

2) Ibid.

3) Ibid. at pp. 228-229, (italics in original).

State which has recognized a situation, act or transaction of international relevance can no longer maintain that vis-à-vis itself it is not opposable. From this angle recognition appears as an effective agency of peaceful change in international law." (1)

Although Schwarzenberger does not define the precise meaning of the term "opposability", he seems to apply it in the meaning given to it in the judgment of the International Court of Justice in the Fisheries case. There, in a well-known and frequently-quoted passage of the judgment, the Court declared that "the application by Norway of a well defined and uniform system would reap the benefits of a general toleration," (2) which, in the words of the French text, is "fondement d'une consolidation historique qui le rendrait opposable à tous les Etats." (3) From the context in which this term was applied by the Court, it seems to emerge that "opposability" is the consequence of the conduct of a particular State in the face of certain circumstances, this consequence being that the conduct of such State might

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1) Ibid. at p. 249. (Italics in original).

2) ICJ Reports, 1951, p. 138.

3) Ibid. (Italics added); the corresponding expression in English for the italicized word is "enforceable."

be held out against it as a practice binding it. It is a kind of estoppel which is created by the conduct of the State and which precludes it from acting contrary to what has become binding upon it by its behaviour. Thus it has been maintained by the Government of India in the course of the Sino-Indian Boundary Dispute that in the absence of any Chinese protest against various Indian manifestations of sovereignty over the territories in question, "China must be held to have accepted and acquiesced in the Indian alignment and to be estopped from raising claims to Indian territory." (1) In this respect the function of "opposability" seems to be closely related to the notion of "estoppel" and in fact, "the legal effect of recognition is to create an estoppel." (2) This inevitable and logical consequence of every act of recognition was clearly borne out in the judgment rendered by the Permanent Court of International Justice in the Legal Status of Eastern Greenland case (3) where the Court said,

1) See the Summary of the Report of the Officials of the Governments of India and the People's Republic of China on the Boundary Question, published by the Ministry of External Affairs of the Government of India, MEA. 32, p. 10 (italics added).

2) Schwarzenberger, loc.cit. at p. 253. For a more detailed discussion of the doctrine of estoppel in relation to acquiescence , see chapter 4, section VII below.

3) PCIJ Series A/B no. 53.

inter alia: "Norway reaffirmed that she recognized the whole of Greenland as Danish and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland." (1)

While the foregoing interpretation of the term "opposability", as given by Schwarzenberger, seems to be the correct one, as emerging from the pronouncements of international tribunals, it might be added, for the sake of completeness, that it is not the only one in existence. Contrary to Schwarzenberger, who seems to conceive "opposability" as the result and outcome of recognition, resembling in its function and scope the doctrine of estoppel, Charpentier avails himself of this term in a somewhat different meaning. He distinguishes between two different aspects of recognition, the first being "la manifestation de volonté par laquelle l'Etat tiers adhère à une modification qui s'était réalisée sans sa participation," (2) while the second is defined as "l'extension à l'Etat tiers des effets de la

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1) Ibid. at pp. 68-69; see also the Advisory Opinion of the International Court of Justice concerning the International Status of South-West Africa, ICJ Reports, 1950, p. 128 et se at pp. 135-136, and at p. 142.

2) Charpentier, La Reconnaissance en Droit International et l'Evolution du Droit des Gens, 1956, p. 5.

modification."[1] He goes on to explain that "le premier sens est volontaire ou formel. Le deuxième sens est matériel ou fonctionnel,"[2] indicating "non l'attitude de l'Etat tiers, mais la modification elle-même, non pas un acte, mais un fait juridique."[3] It is this second kind of recognition which is called by Charpentier "opposabilité".

The line of cleavage between the two approaches seems to become clearer owing to Charpentier's assertion that "rien ne prouve que l'extension à un Etat tiers des effets de la modification nécessite sa reconnaissance .... rien ne prouve, non plus, que la reconnaissance ait pour effet d'étendre à l'Etat qui l'accorde les effets de la modification."[4]

Conversely, as will be recalled, recognition, in one form or another, is for Schwarzenberger the prerequisite for a situation to become opposable. Such recognition does not necessarily express itself in a formal act. In some cases it takes the form of passive toleration in circumstances where a different conduct would have been expected from a party which meant to object to that situation. A

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1) Ibid.

2) Ibid.

3) Ibid.

4) Ibid.

recognition of this kind, such a passive toleration, is what Schwarzenberger calls "acquiescence". According to this writer, acquiescence "differs from recognition merely in its mode of expression: passive toleration; for even implied recognition presupposes some acts which are capable of being interpreted as such. When ..... it is accompanied by a positive act by which acquiescence is expressed, it amounts to recognition." (1) Thus, while differing from recognition in its mode of expression, acquiescence produces likewise "an estoppel in circumstances when good faith would require that the State concerned should take active steps of some kind in order to preserve its rights of freedom of action." (2) Similarly, another author described acquiescence as "the in-action of a State which is faced with a situation constituting a threat or infringement of its rights .... It takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection." (3)

If acquiescence is looked upon from this angle, it matters little whether it is regarded as a branch of the

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1) Schwarzenberger, loc.cit. at p. 257.

2) Ibid. at p. 260.

3) MacGibbon in 31 BYIL (1954) p. 143.

doctrine of recognition or of the principle of consent properly so called. For the only essential difference between consent and recognition is that recognition becomes effective with unilateral communication. Consent, however, requires a meeting of wills and acceptance of a proposal made by one party to another. (1)

V. The role of the time element in the creation of special customary or "historic" rights.

The foregoing considerations as to the nature of customary international law, its process of growth, its constitutive elements and its binding force were of a general character. It is now intended to focus attention upon one of the more specific categories of customary rights - limited both in quantity and in its scope of application. The subsequent analysis will be devoted to a discussion of the so-called "special customary rights" among which, it is submitted, historic rights might be also classified.

Special customary rights have been defined by Fitzmaurice as rights "such as would not exist under ordinary law." (2) While leaving aside at this stage the distinguishing

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1) Schwarzenberger, loc.cit. at p. 260.

2) Fitzmaurice in 30 BYIL (1953) p. 69.

characteristics of general customary rights and special customary rights, respectively, it cannot be overemphasized that special customary rights share with general customary rights "a common process of development, which involves, on the one hand, the constant assertion of the right in question and, on the other hand, consent or acquiescence in that assertion on the part of the affected States ..... The two elements are complementary and interdependent." (1) Similarly, it has been said that both general and special customary rights depend on the establishment of a practice or usage - one general and the other particular - and each derives its eventual legal sanction from some form of consent on the part of States, either general acceptance in the one case, and, in the other, specific recognition or tacit acquiescence. However, the method (practice and assent) is the same. (2) It has also been pointed out by Fitzmaurice that "the acquisition of a historic right ..... is merely a special case of the creation of a right by custom or usage, similar in principle to the creation of a general rule by those means." (3)

It should be noted, however, that special customary

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1) MacGibbon in 33 BYIL (1957) p. 119.

2) Fitzmaurice in 30 BYIL (1953) p. 31, note 3.

3) Ibid. at p. 39.

rights differ in at least two respects from the general rules of customary international law: "In the first place", says MacGibbon, "they are or were in origin, apparently or in actual fact, essentially adverse rights. In the second place, they are, *ex hypothesi*, deprived of the benefit accruing to rights which the generality of States exercise. In place of general participation which raises strongly the presumption of consent with regard to general customary rights, special and exceptional customary rights are validated entirely by the consent or acquiescence of the States affected manifested in relation to a passage of a comparatively pro - longed period of time." (1)

Thus the time factor assumes with regard to the formation of special customary rights a role which it does not fulfil in respect of the general customary rights. As has been already pointed out, the efflux of time as such is not re - garded an essential element in the establishment of general customary norms of international law. In the words of Lauterpacht, "a 'consistent and uniform usage practiced by the States in question' - to use the language of the Inter - national Court of Justice in the *Asylum* case - can be packed within a short space of years. The 'evidence of general practice accepted as law' - in the words of Article 38 of the

1) MacGibbon in 33 BYIL (1957) at p. 123; (italics in original).

Statute - need not be spread over decades." (1) Similarly, Sir Gerald Fitzmaurice noted that a new rule of customary law based on the practice of States can in fact emerge very quickly and even almost suddenly if new circumstances have arisen that imperatively call for legal regulation. (2) From the juridical point of view, however, "the length of time within which the customary rule of international law comes to fruition is irrelevant." (3)

Thus in the growth of general rules of customary international law the time factor is not of decisive importance, although in the nature of things some time elapses between the initiation of a usage, its development into a general practice and its final acceptance as law. However, all that can be said as to the length of time required for the crystallization of a new custom is that "it must be proportionate to the degree and the intensity of the change that it purports or is asserted to affect." (4) It necessarily follows that such crystallization of a usage and its transformation into a binding custom of international law will be hastened by the general participation of the States affected

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1) Lauterpacht in 27 BYIL (1950) at p.393. (Italics in original)

2) Fitzmaurice in 30 BYIL (1953) at p.31.

3) Lauterpacht, loc.cit.

4) Ibid.

by its growth and development.

Conversely, a practice which runs counter to the prevailing international order and is in derogation of it will require a longer period of time for its ripening into a special customary right. The acquisition of such exceptional rights by individual States "contrary to the existing and otherwise still subsisting international order involves .... considerations and criteria that make the passage of time, and of an appreciable period of time at that, essential at any rate in all those cases .... where the positive consent or express recognition of States cannot be shown." (1)

Indeed, it is the lack of such positive consent or express recognition that characterises historic claims put forward by the different States. For obvious reasons there is no need to invoke the theory of historic rights - i.e. the theory of special customary rights - which relies heavily on the time factor for the establishment of such rights, in cases where a departure by a State from the generally accepted rules of international law has met with the explicit approval of the States which are likely to be affected by such a departure. Nor does the need for the invocation of this doctrine arise in cases where, without explicitly consenting, the affected

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1) Fitzmaurice in 30 BYIL (1953) at p. 31.

State has acted in such a manner that its consent can be inferred in a positive sense from its actions. "Where, however", says Fitzmaurice, "other States have neither consented expressly, nor by their conduct actively implied, their consent, but have simply been _inactive_, only the historic element in a claim can supply the necessary presumption of (tacit) acquiescence arising out of the fact that the practice in question has continued for a long time without encountering active opposition." (1) Consequently, "the theory of historic rights comes into play .... where an absence of express consent by States might otherwise lead to an inference of opposition." (2) This idea found its expression in the United Kingdom's Reply in the _Fisheries_ case in the following words:

> "The relevance of an historic title is to raise an inference of the acquiescence of States in a claim which is exceptional and which apart from such acquiescence would be illegal and invalid." (3)

In all the cases where an historic title is asserted, the time factor fulfils the function that is usually assigned

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1) Ibid. at p. 29. (Italics in original).

2) Ibid.

3) ICJ, _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. II, p. 651.

to express recognition or positive consent, and the need for the efflux of a considerable period of time for the growth of historic rights is explained by the fact that "the presumption of general and particular acceptance which may be raised by absence of protest will be strengthened in proportion to the length of time silence persists." (1) The primary function of the theory of historic rights is therefore to make up for the lack of express evidence of the acquiescence of a particular State against whom such a claim is meant to be invoked. This attitude was taken up in the Reply of the United Kingdom in the Fisheries case, commenting on the function of the theory of historic waters. With due allowance to the existence of some characteristic features appertaining to maritime historic rights which distinguish them from historic rights in general, one is tempted to subscribe to the statement that "there would have been no need for a theory of historic waters if only waters covered by express acquiescence were to be involved. Frequently, however, evidence of express acquiescence by the particular State is lacking and then the claimant State is entitled, if it can, to raise an inference of .... acquiescence .... by proving the historic character of its claim by long

1) MacGibbon in 33 BYIL (1957) p. 120.

usage. The historic element is thus relevant precisely in regard to the acquiescence of other States in an appropriation of maritime territory which, apart from the acquiescence implied from long usage, they would be entitled to regard as an invasion of their rights." (1) This statement applies, *mutatis mutandis*, also, to historic rights in general, i.e. historic rights concerning other than maritime areas. (2)

VI. Some historic rights viewed as remainders of more extensive ancient rights.

The logical consequence of the adoption of the consensual basis as the source of the binding force of customary international law appears to be that, if it can be proved that a particular State opposed a new customary rule from the time of its inception and gestation - i.e. during the period when such a rule was in the process of taking shape - such a rule will not be held binding on the recalcitrant State. Thus we are faced with a second possibility of establishing historic rights, which, in fact, is nothing but a further extension of the doctrine of the consensual basis of customary international law. If a State consistently

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1) ICJ, *Fisheries case*, *Pleadings, Oral Arguments, Documents*, vol. II. pp. 609-610. (Italics added).

2) As to the juridical aspects specifically related to maritime historic titles, see chapter 6 below.

declines to accept, and unequivocally opposes, a nascent customary rule from the beginning of its taking shape, this rule does not become binding on the opposing State, which thereby acquires an historic right to the effect that such a rule cannot be applied against it. Sir Cecil Hurst seems to have had in mind this possibility while dealing with some of the problems pertaining to the ownership of the bed of the sea. In his view "the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership and sovereignty of the bed of the sea. The claims have been restricted by the silent abandonment of the more extended claims. Consequently, where effective occupation has long been maintained of portions of the bed of the sea outside the three-mile limit, those claims are valid and subsisting claims, entitled to recognition by other States." (1)

Similarly, Claudio Baldoni, commenting on the status of historic bays, poses the question whether "les zones comprises dans ces baies .... ont jamais été assujetties au principe de la mer libre." (2) He comes to the conclusion

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1) Hurst, Whose is the Bed of the Sea? 4 BYIL (1923-1924) at p. 43.

2) Baldoni, Les Navires de Guerre dans les Eaux Territoriales Etrangères, 65 Hague Recueil (1938) vol. III, p. 185 et seq. at p. 221.

that:

> "La recherche historique nous permet de donner une réponse négative à cette question. En effet, à l'époque où la règle de la liberté des mers s'affirmait, les baies de Cancale, de Chaleurs, de Chesapeake, de Conception, de Delaware, de Fonseca et de Miramichi étaient déjà assujetties à la souveraineté effective et permanente des Etats riverains. Le principe de la liberté des mers n'a partant jamais été en vigueur pour elles. Il n'est donc pas nécessaire pour expliquer leur appartenance à l'Etat riverain, de recourir aux prétendus principes de prescription ou comme d'autres l'estiment, à de prétendues règles spéciales créées en dérogation au liberté de la haute mer." (1)

This concept was readily taken up by the Norwegian Government in its Rejoinder in the Fisheries case, where it was quoted with approval, and it was further alleged that "les eaux pour lesquelles un titre historique .... peut être invoqué ne sont pas des eaux qui auraient fait partie de la haute mer et que l'Etat riverain se serait appropriées. Ce sont des eaux qui ont toujours été comprises dans son terri - toire et que la haute mer n'a jamais entamées." (2)

Thus the Norwegian concept of historic waters was pre - sented as being in contrast with the British concept, which relied upon the acquiescence of other nations as the basis for the establishment of an historic title. In the words of

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1) Ibid. at pp. 221-222.

2) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. III, p. 445.

of the United Kingdom's Reply in the Fisheries case, "where the claim goes beyond what is accepted under general customary international law, it is the acquiescence of other States, express or implied by long usage, that sets the seal of legal validity upon the exceptional claim." (1)

It is submitted, however, that the apparent incompati - bility of the two conflicting views might be removed by bearing in mind that historic rights are no more than specific customary rights, and that customary norms of international law derive their legal validity from the acceptance and con- sent of the member States of the international community. Seen against this background, the apparently contradictory concepts as to the origins of the theory of historic waters would not appear to be irreconcilable. The United Kingdom seems to have argued on the assumption that Norway had not dissociated herself from the general rules of maritime inter- national law, at the time these rules were taking shape, and that she could therefore have acquired historic rights over maritime areas only after the coming into force of these rules, and with the consent of the international community. Norway, however, took the view that these rules had never become binding on her, since she had from the outset declined to accept them. Thus the dispute between the parties seems to

1) Ibid. vol. II, p. 621.

have touched upon the facts rather than upon the principles. It can only be regretted that this point seems to have been overlooked by the parties to the dispute who argued at great length the legal issues, thereby somewhat obscuring the questions of fact.

VII. <u>Non-exclusive historic rights.</u>

In the foregoing sections a distinction has been drawn between:

(a) customary rights and obligations; and between

(b) general customary rights and special customary rights.

The present section deals with a further distinction within the sphere of the special customary rights themselves. Sir Gerald Fitzmaurice drew attention to the fact that special customary rights fall in two different categories:

(1) "Special customary rights different from, and in principle contrary to, the ordinary rule of law applicable .... built up by a particular State or States .... leading to the emergence of a usage .... or customary or historic right in favour of such State or States." (1) In the formation of

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1) Fitzmaurice in 30 BYIL (1953) p. 68.

such rights which are acquired as against the world in general and which are valid erga omnes "the element of con - sent, that is to say acquiescence, on the part of other States is not only present, but necessary." (1) Special customary rights of this kind might well be termed "historic rights properly so-called."

(2) "Rights as would not exist under ordinary law, [which] may, however, be acquired by one State, not as against the word in general .... but against another particular State, e.g. in its territory or waters or with reference to its vessels or nationals .... While the element of consent may be more difficult to detect here and may have been lacking at the origin of the matter, it is believed that if the right has developed into a legal right, this is because consent, in the form of acquiescence, was given or can be presumed."(2)

The distinction made by Sir Gerald amounts, in fact, to a distinction between historic rights proper (namely, historic rights involving the acquisition of full territorial sovereignt and non-exclusive historic rights, occasionally referred to as "international servitudes", which imply the acquisition by one State over the territory of another State of rights

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1) Ibid.

2) Ibid. at p. 69.

falling short of sovereignty, such as the right of transit or the right of fishing. Since claims belonging to this category of non-exclusive historic rights are raised in our days mainly in respect of maritime areas, it is felt that a more thorough discussion of their nature and scope should be deferred to the chapter dealing with the specific legal aspects attendant upon maritime historic claims.(1)

Incidentally, the existence of non-exclusive historic rights over land territories has met of late with the approval of the International Court of Justice in the case concerning Right of Passage over Indian Territory.(2) In the judgment delivered in this case, the Court explicitly recognized the existence in international law of a doctrine sanctioning the acquisition by a State against another State of special customary rights falling short of sovereignty. The Court approved of the validity of certain Portuguese rights of transit over Indian territory, and, by a majority of 11 against 4, held that:

> "with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage .... This practice having continued over a period extending beyond a century and a quarter, unaffected by the

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1) See chapter 6, section VIII below.

2) ICJ Reports, 1960, p. 6.

> "change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of the circumstances of the case, satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation." (1)

In another passage of the judgment the Court stressed that the number of States required for the establishment of such historic rights does not necessarily have to be larger than two. The Court stated that:

> "it is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States." (2)

VIII. Acquiescence versus prescription as the legal basis of historic rights.

Special customary rights, like general customary rights, have no fixed period of gestation for such rights to mature. "It is the great cardinal characteristic of acquiescence .... that it does not require any particular length of time to perfect it; it depends on each particular case upon all the circumstances of the case." (3) And it is this cardinal

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1) Ibid. p. 59.

2) Ibid. p. 39.

3) Proceedings of the Alaskan Boundary Tribunal, vol.VII.p.619.

characteristic of acquiescence that removes the besetting difficulty which confronts the exponents of international prescription, namely, that it can dispense with the exacting requirements for the efflux of a fixed period of time. The doctrine of acquiescence "reduces the significance of the necessity for a fixed prescriptive period by constituting a conclusive test by which the validity of a prescriptive claim may be evaluated, namely, the test of the existence or otherwise of a general conviction that the situation which has been created is in conformity with the requirements of international stability and order." (1)

Moreover, the doctrine of acquiescence is indifferent to the question whether or not the State purporting to have acquired a certain right on the basis of acquiescence acted in good faith. (Bona fides, as will be recalled, is usually required for the operation of prescription, but can hardly be assumed where the establishment of adverse territorial rights is concerned). Acquiescence takes account of the consensual basis of international law and it is its great virtue that "it looks for its determining force to the root of the processes which give rise to new rules of international law, finding its justification in the final resort in the consent of the

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1) MacGibbon in 30 BYIL (1953) at p. 306.

States." (1) Instead of resorting to the institution of prescription, which represents a development of custom, its ascendancy to a higher stage and its refinement, international law which, in its present rudimentary form, has not yet achieved such a high degree of development, "remonte au principe, à la coutume. Source reconnue par le droit international, la coutume crée, transforme, éteint les règles et les obligations conformément à son régime juridique propre." (2)

Acquiescence which is instrumental in the establishment of any customary right of international law, is indispensable indeed in the formation of historic rights. The doctrine of acquiescence "mitigates the rigours of the positivist view and imparts a welcome measure of controlled flexibility in the process of formation of the rules of customary international law." (3)

IX. Acquiescence as the juridical basis of historic rights.- Opinions of writers.

In the works of publicists who have examined the legal foundations of historic rights, acquiescence - taking the

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1) MacGibbon in 31 BYIL (1954) at p. 166.

2) Pinto, loc.cit. p. 449.

3) MacGibbon in 33 BYIL (1957) at p. 145.

form of absence of protest under circumstances which would have warranted such a protest as evidence of opposition - has been assigned a prominent role. As has been observed by MacGibbon, to those publicists "belongs in great measure the credit for exposing the fundamental antinomy which tribunals may be called upon to resolve in questions of disputed title, namely, the rival claims to consideration of the maxim _quieta non movere_ on the one hand and the concept of good faith on the other." (1)

According to Hyde "it has been deemed more desirable to the family of nations that an adverse occupant in possession should be suffered to remain in unmolested control than that the existing sovereign, although unjustly deprived of possession, should retain its rights of such, at least when it has failed to make constant and appropriate efforts to keep them alive, as by ceaseless protests against the act of the wrongdoer." (2)

In view of the fact that disputes involving the claim of historic rights have arisen in recent times chiefly in respect of maritime territories, it is easy to understand why the process of formation of historic rights has been subjected to

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1) MacGibbon in 31 BYIL (1954) p. 152. (Italics in original).

2) Hyde, _International Law, Chiefly as Interpreted and Applied by the United States_, 2nd revised edition, 1945, vol.I, p.387.

examination mainly by writers who have devoted particular attention to problems relating to the establishment of maritime historic rights. Commenting on the territorial character of historic bays, Westlake maintains that the general rule as to the territoriality of bays with entrances not exceeding twice the width of the maritime belt "often meets with an exception in the case of bays which penetrate deep into the land .... Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit for such appropriation." (1)

In the opinion of Heimburger "the legality of the actually consolidated possession of a State does not rest on the concept of prescription - analogous to the municipal law prescription - neither definite, nor indefinite; it is founded solely and exclusively on the title of international recognition which is a specifically international law title. Such recognition may be granted expressly; in the majority of cases, however, it will be granted by the States tacitly and will be inferred from such State acts, the commission of which presupposes recognition on their part. Recognition

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1) Westlake, op.cit. part I, pp. 191-192 (italics added).

will be extended to every possession which is accepted by general conviction as a possession manifesting actual consolidation and constant necessity. For the establishment of such a general conviction, however, the efflux of a period of time is required, during which a possession, the origins of which are uncertain, will be gradually consolidated and become capable of asserting its intrinsic necessity." (1)

Perels maintains that "the laying of claims of sovereignty over maritime areas which strictly speaking are parts of the high seas, has occasionally found express or tacit recognition." (2) Referring to various British claims of sovereignty over maritime territories, the same author states that "the exceptional claims of the British Crown have

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1) Heimburger, Der Erwerb der Gebietshoheit, 1888, vol.I, p.151, where the author says: "Die Rechtmässigkeit des thatsächlich befestigten Staatenbesitzes beruht überhaupt nicht auf einer der privatrechtlichen analogen Verjährung, weder auf einer bestimmten, noch auf einer unbestimmten; sie gründet sich vielmehr einzig und allein auf den spezifisch völkerrechtlichen Rechtsgrund der internationalen Anerkennung. Diese kann ausdrücklich geschehen; sie wird aber meist stillschweigend durch staatliche Willensäusserungen erfolgen welche dieselbe voraussetzen. Sie wird jedem Besitz zu Teil der sich dem allgemeinen Bewusstsein als ein thatsächlich befestigter und dauernd notwendiger offenbart. Zur Begründung einer derartigen allgemeinen Überzeugung ist jedoch der Ablauf einer gewissen Zeit erforderlich während der sich ein seinem Ursprung nach unsicherer Besitz allmählich befestigen und seine innere Notwendigkeit bewähren kann."

2) Perels, Das Internationale Öffentliche Seerecht, 1903, p.33, where this writer states: "Die Inanspruchnahme von Staatshoheitsrechten in Seegebieten die eigentlich zur hohen See gehören hat zuweilen ausdrückliche oder stillschweigende Anerkennung gefunden."

gained ..... recognition of other States, either tacitly or as manifested through the conclusive acts of those States." (1)

Raestad, dealing with problems relating to the acquisition by States of rights over maritime territories in derogation of the normally applicable rules of international law, takes the view that "l'important c'est de savoir *quand et comment a eu lieu le consentement exprès ou tacite des nations* qui donne à l'occupation ou à l'usurpation la qualité d'un titre de droit." (2) He further states that "la prescription telle qu'elle a été introduite dans les législations nationales n'existant pas .... dans le droit international, un état de choses qui existe depuis longtemps n'est sanctionné par le droit des gens que si *l'existence prolongée de cet état de choses prouve le consentement tacite des nations.*" (3)

Fauchille, referring to the problem of historic bays, explains that "ce sont les grands golfes et les grandes baies dont le caractère de territorialité a été *reconnu par un usage*

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1) Ibid. "Die Sonderansprüche der britischen Krone hatten ... die stillschweigende oder durch konkludente Handlungen bezeugte Anerkennung für sich."

2) Raestad, *La Mer Territoriale*, 1913, p. 167 (italics added).

3) Ibid. at. p. 174 (italics added).

longuement accepté et une coutume non-controversée." (1) The same author goes on to say that "c'est l'acquiescement des Etats, qui d'après des décisions judiciaires explique le caractère de territorialité des baies historiques." (2)

Jessup contends that "holding in abeyance the general rule which is to govern all bays it must be admitted that there are certain bodies of water to which individual States by general acquiescence or long usage have acquired the absolute right or title." (3) He further claims that the legality of such excessive claims "is to be measured not by the size of the area affected but by the definiteness and duration of the assertion and the acquiescence of foreign powers." (4)

Gidel expresses the view that "il ne suffit pas que l'Etat riverain émette la prétention de considérer telles ou telles eaux comme lui étant 'propres' pour que les autres Etats aient le devoir s'incliner devant cette prétention; la consécration de ces prétentions ne peut dériver .... que de l'acquiescement international, c'est l'usage prolongé qui,

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1) Fauchille, op.cit. vol.I, part I, p.380 (italics added).

2) Ibid. (italics added).

3) Jessup, The Law of Territorial Waters and Maritime Juris - diction, 1927, pp. 362-363 (italics added). Jessup seems to regard "long usage" as the alternative to "general acquiescence" rather than the evidence of it.

4) Ibid. at p. 382 (italics added).

généralement, on fournira la manifestation." (1)

Canada's claim to Hudson Bay as an historic bay has been justified by Johnston "on the basis of occupation [by Canada] and acquiescence by other States in that occupation." (2)

Balladore Pallieri claims that "the legal basis of the ...... claims to 'historic' bays is constituted by continued usage *with the explicit or implicit consent of the members of international community.*" (3)

Colombos takes the view that "the territorial State is entitled to a wider belt of marginal waters, [in bays], provided that it can produce evidence of a long and consistent dominion over that bay and that its claim has been accepted, expressly or tacitly, by the great majority of other nations." (4)

Schwarzenberger, discussing the term "historic waters", contends that "all it means is that the title on which the

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1) Gidel, *Le Droit International Public de la Mer*, 1934, vol. III, p. 651 (italics added).

2) Dr. V.K. Johnston, *Canada's Title to Hudson Bay and Hudson Strait*, 15 BYIL (1934), p. 1, at p. 20.

3) Balladore Pallieri, *Diritto Internazionale Pubblico*, 7th revised ed. 1956, p.377, as quoted in English in the United Nations Memorandum on historic bays, prepared by the Secretariat of the United Nations for the first U.N. Conference on the Law of the Sea, Official Records, vol. I. Document A/Conf. 13/1, p.20; (italics added).

4) Colombos, *The International Law of the Sea*, 4th ed. 1959, pp. 154-155.

incorporation of portions of the high seas into the terri - torial sea or of parts of the territorial sea into national waters rests is based upon an uncontested usage. As time passes, the presumption increases that the silence of other States amounts to acquiescence and creates an estoppel against such a historically consolidated title being contested." (1)

Vishnepolskii founds Soviet historic claims upon the Kara Sea on the alleged recognition of those claims by foreign powers at different times and on the lack of oppo - sition to various Russian enactments which purported to regu - late the regime of navigation in the said sea. (2) In addition to the Kara Sea the same writer lays claim on behalf of the Soviet Union to the seas of Chukov and Laptev as well as to the Eastern Siberian Sea which he regards as "our national waters whose legal regime must be determined in virtue of the recognition of the sovereignty of the USSR

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1) Schwarzenberger, op.cit. p. 327, (italics added).

2) Vishnepolskii, in Sovietskoe Gosudarstwo i Prawo, issue No.7, July 1952, pp. 36-45, as quoted in English translation by Kulski in 47 AJIL (1953) p. 132; Vishnepolskii maintains that "notwithstanding direct knowledge of the Kara Sea on the part of several representatives of the Western and Scandinavian countries, the latter did not deem it possible to interfere with the regulations issued by the Russian authorities concerning that sea. The right of Russia, and by virtue of succession, that of the USSR to establish auto-nomously any legal regime of navigation in the Kara Sea, a right exercised for centuries, was never subject to any pro-test on the part of the foreign powers and must be considered as an 'uninterrupted and undisputable custom'."

over those seas." [1]

Commenting on the North Atlantic Fisheries Arbitration of 1910 [2] Dr. Drago, who had been himself one of the judges in that arbitration, explained the theory of historic bays, in an article published in 1912, in the following words:

> "Ces baies exceptionnelles apparaissent dans plusieurs traités et la doctrine les reconnaît expressément .... et font .... une catégorie spéciale et distincte dont la propriété appartient aux pays qui les entourent. Ces pays, lorsqu'ils ont procédé à l'affirmation de leur souveraineté, en acquièrent la possession et les incorporent à leur domaine, au consentement des autres nations."[3]

Referring to the estuary of Rio de la Plata which he regards as an historic bay, Drago points out that it constitutes

> "une baie historique par excellence, est une baie historique de toute ancienneté, présentant un caractère très net et acceptée comme telle par le consentement de toutes les nations depuis de longues années." [4]

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1) Kulski, loc.cit. at p. 133.

2) Scott, Hague Court Reports, 1st Series, 1916, pp. 141-225.

3) Drago, Un triomphe de l'Arbitrage, 19 RGDIP (1912) p. 5, at p. 37.

4) Ibid. (italics added).

X. Acquiescence as the juridical basis of historic rights. - International conferences and opinions of learned societies.

Since the end of the nineteenth century numerous attempts have been made by various learned societies to draft international codifications concerning the law of the sea. The problem of historic rights had to be faced by these societies while dealing with the formulation of the provisions relating to bays. Although the term "acquiescence" has not been mentioned in the various drafts, it would appear that the wording of these drafts justifies the conclusion that in the opinion of the draftsmen the attitude taken up by the international community *vis-à-vis* such historic claims is of direct relevance in ascertaining whether or not an historic title has been established.

Thus article 3 of the draft regulations concerning the territorial sea in time of peace, as adopted by the Institute of International Law at its Stockholm session in 1928, lays down the rule that the territorial sea is measured in the case of bays from a straight line drawn across the bay at the nearest opening to the sea, at a point where the distance between the two shores does not exceed ten miles, "*unless*

international usage has sanctioned a *greater width*." (1) It has therefore been claimed - rightly it is believed - that the word "international" in this context was meant "to express the principle that a unilateral national pretension is not sufficient. The national usage must have received international recognition." (2)

The draft Convention submitted in 1926 to the 34th Conference of the International Law Association by a committee appointed by the Executive Council provided in article 7 that, with regard to bays and gulfs, the territorial waters should follow the sinuosities of the coast "unless an established usage has sanctioned a *greater* limit." (3) In the course of the debate the exact meaning of the term "established" seems to have given rise to some doubts and in the draft Convention, as adopted by the Conference, this passage was deleted. In its final wording the saving clause speaks of "an established usage generally recognised by Nations" (4)

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1) 34 Annuaire de l'Institut de Droit International, Stockholm session, August, 1928, pp. 755-756 (translated from French; italics added).

2) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, pp. 623-624. (Italics in original).

3) International Law Association, Report of the 34th Conference, 1926, p. 143.

4) Ibid. at p. 102.

as the prerequisite for the departure from general rules governing the regime of bays and gulfs. This amendment, illuminating in itself, only gains additional significance from the fact that in an earlier draft relating to the same subject the International Law Association at its Brussels session in 1895 adopted a draft rule which in its relevant passage referred to a "continuous usage of long standing" ("usage continu et séculaire"). (1)

In article 6 of Project No. 10 prepared in 1925 by a Committee set up by the American Institute of International Law for the codification of American international law, a "continued and well-established usage" is required for the sanctioning of a width of a territorial belt in derogation of the generally applicable rules relating to the regime of bays. (2) Although the precise meaning of the expression

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1) International Law Association, Report of the 17th Conference, 1895, p. 115, article 3; This issue has been somewhat obscured owing to the fact that in the same article "occupation" has been inserted as an alternative to "established usage". In the opinion of the United Kingdom's Reply in the Fisheries case the words "generally recognised by nations" apply to occupation also, (see ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p.624), thus rejecting the Norwegian contention, according to which, in addition to "an established usage generally recognized by nations", there was another mode of acquiring exceptional rights over maritime territory, namely, by means of simple occupation. (see ibid. vol. I, p. 557).

2) 20 AJIL (1926) Special Supplement, p. 318.

"well-established" is not quite clear, one is tempted to agree with the proposition that "when international jurists speak of well-established usage, they necessarily mean a usage well-established among States, or in other words, a well-established international usage." (1)

Article 22 of the Harvard Research draft of 1929 on territorial waters stipulates that "the provisions of this convention relating to the extent of territorial waters do not preclude the delimitation of territorial waters in particular areas in accordance with established usage." (2) In the comment on this article - the scope of which is of a general character and is not confined to bays only - it is stated that the article "seems necessary because of historic claims made by certain States and acquiesced in by other States with reference to certain bodies or with reference to

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p. 624; see, however, the project submitted in 1933 to the 7th International Conference of American States by the American Institute of International Law where historic bays and estuaries were defined as bays or estuaries "over which the coastal State or States, or their constituents, have traditionally exercised and maintained their sovereign ownership" (see ibid. vol. III, p.455). (Italics added). Here no reference has been made to the reaction of foreign States to the assertion of State sovereignty.

2) Research of International Law, Harvard Law School (Nationality, Responsibility of States, Territorial Waters), 1929, p. 288.

particular areas of water." (1)

XI. Acquiescence as the juridical basis of historic rights. - Decisions of international tribunals.

The doctrine of acquiescence was frequently resorted to by both national and international tribunals when called upon to pronounce on the question of disputed territorial titles. Some of these pronouncements mention the term "acquiescence" expressly, while others amount to virtually recognising that principle without explicitly referring to it in their judgments.

In the Alaskan Boundary Dispute between Great Britain and the United States the tribunal took note of the fact that for more than sixty years "Russia and in succession to her the United States occupied, possessed and governed the territory [in dispute] .... without any protest or objection." (2) It was this absence of objection on the part of Great Britain that was construed by the tribunal as her acquiescence in the rights of Russia and later of the United States which was among the main considerations prompting the tribunal to decide the case in favour of the United

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1) Ibid. (Italics added).

2) Cmd. 1877 (1904) p. 49 et seq. at p. 79.

States' contention. In fact, the United States members of the tribunal had earlier laid particular emphasis on the statement made by the Prime Minister of Canada himself in the Canadian Parliament, admitting that no protest whatsoever had been lodged with the United States against her occupation of the disputed territory, and they drew from this fact the following conclusion:

> "It is manifest that the attempt to dispute that possession ...... is met by the practical, effective construction of the Treaty, presented by the long-continued acquiescence of Great Britain in the construction which gave the territory to Russia and the United States and to which the Prime Minister testifies. Only the clearest case of mistake could warrant a change of construction after so long a period of acquiescence in the former construction, and no such case has been made out before this Tribunal." (1)

In the award rendered by the King of Italy in the border dispute between Great Britain and Brazil concerning the delineation of the Boundary between Brazil and British Guyana (2) the arbitrator, while admitting that "it cannot be decided with certainty whether the right of Brazil or Great Britain is the stronger," (3) found that "acts of authority and jurisdiction over traders and native tribes were ... continued

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1) Cmd. 1877 (1904) p. 49 et seq. at p. 87.

2) 99 BFSP pp. 930-932.

3) Ibid. at p. 931.

in the name of British sovereignty ..... that such effective assertion of rights of sovereign jurisdiction was generally developed *and not contradicted* and by degrees became accepted." (1) He therefore concluded that by virtue of the said facts the acquisition of authority by Great Britain was effected over a certain part of the disputed territory.

In the dispute that had arisen between Great Britain and Portugal in the latter part of the nineteenth century over the *Title to the Island of Bulama*, off the coast of Sierra Leone, General Grant (then President of the United States) in his capacity as sole arbitrator, held that Great Britain's claim over the disputed island ought to be rejected owing to the fact that Portugal had never acquiesced in the acts which were alleged to have established the British claim. (2)

Five years later, in another dispute between the same parties relating to the *Territorial Rights over the Delagoa Bay*, the Arbitrator, President MacMahon of France, in his award of 24 July, 1875, found in favour of Portugal, explaining his decision, *inter alia*, in the following words:

> "Les actes par lesquels le Portugal a appuyé ses prétentions n'ont soulevé aucune réclamation de la part de Gouvernement des Provinces Unies

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1) Ibid. (Italics added).

2) Lapradelle - Politis, op.cit. vol. II, 1923, p. 612.

"[to which the territory adjoining had formerly belonged] qu'en 1782 ces prétentions ont été tacitement acceptées par l'Autriche, à la suite d'explications diplomatiques échangées entre cette puissance et le Portugal; .... qu'en 1817 l'Angleterre elle-même n'a pas contesté le droit du Portugal [by signing with her a treaty, art. 12 of which specifically referred to the disputed territory]." (1)

It was on this basis of total lack of objection to the exercise of Portuguese authority by the States affected by such exercise of authority that the arbitrator founded his conclusions as to the legal validity of the Portuguese claims.

In the Grisbadarna Arbitration of 1909 between Sweden and Norway (2) the Permanent Court of Arbitration gave among the reasons which prompted it to allot the Grisbadarna bank to Sweden the circumstance

"that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish ...... which involved expense ...... whereas Norway showed much less solicitude in this region." (3)

The Court concluded by saying that:

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1) Martens, Nouveau Recueil des Traités, (Deuxième Série), vol. III, p. 517.

2) Scott, Hague Court Reports, 1st Series, 1916, p. 121.

3) Ibid. at p. 130.

> "the stationing of a light-boat which is necessary to the navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway and likewise a large number of beacons were established there without giving rise to any protests." (1)

Thus it clearly emerges from the perusal of the tribunal's award that Norway's acquiescence in certain acts of authority performed by Sweden in the Grisbadarna was reckoned with as one of the decisive factors in upholding the validity of the Swedish claims.

In the Chamizal Arbitration between the United States and Mexico (2) the Commissioners in their award indicated that one of their reasons for the dismissal of the American claim was the fact that:

> "the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment." (3)

The Commissioners apparently took the view that the Mexican protests, obviating any presumption of Mexican acquiescence in the alleged American rights and expressing Mexican oppo - sition to such alleged rights prevented the American rights from maturing.

In the Island of Palmas Arbitration (4) between the United

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1) Ibid. at p. 131.

2) 5 AJIL (1911) p. 782 et seq.

3) Ibid. at p. 807.

4) UNRIAA, vol. II, p. 829 et seq.

States of America and the Netherlands, Judge Huber, the Arbitrator, in upholding the Netherlands claim, expressly relied on the acquiescence of Spain and other States in the exercise of authority by the Netherlands over the disputed island. He stated that:

> "since the moment when the Spaniards, in withdrawing from the Moluccas in 1666 made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Nether - lands ...... has been recorded ..... The peaceful character of the display of Netherland's sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted." (1)

In a later passage the Arbitrator reverted once more to the same principle when he pointed out that:

> "the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time." (2)

The doctrine of acquiescence was also resorted to in some of the territorial disputes relating to the precise delineation of the boundaries of the Latin-AmericanStates, which are usually referred to as the "uti possidetis" cases.(3)

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1) Ibid. at p. 868.

2) Ibid. at p. 869.

3) As to the meaning and scope of this term in international law, see Appendix A.

In the award rendered in Bern on 24 March, 1922, in the Colombia-Venezuela Boundary Arbitration, (1) the Swiss Federal Council, which had been appointed by the parties to act as arbitrator in this case, found in favour of Colombia, pointing out, inter alia, that in a treaty of cession signed in 1907 by Colombia and Brazil, Colombia ceded to Brazil parts of the disputed territory. The Swiss Federal Council stressed the fact that:

> "cette cession n'a pas provoqué aucune réclamation de la part du Vénézuela et les occupations colombiennes de 1900 dans le bassin de l'Orénoque ont été subies par le Vénézuela sans protestation claire et explicite." (2)

The arbitrators regarded the absence of objection by Venezuela as amounting to acquiescence on her part in Colombian jurisdiction over the disputed territory and awarded it accordingly to Colombia. (3)

Similar reasoning seems to underly the award given on 23 January, 1933, in the Guatemala-Honduras Boundary Arbitration, (4) in which Chief Justice Hughes of the United States

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1) UNRIAA, vol. I, pp. 223-298.

2) Ibid. at p. 280.

3) For a more detailed discussion of this case see Scott, The Swiss Decision in the Boundary Dispute between Colombia and Venezuela, 16 AJIL (1922) p. 428 et seq.

4) UNRIAA vol. II, pp. 1327-1366.

acted as president of the tribunal, the other two members having been appointed by the parties to the dispute them - selves. By the terms of the arbitration treaty of 16 July, 1930, the parties agreed that the boundary between the two countries should follow the line which had divided them in 1821, at the time of the cessation of Spanish rule. In its search for evidence of the administrative frontier at the crucial time, the tribunal deemed itself

> "at liberty to resort to all manifestations of [the] will [of the Spanish Crown] .... and also, in the absence of precise laws and prescripts, to conduct indicating royal acquiescence in colonial assertions of administrative authority. The Crown was at liberty at all times to change its royal commands or to interpret them by allowing what it did not forbid. In this situation the continued and unopposed assertion of administrative authority by either of the colonial entities, under claim of right, which is not shown to be an act of usurpation because of conflict with a clear and definite expression of the Royal will, is entitled to weight and is not to be overborne by reference to antecedent provisions or recitals of an equivocal character."(1)

The tribunal went on to say that in determining this question the actions and behaviour of the new States

> "in establishing their independent Governments and in formally describing the extent of the territory to the sovereignty over which they regarded themselves as succeeding is significant ..... The Constitutions of the new States and the governmental acts of each especially when unopposed, or when initial opposition was

1) Ibid. at pp. 1324-1325.

"n?t continued, are of special importance." (1)

The tribunal reverted to the same topic in a latter passage where it stated that:

> "while no State can acquire jurisdiction over territory in another State by mere declarations on its own behalf, it is equally true that these assertions of authority by Guatemala .... show clearly the understanding that this was her territory. These assertions invited opposition on the part of Honduras if they were believed to be unwarranted." (2)

Starting from these premises the tribunal reached the conclusion that:

> "if it had been considered that Honduras was being deprived of territory to which she was entitled, and especially that Guatemala was asserting authority over territory which was, or prior to independence had been, under the administrative control of Honduras, it can hardly be doubted that those assertions by Guatemala would have aroused immediate antagonism and would have been followed by protest and opposition on the part of Honduras." (3)

In the judgment delivered in 1917 by the Central American Court of Justice (4) in the Gulf of Fonseca case (5) the

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1) Ibid. at p. 1325 (Italics added).

2) Ibid. at p. 1327.

3) Ibid. at p. 1328. For a detailed discussion of the history of this dispute leading up to the arbitration and for a comprehensive analysis of its legal aspects and of the award, see Fisher in 27 AJIL (1933) pp. 403-428.

4) Now defunct.

5) 11 AJIL (1917) p. 674 et seq.

Court, in giving its reasons for declaring the bay as the common property of the littoral States - to the exclusion of all other powers - stated that:

> "the representative authorities [of the former central American provinces and subsequently of the newly established independent States in the region] have notoriously affirmed their peaceful ownership and possession in the gulf, that is *without protest or contradiction by any nation whatsoever .... A secular possession such as that of the gulf could only have been maintained by the acquiescence of the family of nations*." (1)

In a later passage of its judgment the Court resorts once more to the same concept by saying that the Gulf of Fonseca constitutes an historic bay, since

> "it combines all the characteristics and conditions .... prescribed as essential to territorial waters to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by *acquiescence on the part of other nations*." (2)

In the *Minquiers and Ecrehos* case (3) the International Court of Justice, in upholding the British claim drew attention, *inter alia*, to the fact that in respect of the Ecrehos

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1) Ibid. at pp. 700-701. (Italics added).

2) Ibid. at p. 705. (First italics in original; second added).

3) ICJ Reports, 1953, p. 47 et seq.

> "by a British Treasury Warrant of 1875, constituting Jersey as a part of the Channel Islands, the 'Ecrehos Rocks' were included within the limits of that port. This legislation was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this act derogated from the Fishery Convention of 1839. But this protest could not deprive the act of its character as a manifestation of sovereignty." (1)

In other words: the Court attached considerable importance to the fact that the French protest had been confined to the alleged breach of the Fishery Convention of 1839 and had not found any fault with the United Kingdom legislating at all for the "Ecrehos Rock". From this absence of objection on the part of the French Government the Court drew the inference of France having acquiesced in this manifestation of British sovereignty.

Likewise, with regard to the Minquiers, the Court deemed it appropriate to refer to the fact that:

> "when the British Embassy in Paris in a Note of November 12th, 1869, to the French Foreign Minister complained about the alleged theft by French fishermen at the Minquiers and referred to this group as 'this dependency of the Channel Islands', the French Minister, in his reply of March 11th, 1870, refuted the accusation against French fishermen but made no reservation in respect of the statement that the Minquiers

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1) Ibid. at p. 66.

"group was a dependency of the Channel Islands." (1)

The function of the doctrine of acquiescence, taking the form of absence of objection, was perhaps even more emphatically resorted to in the individual opinions delivered in the Minquiers and Ecrehos case by Judges Basdevant and Levi Carneiro who both approached the problem from a similar angle. Judge Basdevant found in favour of the United Kingdom on the ground that:

> "for a long time and in a consistent manner the Jersey authorities have taken an interest in what was happening in the Ecrehos and the Minquiers and that they took action in this connection to an extent and in a way appropriate to the character of these islets and the use which was made of them. They did this without encountering any competing action, still less any exclusive action on the part of the French authorities." (2)

This complete absence of any "competing action" on the part of the French authorities was apparently given due weight by Judge Basdevant in awarding the disputed islet to the United Kingdom. Judge Levi Carneiro in his turn pointed out that:

> "there can .... no longer be any excuse for the failure of the French Government to protest against the acts by which the British Government exercised sovereignty over the disputed islets .... As regards to Ecrehos no protests

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1) Ibid. at p. 71.

2) Ibid. at p. 83; (Italics added); As to the problems surrounding the relative worth of competing claims, see chapter 5, section IV below.

"were made after 1888 for sixty years." (1)

Again, the absence of any French objection to the exercise of governmental functions by the United Kingdom over the disputed islets was invoked as one of the main reasons for deciding this case in favour of the United Kingdom.

In the Walfisch Bay Arbitration (2) between Great Britain and Germany the tribunal found for Great Britain and gave among its reasons the fact that:

> "exception has not been taken to the continued possession on the part of Great Britain of the territory extending to the point on the coast where the southern frontier [of the bay] commences." (3)

It was on this ground that the tribunal reached the conclusion that British sovereignty had been established over the disputed territory.

The significance of the doctrine of acquiescence in relation to the establishment of historic rights was perhaps most emphatically borne out by the International Court of Justice in the Fisheries case. (4) In examining the legal validity of the Norwegian system of delimiting territorial

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1) Ibid. at p. 106.

2) 104 BFSP at p. 150 et seq.

3) Ibid. at pp. 101-102. (Italics added).

4) ICJ Reports, 1951, p. 116 et seq.

waters the Court considered

> "whether the application of the Norwegian system encountered any opposition from foreign States."(1)

The Court found that:

> "Norway has been in a position to argue without contradiction that neither the promulgation of her Delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States ... The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government in no way contested it." (2)

In a later passage the Court once more reverted to the same idea when it noted

> "that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations ..... [The Norwegian] method

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1) Ibid. at p. 138.

2) Ibid. (Italics added). The somewhat loose phrase "general toleration" used by the Court several times in its judgment has given rise to some doubts. It has been suggested by Johnson that "general toleration" was "probably intended to have a rather weaker meaning than acquiescence." (see Johnson, The Anglo-Norwegian Fisheries Case, 1 ICLQ (1952) p. 145 et seq. at p. 165, note 33). This contention, however, has been questioned by MacGibbon who holds the view that "the remainder of the Judgment [in the Fisheries case] hardly supports the view that such a distinction was intended ..... The use of the phrase "general toleration" where "general acquiescence" might have been expected is of no apparent significance: the terms are synonymous." (see MacGibbon in 31 BYIL (1954) p. 160, note 5). Whatever the precise meanin of this phrase, one is tempted to subscribe to MacGibbon's submission that "confusion may well arise from the looseness of terminology employed by jurists in this particular matter. (ibid. at p. 161).

> "had been consolidated by a constant and sufficiently long practice in the face of which the attitude of Governments bears witness to the fact that they did not consider it to be contrary to international law." (1)

Judge Hsu-Mo in his individual opinion justified Norway's method of delimitation "because of her special geographical conditions and her consistent past practice which is acquiesced in by the international community as a whole." (2)

Judge McNair, while dissenting from the majority judgment, approached the problem in a manner not unlike that of the majority. He posed the question

> "whether the United Kingdom had precluded herself from objecting to [the Norwegian system of delimitation] by acquiescing in it." (3)

In assessing the evidence which was before the Court, he reached the conclusion that the conduct of the United Kingdom leading up to the dispute before the Court should not be construed as acquiescence on her part in the Norwegian method. Thus, although Judge McNair differed from the majority of the Court in his appraisal of the available evidence, and consequently reached a different conclusion, the approach to the problem and the legal principles applied both by the majority

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1) Ibid. at p. 139.

2) Ibid. at p. 154.

3) Ibid. at p. 171.

and by the two dissenting judges were basically the same.

The other dissenting judge in this case, Judge Read, dealt with the question confronting him in a very similar manner. He defined historic waters as waters which, regardless of breadth, the coastal States could treat as internal waters, provided that sovereignty had been exercised in those waters by the said States "without challenge for a long time." (1) Dealing more specifically with Norway's historic claims, Judge Read expressed the view that, in order to establish such rights, it would be sufficient for Norway to prove that she had "consistently and persistently asserted the right to apply the system to the Norwegian coast generally and that <u>there had been acquiescence in this claim</u> by the international community." (2) In examining the pattern of behaviour followed by the United Kingdom Government in respect of the Norwegian claims, as it found expression in the correspondence exchanged in 1913 between Great Britain and Norway, Judge Read came to the conclusion that "this information [i.e. the information passed on by Norway to the British Government concerning the application of her system of delimitation] was received in such circumstances that the failure to make

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1) Ibid. at p. 188.

2) Ibid. at p. 197; see also ibid. at pp. 194-195.

immediate protest could not have been regarded as acquiescence." (1)

As will be recalled, in the case concerning Sovereignty over Certain Frontier Land (2) relating to a territorial dispute between Belgium and the Netherlands, the International Court of Justice was confronted with the question "whether Belgium has lost its sovereignty by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands." (3)

The Court examined the available evidence in the light of this question and found for Belgium on the ground that her conduct could not be construed in the given circumstances as acquiescence in the Netherlands' rights. Judge Sir Hersch Lauterpacht, while dissenting from the majority and while taking the view that the disputed plots of territory should have been awarded to the Netherlands, made it clear that this conclusion was warranted solely by the fact that "at least during the fifty years following the adoption of [the Boundary Convention of 1843] there had been no challenge to the exercise by the Government of the Netherlands and its

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1) Ibid. at p. 204.

2) ICJ Reports, 1959, p. 209.

3) Ibid. at p. 227.

officials of normal administrative authority with regard to the plots in question." (1)

Similarly, Judge Armand-Ugon, himself one of the dissenting Judges, stated that the Netherlands had acquired an indis - putable right of sovereignty over the contested territory owing to the fact that:

> "the Netherlands Government has exercised pre- ponderant Governmental functions in respect of the disputed plots without these having given rise on the part of the Belgian Government to any protest or any opposition. This prolonged tolerance of the Belgian Government in this respect has created an indisputable right of sovereignty in favour of the Netherlands." (2)

Judge Moreno Quintana seems to have relied upon the same principle when he stated that:

> "Belgium, which was not separated from Holland until 1837, has since that date and up to 1921 perhaps - almost a century - made no formal protest against the exercise of sovereignty by the other country." (3)

More recently, in the case concerning Right of Passage over Indian Territory, (4) the International Court of Justice held that:

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1) Ibid. at p. 231.

2) Ibid. at p. 250.

3) Ibid. at p. 255.

4) ICJ Reports, 1960, p. 6 et seq.

> "the exclusive authority of the Portuguese over the villages [comprised in the Maratha grant] was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages acquired the character of Portuguese enclaves within Indian territory." (1)

In Judge Wellington Koo's separate opinion this point is borne out even more explicitly when he states that:

> "although during the early years of British succession the attitude of the British autho - rities on the subject was obscure, their _tacit recognition_ of Portuguese sovereignty over the enclaves became increasingly clear as time went on." (2)

Referring to the Indian contention that India had never recognized Portugal's territorial sovereignty over the said en - claves, Judge Wellington Koo pointed out that:

> "under international law such recognition need not always be express or explicit. It does not always call for an open declaration; _it may be tacit_." (3)

Judge Armand-Ugon in his dissenting opinion founded Portuguese rights of passage over Indian territory, _inter alia_, on the fact that "during the British period _no difficulty or obstacle was raised_ concerning the existence of this

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1) Ibid. at p. 6.

2) Ibid. at p. 65.(italics added).

3) Ibid. at p. 65.(italics added).

XII. Acquiescence as the juridical basis of historic rights.- Decisions of municipal courts.

In the previous chapter reference was made to some of the pronouncements of municipal courts relating to territorial disputes (1) and it was submitted that these pronouncements did not amount to an endorsement of the principle of international prescription but were founded rather on the doctrine of acquiescence. It is not intended to revert here to the same authorities; however, a number of further pronouncements of national courts on the same topic will be mentioned presently.

In Virginia v. Tennessee (2) it was held by the Supreme Court of the United States that:

> "a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years is conclusive even if it be ascertained that it varies somewhat from the courses given in the original grant." (3)

In Maryland v. West Virginia (4) the same Court was concerned with an action instituted by Maryland alleging that the

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1) See chapter 2, section VI. B above.

2) 148 U.S. (1893) p. 503 et seq.

3) Ibid. at p. 522.

4) 217 U.S. (1909) p. 1 et seq.

boundary line originally fixed between herself and West Virginia (the so-called "Deakins-line") had been violated by West Virginia. The Court, however, declined to uphold the Maryland claim on the ground that:

> "a perusal of the record satisfies us that for many years occupation and conveyance of the lands of the Virginia side has been made with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it and the facts in this connection cannot be ignored." (1)

The Court summed up by saying that even on the assumption that the actual boundary line was in derogation of that agreed upon originally by the rival States, "a right has arisen, has been practically undisturbed for years [and should] not .... be overthrown without doing violence to principles of established rights and justice equally binding upon States and indivi - duals." (2)

In New Mexico v. Colorado (3) the Court was called upon to pronounce in a boundary dispute between the two States and held that:

> "from 1868, when [the surveyor] Darling ran out and marked the line of the 37th parallel, to 1919, when this suit was brought, a period of more than half a century, his line was

1) Ibid. at p. 41.

2) Ibid. at p. 44.

3) 267 U.S. (1924-25) p. 30 et seq.

> "recognized and acquiesced in successively as the boundary between the two Territories, between the State of Colorado and the Territory of New Mexico, and between the two States [after the admission of New Mexico to the Union in 1912]." (1)

In Vermont v. New Hampshire (2) the Court found in favour of Vermont and explained its decision, inter alia, by the fact that:

> "the New Hampshire representatives in Congress were familiar with the terms of its resolutions and could not have been unaware of the fact that in all the formal representations made to Congress on behalf of Vermont and in the various reports and resolutions of Committees and the resolutions of Congress itself the eastern boundary of Vermont was described interchangeably as the west side of the Connecticut River ..... Although these were public acts of notoriety, New Hampshire does not appear ever to have made any objection to these definitions of the boundary line ..... The conclusion we have reached ..... finds its support .... in the long continued failures of New Hampshire to assert any dominion over the west bank of the river and in her long acquiescence in the dominion asserted there by Vermont." (3)

In New Jersey v. Delaware (4) the Supreme Court was called upon to determine the boundary in the Delaware Bay and River. The Court quoted, with approval, a statement made by the Master, according to which

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1) Ibid. at p. 30.

2) 289 U.S. (1932) p. 593 et seq.

3) Ibid. at p. 613.

4) 291 U.S. (1934) p. 361 et seq.

"at no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within the said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey thereto ..... The truth indeed is that almost from the beginning of Statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary, otherwise uncertain ..... Acquiescence is not compatible with a century of conflict." (1)

It was on this ground - the lack of acquiescence - that the claim put forward by New Jersey was bound to fail.

The same principle was also applied as the criterion for the Court's decision in Massachusetts v. New York (2) where it was held that:

"long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary." (3)

On the evidence produced, the Court reached the conclusion that Massachusetts must be considered as having acquiesced in the state of things of which it was complaining and her claim of title to the disputed territory was accordingly dismissed.

In Stetson v. United States (4) the United States Second

1) Ibid. at p. 376-377.

2) 271 U.S. (1926) p. 65 et seq.

3) See ibid. at p. 95.

4) Scott, Cases on International Law, 1922, p. 232.

Court of Commissioners set up to deal with the so-called "Alabama Claims" arising out of the American Civil War, was faced with a claim based on the sinking of the vessel "Alleganean" by Confederate forces in Chesapeake Bay. The Court dismissed the claim on the ground that the capture of the ship had taken place not on the high seas but within the internal waters of the United States. Among the reasons which prompted the Court in arriving at this conclusion, which presupposed the territoriality of Chesapeake Bay and its incorporation within the maritime domain of the United States, the Commissioners mentioned the fact that:

> "from the earliest history of the country [Chesapeake Bay] has been claimed to be territorial waters and that the claim has never been questioned." (1)

In <u>Annakumaru Pillai v. Muthupayal and others</u> (2) the Supreme Court of Madras was called upon to pronounce on the legal status of Palk's Bay and it found amongst other reasons that:

> "considering the evidence that exists as to the occupation of Palk's Bay by the British with the acquiescence of other nations, we have no hesitation in holding that it is .... an integral part of His Majesty's Dominions." (3)

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1) Ibid. at p. 237.

2) 117 Indian Law Reports (Madras Series)(1903), p. 551 et seq.

3) Ibid. at p. 573.

In an earlier passage of thesame judgment the Court declared that:

> "considering that the various European maritime powers who from about the 16th century were contending for supremacy in the Indian Seas, raised no question as to the right of the Sovereigns ...... to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable." (1)

XIII. Acquiescence as the juridical basis of historic rights.- State practice.

Turning now to the practice of States and to the attitude adopted by State authorities with regard to territorial disputes involving conflicting claims over the disputed territories, it is submitted that this practice too seems to support the contention that it is the behaviour of States affected by the claim of historic rights - usually taking the form of tacit recognition or acquiescence - that establishes such historic rights.

In the course of the proceedings under art. IV of the Treaty of Ghent of 1794 concerning the Title to the Islands in the Passamaquoddy Bay, the British Agent maintained that:

> "the simple uncontroverted fact that all ..... islands now in question .... were in the

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1) Ibid. at p. 566.

"possession of His Majesty and .... continued in his possession with the tacit consent and acquiescence, not only of the Government of the United States but that of the State of Massachusetts, always vigilant and tenacious of all her rights .... must to any unprejudiced mind most strongly evince the sense of both nations at that time with regard to the right to these islands." (1)

In the prolonged controversy between Great Britain and Spain in the middle of the 19th century relating to the "Cuban Cays" Great Britain protested against the Spanish practice of arresting alleged smugglers at distances exceeding the conventional three-mile limit. Spain justified these actions by relying on various acts of national legislation purporting to vindicate such a course of action. (2) Lord Howden, the British Ambassador in Madrid at the time, in a despatch dated 9th February, 1853, asked for instructions as to how to approach these problems in his dealings with the Spanish Government. As a result of this request a memorandum was prepared by Hertslet and submitted on 10 March, 1853. In this memorandum, Hertslet claimed, inter alia, that:

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1) Moore, International Adjudications (Modern Series), 1933, vol. VI, p. 213.

2) For a selection of the extremely voluminous correspondence on this subject, see Smith, Great Britain and the Law of Nations, 1935, vol. II, pp. 169-198.

"it is not stated that Great Britain has at any time objected to this jurisdiction [to the extent of six miles.]" (1)

In the Colombian argument presented to the Swiss Federal Council in the course of the Colombian-Venezuelan Boundary Arbitration (2) reference was made to Venezuela's failure to protest on two occasion on which such protest would have been expected from a party which deemed its rights to have been encroached upon. It was stated in the Colombian argument that:

"le Vénézuela n'a soulevé aucune réclamation." (3)

And it was further asserted that:

"l'absence de protestation est en droit international une des formes de l'acceptation de la reconnaissance de certains faits." (4)

(As will be recalled, the Swiss Federal Council upheld the Colombian claim).

The Preparatory Committee of the Hague Codification

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1) F.O. 72/839 as quoted by Smith, op.cit. at p. 171.

2) UNRIAA vol. I, pp. 223-298.

3) Ibid. at p. 251.

4) Ibid.

Conference of 1930 [1] circulated a questionnaire among the various Governments requesting their replies to a number of points which were due to be raised at the Conference. Some of the Governments asked about their views availed themselves of that opportunity to express their opinion on the subject of historic bays, and they resorted to the principle of acquiescence as the foundation of historic rights. The Australian Government defined as "historic bays" certain bays "whose width exceeds six or even ten miles which are regarded by general acquiescence as territorial waters." [2] In the view of the Belgian Government any claims by States to a breadth of territorial waters exceeding the limits agreed upon in an international convention "could only be accepted if justified by undisputed international usage." [3] Germany required for historic bays the proof that such bays have acquired an exceptional status "through long usage generally recognized by other States." [4] Great Britain took the

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1) This Committee was appointed under a resolution adopted by the Council of the League of Nations on 28 September, 1927. At its session in Geneva in January and February, 1929, the Committee examined the replies of the Governments and drew up bases of discussions for the use of the Conference. As to basis of discussions No. 8, which has direct relevance to the subject of this chapter, see Ser. L.o.N.P. 1929, vol.II, p. 45.

2) Ibid. at p. 117.

3) Ibid. at p. 120.

4) Ibid. Suppl. (a), p. 111.

view that "by general acquiescence certain historic bays have been recognized as forming part of the national territory." (1) Japan required "time-honoured and generally accepted usage." (2) Poland expressed the view that "if a State exercises sovereignty over a bay and no objection has been raised by other States, the waters of the bay should be regarded as territorial waters." (3) The Netherlands, while recognising in principle the existence of historic rights, did not enlarge on the subject and did not specify what requirements they deemed necessary for the establishment of such rights." (4) Norway and Portugal referred to the attitude of other States only indirectly by an oblique reference mentioning this element among a variety of other factors. In the Norwegian reply it was claimed that there may be historical, economic or geographical factors, such as the traditional conception of territorial limits, the undisturbed possession of the right of fishing ... exercised by the coastal State .... since time immemorial and necessary for the subsistence and also the nature of fishing

1) Ser. L.o.N.P. 1929, vol.II, p. 163.

2) Ibid. at p. 168.

3) Ibid. at p. 182.

4) Ibid. at p. 177. Similarly, Canada contented herself with stating that there were certain bays "which for historic or geographic reasons are considered as part of the inland waters of the coastal State." (ibid. at p. 2).

grounds." (1) Portugal, similarly, spoke of "the domestic legislation of .... States, their higher interests and necessities and long-established usages and customs .... the security and defence of the land territory and ports, and the well-being and even the existence of the State." (2) Reference was also made in the Portuguese reply to recognized fishing interests and to the fact that "on the shores of certain bays [the local inhabitants] enjoy the exclusive right of fishing through immemorial and unbroken usage." (3)

After having received the Governments' replies, the Preparatory Committee drew up bases of discussions for the Hague Codification Conference, 1930. Basis of Discussion No. 8 provided that:

> "the belt of territorial waters shall be measured from a straight line downcross the entrance of the bay, whatever its breadth may be, if by usage the bay is subject to exclusive authority of the coastal State ....." (4)

The discussion on Basis No. 8 was opened by the Japanese delegate, Viscount Mushakoji, who proposed an amendment which was aimed at taking account of other States' attitude in the

1) Ibid. at p. 174.

2) Ibid. at p. 184.

3) Ibid.

4) Ibid. at p. 45.

formation of an historic title. He stated that in the opinion of the Japanese delegation "a mere claim on the part of the State concerned - which seems to be the sole condition according to the present text, to judge from the words 'by usage' - is not enough. For that reason, the Japanese delegation proposes that the words 'long established and universally recognized' should be inserted before the word 'usage' ..... The Japanese delegation cannot agree that the sole condition should be the proof furnished by the coastal State." (1) The British delegate, Sir Maurice Gwyer, who intervened after the Japanese delegate, pointed out that the United Kingdom delegation "agrees with the Japanese delegation that something more than mere usage is required - that some definitive acts, if you like, over this piece of water are necessary ...... The coastal state has to prove that it has exercised exclusive dominion over this piece of water." (2) Referring to this statement made by Sir Maurice, the United Kingdom Reply in the Fisheries case explained that "the word 'usage' was intended to mean more than mere national usage; it meant an exercise of exclusive dominion and has, in other words, to be an international usage." (3)

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1) Ser. L.o.N.P. 1930, vol. XVI. p. 103.

2) Ibid. at p. 104.

3) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p. 633. (Italics in original).

In a further statement made by Sir Maurice in the course of the debate, he maintained that:

> "every State which claims jurisdiction over an historic bay ...... is claiming jurisdiction over part of the high seas, and that is .... a claim which must necessarily be regulated by some recognized rules of international law. Otherwise we return to the old state of affairs in which every State claimed the right to annex as part of its own territory some part of the high seas." (1)

At the conclusion of the debate in the Plenary Committee, the question of historic waters was referred to Subcommittee No. 1, to which the United Kingdom delegation submitted three different draft texts in all of which acquiescence was explicitly mentioned as a requirement for the establishment of a title to "historic waters". In the relevant paragraph of text No. 1 reference was made to the exercise "of exclusive authority, in virtue of long usage and _with the general acquiescence of other States_."(2) In the second text the requirement for other States' consent has been expressed in the following words: "that the jurisdiction of the State has been _generally acquiesced in by other States_."(3) The third text, prepared at a later stage of the deliberations of the

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1) Ser. L.o.N.P. 1930, vol. XVI. p. 111.

2) The text of this draft has been reproduced by Gidel, op.cit. vol.III, p. 635, note 1. (Italics added).

3) Ibid. (Italics added).

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1) Ser. L.o.N.P. 1930, vol. XVI, p. 111.

2) The text of this draft has been reproduced by Gidel, op.cit. vol.III, p. 635, note 1. (Italics added).

3) Ibid. (Italics added).

drafting committee, read as follows:

> "If, by virtue of uninterrupted usage, a coastal State has exercised exclusive authority over an area of water, surrounded to a very large extent by land or lands belonging to the territory of that State, the area in question shall, if the authority of the State has been generally recognized or admitted by other States, be deemed to form part of the inland waters of the State. If a tacit or express consent, though very general, is not unanimous, the rights of the non-consenting States continue to be reserved." (1)

The minutes of the Second Committee of the Conference and of Subcommittee No. 1 appointed by it were canvassed at great length by the parties to the _Fisheries_ case, (2) but they seemed to have been at one in their assessment of the work done by the Conference on this subject. In the Reply of the United Kingdom it is asserted that "the whole discussion of historic waters in the Plenary Committee was far from scientific," (3) whilst the Norwegian Rejoinder claims that "la discussion, qui s'est déroulée au sein de la 2me Commission a été confuse." (4) Moreover, as is well-known, the

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1) The text of this draft can be found in the _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. II, p. 635.

2) Ibid. vol. I, pp. 557-562; see also ibid. vol. II, pp. 628-640.

3) Ibid. vol. II, p. 640.

4) Ibid. vol. III, p. 454.

Conference broke up without any tangible results and no excessive significance can be therefore attached to its deliberations. Unfortunately, the views expounded there by a great number of delegates are far from being masterpieces of precision - as is clearly evidenced by the conflicting interpretations given to these views by the rival parties in the *Fisheries* case - and can hardly be relied upon as an endorsement in favour of one view or another.

In the written arguments submitted to the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case, Denmark maintained that her sovereignty over Greenland

> "a été exercée en fait pendant de longues périodes d'une manière entièrement publique et avec la reconnaissance et l'adhésion de tous les autres Etats. Un tel exercice prolongé, ininterrompu, paisible, public et *incontesté* de la souveraineté constitue un titre valable .... à la possession d'un territoire." (1)

In his oral pleadings on behalf of Denmark, De Visscher drew attention to the fact that "le Denmark pendant plus de deux siècles *n'a jamais rencontré en Groënland une prétention qui se soit élevée contre sa souveraineté.*" (2)

In view of the attitude taken up later by Norway in the

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1) PCIJ Series C, No. 62, p. 101. (Italics added).

2) PCIJ Series C, No. 66, p. 2873. (Italics added).

course of her arguments in the Fisheries case and the interpretation given there by her to the role of acquiescence in the formation of an historic title, it is worth noting that in the Legal Status of Eastern Greenland case she rallied to the support of the Danish contention and quoted with approval the opinion expressed by Anzilotti according to which "ce n'est pas l'écoulement du temps comme tel mais la volonté manifesté par la reconnaissance, grâce a l'écoulement du temps, qui transforme ainsi les situations de fait en situations juridiques." (1)

In the dispute relating to the Territorial Rights over the Delagoa Bay, Portugal maintained that the validity of her claims rested, inter alia, on "la non-contestation de ces droits par les autres nations." (2)

During the Alaskan Boundary Dispute between the United States and Canada the failure of Canada to protest was referred to in a speech made by the Canadian Minister of the Interior in the Canadian Parliament on 11 February, 1898, when he said that Canada was estopped from challenging the

1) Anzilotti, Cours de Droit International (French edition, translated by Gidel) 1929, vol. I, pp. 347-348, (Italics added); Reference to this passage has been made in the Norwegian Rejoinder, ICIJ, Series C, No. 63, p. 1305.

2) Cmd. 1361 (1875) p. 87. (Italics added).

United States' possession of the disputed territory "when there has been no protest made against the occupation of that territory by the United States." (1) He regarded this failure to protest as "an unfortunate thing for us." (2)

In the course of the <u>Alaska Dispute</u> that arose in the years 1821-1825 between Great Britain and Russia, foreshadowing the later controversy between Great Britain and the United States which culminated in the <u>Fur Seal</u> Arbitration of 1898, it was argued in a Russian Memorandum of 23 November, 1822, dispatched by Count Lieven to the Duke of Wellington that "la Russe était donc pleinement autorisée en profiter d'un consentement qui, pour être tacite, n'en étoit pas moins solennel." (3)

The notion of acquiescence was again explicitly referred to at great length by the parties to the <u>Fisheries</u> case. However, the United Kingdom and Norway did not seem to have been at one as to the precise meaning of this term and as to the function which the doctrine of acquiescence was designed to fulfil in the formation of an historic title. The United Kingdom's contention was that "an historic title

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1) <u>Proceedings of the Alaskan Boundary Tribunal</u>, vol. VII, p. 910.

2) Ibid.

3) F.O. 92/51, printed in Smith, op.cit. vol.II. p. 5.

has its whole legal basis in the express or implied recognition of the title by other States, that is in their express or implied acquiescence in the enforcement of the exceptional claim." (1)

Norway, on the other hand, seems to have taken the view that the function of the historic element in the establishment of an historic title - at least in so far as a maritime historic title is concerned - is merely to provide confirmation for the intrinsical validity of the coastal State's claim, which in itself is justified on other grounds. Norway "n'invoque pas l'Histoire pour justifier des droits exceptionnels, pour revendiquer des espaces maritimes que le droit commun lui refuserait; il invoque l'Histoire avec d'autres facteurs, pour justifier la manière dont il applique le droit commun." (2) Norway also challenged the United Kingdom's concept "d'après laquelle le titre historique aurait pour seul fondement l'acquiescement des autres Etats," (3) since in her view this would mean that "le phénomène se

1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. IV, p. 121. (Statement by Sir Frank Soskice.)

2) Ibid. vol. IV, p. 303. (Statement by Bourquin on behalf of Norway).

3) Ibid.

confondrait avec celui de la reconnaissance." (1) Bourquin, on behalf of Norway, contrasted the notions of historic title and recognition by saying that in the formation of an historic title "la durée devient une condition majeure. Au contraire, dans la théorie de la reconnaissance ce facteur n'a aucune importance ..... parce qu'elle est uniquement fondée sur la volonté de l'Etat." (2)

The Norwegian objection to the British concept of the function of acquiescence in the formation of an historic title has been met by MacGibbon, who charges Norway with misrepresenting the United Kingdom's attitude in this respect. He points out - rightly, it is believed - that "if due weight is given to the consideration that acquiescence is primarily dependent for its legal effect upon the fact that it is necessarily conjoined with the passage of time, it will be seen that the part played by the historic element was recognized to be of major importance by both

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1) Ibid.

2) Ibid. at p. 309; see to the same effect the Norwegian Rejoinder, ibid. vol. III, at p. 442. The same idea was also expressed by Charpentier, op.cit. at p. 75, where the author criticises some of the judgments delivered by the United States Supreme Court for their requiring the proof of "long acquiescence". Charpentier asks: "De plus, pourquoi exiger un 'long acquiescement'? Un acquiescement est instantané; une fois donné, il produit des effets définitifs".

parties." (1)

The Court, while finding for Norway on the merits of the case, seems to have upheld the United Kingdom's contention in this respect - as has been submitted above - thus granting her some partial satisfaction in the doctrinal sphere which, however, hardly counterbalances Norway's substantial success on the merits of the case.

In the course of the oral pleadings in the _Minquiers and Ecrehos_ case, counsel for the United Kingdom drew attention to France's failure to protest against diverse manifestations of British sovereignty over the disputed islets and concluded that "these omissions related to acts of sovereignty so definite and significant that the failure to take any notice of them amounted to virtual acquiescence." (2)

Acquiescence, taking the form of absence of opposition, was impliedly mentioned by Mr. Randolph, the United States Attorney General, in his well-known opinion of 1793 concerning the legal status of Delaware Bay. The problem arose as a result of the capture of the English vessel "The

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1) MacGibbon in 31 BYIL (1954) p. 143, at p. 165.

2) ICJ, _Minquiers and Ecrehos case_, _Pleadings, Oral Arguments, Documents_, vol. II, p. 337.

Grange" by the French frigate "L'Embuscade" inside the bay. Randolph expressed the view that this capture had taken place within the inland waters of the United States and was therefore illegal. Among the considerations that led him to pronounce in favour of the territoriality of Delaware Bay he mentioned the fact that the bay "communicates with no foreign dominion; no foreign nation has ever before exacted a community of right in it as if it were a main sea; under the former and present Government the exclusive jurisdiction has been asserted." (1) He further pointed out that "from the establishment of the British provinces on the banks of the Delaware to the American Revolution it was deemed the peculiar navigation of the British Empire; That by the Treaty of Paris on the third day of September, 1783, his Britannic Majesty relinquished, with the privity of France, the sovereignty of those provinces as well as of the other provinces and colonies." (2) Commenting on Attorney General Randolph's opinion, it was stated in the United Kingdom's Reply in the Fisheries case that in view of the fact that "in 1793 the modern rules for the delimitation of maritime territory were in their infancy ....

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1) Moore, International Law Digest, 1906, vol.I, p. 738.

2) Ibid. at p. 735.

it is really somewhat striking that ...... Attorney General Randolph in his opinion gave so much attention to the attitude of other States to the United States claim." (1)

When in 1911 the English fishing vessel "Lord Roberts" was arrested in the Varangerfjord for having fished within what Norway considered her territorial waters and was subsequently found guilty by a Norwegian Court in Vardö of having infringed Norwegian law, the British Government protested against this procedure. As a result of this protest a Royal Commission was appointed which, in its report of 29 February, 1912, justified the Norwegian practice on the ground that Norway had enjoyed over the Varangerfjord "un long usage qui n'avait jamais été contesté par les gouvernements étrangers." (2) In her applications for the institution of proceedings in the Antarctica cases, the United Kingdom pointed out that the administration of State authority by the Falkland Islands Government over the territories in dispute was exercised, "without any objection

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p. 611.

2) Quoted after Mochot, Le Régime des Baies et Golfes en Droit International, 1938, pp. 136-137.

from the Republic of Argentina." (1)

Similarly, in the recent Sino-Indian Boundary Dispute the Government of India took the view that in the face of China's failure to lodge any protest against long standing Indian assertions, China must be held to have accepted and acquiesced in the Indian alignment. (2)

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1) ICJ, Antarctica cases, Pleadings, Oral Arguments, Documents, p. 9, (italics added); see to the same effect, ibid. at p. 49 where reference is made to the lack of objection by Chile.

2) See the Summary of the Report of Officials of the Governments of India and the People's Republic of China on the Boundary Question, published by the Ministry of External Affairs of India, MEA 32, p. 10.

CHAPTER 4.

THE REQUIREMENTS FOR THE FORMATION OF AN HISTORIC TITLE AND ITS CONSTITUENT ELEMENTS.

I. General.

In the previous chapter it was submitted that the legal basis for the formation of historic rights was the pre - sumption of acquiescence. The present chapter will be devoted to a closer perusal of this doctrine and to an analysis of the various factors which in their entirety contribute towards raising the presumption that the State or States affected by the historic claim have acquiesced in its assertion. As will be shown below, acquiescence is a basically negative concept inferred from the silence and inaction of the affected States in circumstances where a State wishing to signify its objection would have been ex- pected to do so in a manner actively indicating its oppo - sition. It necessarily follows that acquiescence can be presumed only if the factual situation on which this pre - sumption is founded really warrants such a conclusion.

As will be explained in this chapter, doctrine and practice alike require for the establishment of an historic title an exercise of authority by the claimant State which is both continuous and peaceful. If these two requirements are more thoroughly scrutinised, it emerges that the first

in fact amounts to requiring a clear and unmistakable display of authority by the claimant State over the disputed terri - tory - usually referred to as effective possession - while the other - the requirement of peacefulness - is the in - vocation of acquiescence in disguise, for it indicates the lack of opposition to such an effective possession on the part of the State or States purportedly affected by the dis- play of authority over the disputed territory. From the legal point of view it is of course not the fact of effective possession, but rather the presumption of acquiescence, that sets the seal of legal validity on the historic claim. Such presumption can, however, not be raised if there is no factual situation to justify it. Thus, these two prerequi- sites for the formation of an historic title are mutually interdependent, and the relationship between the two con- comitant factors instrumental in the shaping of an historic title has therefore been correctly summed up by Johnson in the following words: "Display of authority by one party, acquiescence in that display by the other party - these are the _sine qua non_ of acquisitive prescription." (1)

The exercise of State authority cannot be regarded as

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1) Johnson, 27 BYIL (1950), at p. 345, (Italics in original); the writer regards acquisitive prescription as the root of an historic title.

effective unless it was displayed continuously and uninterruptedly. The manifestations of authority required in each case will, of course, vary according to circumstances. But, whatever these circumstances, no exercise of authority can be reasonably imputed to a State, unless it was displayed _on behalf_ of the State, i.e. exercised _à titre de souverain_.

The first part of this chapter will be accordingly concerned with an inquiry of the actual meaning of effectiveness and continuity in the sphere of territorial possession, with a closer investigation of the various manifestations in which State authority displays itself (with special reference to the question to what extent domestic legislation may be regarded as a manifestation of such authority) and with a treatment of the problems arising from the requirement of the possession being _à titre de souverain_.

The second part of this chapter deals with the problems attendant upon the requirement of peacefulness or acquiescence proper. Since acquiescence, it is submitted, expresses itself mainly through the lack of protest against a given practice by the States affected by the initiation of such practice, the role of protest in the formation of an historic title will be elaborated upon at some length, and an attempt will be made to draw a distinction between cases in which a presumption of acquiescence may be properly inferred from mere silence and those cases in which a simple

lack of objection does not, of itself, warrant this conclusion. Acquiescence being regarded as amounting to passive consent, it is only understandable that it cannot be presumed in those cases where it can be shown that the allegedly acquiescing State had no knowledge of the situation in which it purportedly acquiesced. This aspect of the problem raises the question of the notoriety of territorial situations which will be also dealt with in the second part of this chapter.

Then follow three sections in which the relevance of the so-called "geographical factor", the "legitimate interests" (e.g. economic, social, strategical factors) as well as the function of the time element in the formation of an historic title will be more closely examined.

II. Effective display of State authority.

A. Introductory.

The rule according to which no State is entitled to raise a claim of territorial sovereignty based merely on an abstract right is of comparatively recent origin. It is only since about the eighteenth century that it has become generally recognised that a State can make a successful claim to territorial sovereignty only if such a claim is supported by evidence of an effective display of State

authority over the territory in question.

The precise meaning of the notion of effectiveness as regards territorial situations is susceptible of different interpretations. According to a broad concept of this doctrine, effectiveness "est constituée d'éléments composites: le fait, la durée, la tolérance des Etats tiers, éléments dont le rôle et l'importance varient d'une espèce à une autre ..... Il en est même l'aspect matériel de la possession (corpus possessionis)." (1)

The foregoing definition seems to conceive the notion of effectiveness as embracing - in addition to the purely material element of physical possession - also considerations of a different kind, like the time factor and the reaction of other States, thus incorporating under a single heading elements which are usually distinguished as the objective and subjective factors required for the formation of a terri - torial title. In this context effectiveness denotes a degree of reality which a social phenomenon must display in order to justify its inclusion and integration into international law.(2)

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1) De Visscher, Observations sur l'Effectivité en Droit International, 62 RGDIP (1958) p. 601 et seq, at p. 604.

2) Ibid. at p. 602.

While such a wide and swooping statement may unquestionably serve a useful purpose from the doctrinal point of view, it is felt that it departs to a considerable extent from what has become generally accepted as meaning "effectiveness" in international law. According to the concept prevailing in contemporary international practice, this term has a much narrower scope and is basically confined to the material and physical aspects of diverse territorial situations. It indicates a certain degree of political, military or administrative power deemed appropriate in the given conditions and varying from case to case according to circumstances. In fact, international jurisprudence still envisages "effectiveness" as meaning "l'exercice regulier de fonctions étatiques, droitement liées à des responsabilités internationales." (1)

The weight attached to the principle of effectiveness in international law is far greater than that given to it in the modern systems of domestic law. In the words of De Visscher, "international law concedes to effective territorial possession consequences that private law would by no means admit in relation to property." (2) In his

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1) Ibid. at p. 604.

2) De Visscher, op.cit. at p. 201.

submission a State which has ceased to exercise any effective authority over a given territory will not be entitled to preserve indefinitely its territorial title by simply resorting to verbal protests and the territorial title will pass into the hands of another State which for a sufficient length of time has exercised effective authority over the disputed territory, discharging the responsibilities which are usually incumbent on the territorial sovereign. "Considerations of stability, order and peace ..... are here preponderant." (1)

Thus an international tribunal confronted with the duty of pronouncing on questions relating to territorial sovereignty over disputed areas will be primarily concerned with the question which of the contesting parties has in fact succeeded in establishing its effective control over the territory in question. Effective control is, in the words of Schwarzenberger, "an element which is of central importance for purposes of both the acquisition and maintenance of title." (2) This statement - the scope of which is of general character relating to the acquisition and maintenance of a territorial title - deserves to be somewhat qualified as regards the acquisition of an historic title. No doubt,

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1) Ibid.

2) Schwarzenberger, op.cit. p. 298.

in this case too, effective control over the territory to which an historic claim has been laid is essential for the acquisition of title and cannot be dispensed with. No historic title will be allowed to perfect and mature unless evidence of such "effective control" has been forthcoming. However, it cannot be overemphasized that it is not effective control per se that forms the legal basis of such a title. The mere fact of physical possession or effective control is in law - both on the domestic and on the international level - devoid of any legal significance. Its value rests completely in the field of evidence. The probative weight of the fact of effective possession is considerable indeed, and its cardinal purpose is to raise the inference of other States' acquiescence in a situation which has adversely affected their original rights. The requirements for the effective display of authority by the State building up an historic claim "must be viewed in the light of the consideration that acquiescence is a prerequisite for the valid formation of such titles." (1) Thus the effectiveness of State authority displayed by the State putting forward an historic claim is relevant precisely to the extent to which it is capable of supplying evidence of other States' acquiescence in a situation which has given rise to the formation of such a title. The authorities on

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1) MacGibbon in 30 BYIL (1953) p. 306.

this aspect of the formation of an historic title are not particularly abundant. Nor would it appear that the validity of a claim to territorial sovereignty based solely on effective possession has ever been the subject of a decision rendered by an international tribunal. The dearth of specific authority on this point may be explained by the fact that "not only is the proposition as such self-evident, but where a State .... has continued to exercise effective possession over [a] territory, it is in the nature of things unlikely that its sovereign rights will be subject to legal challenge." (1)

The concept according to which effective possession is vital for the formation of a territorial title has been explicitly recognized in the Clipperton Island case where King Victor Emanuel III of Italy in his capacity as sole arbitrator observed that

> "la prise de possession matérielle .... est une condition nécessaire de l'occupation. Cette prise de possession consiste dans l'acte ou la série d'actes par lesquels l'Etat occupant réduit à sa disposition le territoire en question et se met en mesure d'y faire valoir son autorité exclusive." (2)

The same principle was most lucidly stated in the

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1) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. I, p. 103.

2) UNRIAA vol. II, p. 1110. (For the English translation of the award see 26 AJIL (1932) pp. 390-4).

Island of Palmas Arbitration in which a dispute had arisen between the United States and the Netherlands concerning the sovereignty over the Island of Palmas (or Miangas) in the Pacific. The main American contention was that the United States ought to be regarded as the territorial sovereign of the island by virtue of the fact that they succeeded to Spain, who in her turn had established her title over the island by means of discovery. The Netherlands, on the other hand, founded their claim on a continuous and peaceful display of authority over the disputed island.

Judge Huber, the sole arbitrator, in his award found in favour of the Netherlands, holding that a title based on effective exercise of sovereignty is superior to a claim founded on discovery. In a well-known and frequently-quoted passage of the award the distinguished arbitrator observed 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 ..... is as good as title. The growing insistence with which international law, ever since the middle of the eighteenth century, has demanded that the occupation shall be effective, would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right." (1)

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1) UNRIAA vol. II, p. 839.

It should not be overlooked that both these awards deal with the question of effective control as it poses itself from the specific angle relating to the acquisition of a territorial title by occupation (as a mode of acquiring title). But "if the effectiveness has above all been insisted upon in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things." (1) It is therefore submitted that the considerations underlying the need for effective possession in the case of occupation do apply to the same - if not to a larger - extent to the acquisition of an historic title, where it is only with the proof of effective control that there can be raised a presumption of acquiescence which - as has been already amply illustrated in the previous chapter - is the legal basis for such an exceptional title. This approach is clearly reflected in the application of the United Kingdom instituting proceedings against the Argentine Republic in the Antarctica cases where it was pointed out that the territories in dispute "have for many years been utilised and administered by the Falkland Islands Government effectively, openly and .... without any objection from the Republic of Argentina." (2)

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1) Ibid.

2) ICJ, Antarctica cases, Pleadings, Oral Arguments, Documents, p. 9; as regards the United Kingdom application against Chile, see ibid. p. 49.

In the case concerning the Legal Status of Eastern Greenland the Permanent Court of International Justice, relying on the criteria laid down in the Island of Palmas case, reaffirmed the principle that "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." (1)

The pre-eminence of effective display of State authority and its superiority when faced with a derelict legal title may be a pertinent consideration also with regard to the legal solution of the now century-old British Honduras-Guatemala Dispute. The origins of this dispute go back to 1859 when a Convention was signed between Great Britain and Guatemala fixing the boundaries between Guatemala and British Honduras (which territory is referred to by Guatemala as "Belize"). In the years 1939-1940 and again at the close of the Second World War Guatemala demanded the annulment of the 1859 Convention on the ground that Great Britain had not fulfilled her obligations under article 7 of the said Convention, under which the two parties were to co-operate in the construction of a road from Guatemala City to the

1) PCIJ, Series A/B No. 53, pp. 45-46.

Atlantic Coast. Guatemala further claimed that, as a consequence of the annulment of the Convention, the sovereignty over the whole of British Honduras would revert to her. This contention was based on the assumption that the territory in question was Guatemalan territory up to the conclusion of the 1859 Convention and was ceded to Great Britain by virtue of that Convention. The basis of the Guatemalan assertion of sovereignty over what is now British Honduras, during the period leading up to the 1859 Convention, is the Latin-American concept of <u>uti possidetis</u>. (1)

In 1946 the United Kingdom offered to submit the dispute to the jurisdiction of the International Court of Justice,(2) but Guatemala, in her acceptance of the "optional clause" excluded "the dispute between England and Guatemala concerning the restoration of the territory of Belize, which the Government of Guatemala would .... agree to submit to the judgment of the Court if the case were decided <u>ex aequo et bono</u> ..."(3)

A flurry of diplomatic exchanges and skirmishes has ensued ever since, but no legal proceedings have been

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1) For a more detailed discussion of this doctrine, see Appendix A below.

2) Cmd. 6934 (1946).

3) ICJ, <u>Yearbook 1946-1947</u>, p. 219. (Italics in original).

instituted by either of the parties since Guatemala's rejection of the British offer of 1946.

In a study published in 1953, Bloomfield maintains that, contrary to what is asserted by Guatemala, the status quo ante 1859 was not Guatemalan sovereignty, which Britain had never recognized, but that Britain herself had acquired by that date territorial rights, after Spain had tacitly abandoned her sovereignty over the area.(1) Thus he considers the 1859 Convention as an act purely declaratory of a situation which already existed at that time. As to the application of the uti possidetis rule, the same writer points out that this principle, which is a rule inconsistent with general customary international law, is binding only on those who have expressly agreed to it; Great Britain, however, never entered any agreement, in which the uti possidetis rule was made the test for the determination of the parties' rights.(2) He also quotes with approval Lawrence, who had pointed out that "long continued possession of territory gives a good title to it when no other ground can be clearly shown and even in cases where possession was originally acquired by illegal and wrongful means."(3) Thus one is tempted to

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1) Bloomfield, The British Honduras-Guatemala Dispute, 1953, pp. 78-96.

2) Ibid. at p. 94.

3) Ibid. at p. 81; the quotation is from Lawrence, Principles of International Law, 7th ed., 1923, p. 160.

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2) Ibid. at p. 94.

3) Ibid. at p. 81; the quotation is from Lawrence, <u>Principles of International Law</u>, 7th ed., 1923, p. 160.

share the view expressed by Bianchi that Guatemala has "a legally desperate case." (1) The paramount significance of the effectiveness of a territorial situation, when contrasted with a purely abstract claim, was once more brought into the fore in the Bahrein Islands Controversy between Persia and Great Britain. Here the Iranian Government seems to have struck a somewhat discordant note in its appraisal of the weight of an abstract claim, maintaining that it should prevail in the teeth of an effective display of authority running counter to such a claim.

The early history of the Bahrein Islands is obscure, but they appear to have been inhabited from a very early time on account of their pearl fisheries. (2) When Portuguese power in the Persian Gulf started crumbling towards the turn of the 17th century, Persia revived her ancient claims over the islands in question, but was never able to exercise effective control over them owing to the constant regional strifes between warring local sheikhs and chieftains. Great

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1) Bianchi, Belise: The Controversy between Guatemala and Great Britain over the Territory of British Honduras in Central America, 1959, p. 137; for a brief summary of the developments in this case in the years 1946-1960 see Waddell in 55 AJIL (1961) pp. 459-469.

2) For the historical background of this controversy see Khadduri, Iran's Claim to Sovereignty over Bahrayn, in 45 AJIL (1951) p. 631, at pp. 632-644; see also Adamiyat, Bahrein Islands, 1955, p. 39 et seq. which contains a presentation of the Persian case.

Britain made her appearance in this area shortly after the Napoleonic Wars and, through a series of agreements with the Sheikhs of Bahrein - culminating in a treaty concluded in 1892 - she brought the until then virtually independent islands under what practically amounted to British protection.

The serious flare-up between Great Britain and Persia in respect of these islands came in 1927 as a result of a treaty concluded in that year between Britain and Saudi Arabia in which the latter undertook, inter alia, to maintain friendly relations with Bahrein, on account of her "special treaty relations with His Britannic Majesty's Government." (1) This provision at once evoked a sharp Persian protest (2) and in a second note to Britain the whole Persian case seems to have been telescoped in the following words:

> "A territory belonging to a sovereign State cannot be lawfully detached so long as the right of ownership has not been transferred by this State to another State in virtue of an official act, in this case a treaty, or so long as its annexation by another State or its independence have not been officially recognised by the lawful owner of the territory." (3)

Sir Austen Chamberlain, the then British Foreign Secretary, in his reply challenged the Persian claims that Persia had ever possessed a valid legal title over Bahrein or that

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1) Cmd. 2951 (1927).

2) League of Nations Official Journal, May 1928, p. 605.

3) Ibid. September 1928, p. 1360.

Britain had recognized such a title. The just-quoted Persian argument was met in the British note with the following words:

> "The assertion that the consent of the dispossessed State is invariably required to validate a change of sovereignty is contradicted both by international practice and the facts of history ..... The effective establishment by the territory of its independence is the deciding factor in the question of international title, and in the case of Bahrein, His Majesty's Government regard as wholly untenable the proposition that effective possession and administration by the present ruling family for 145 years, during which these rulers have been independent of Persia, and during which no Persian authority has been exercised in their dominions, can be affected by the mere consideration that the Persian Government have not set their signature to a document formally recognising the fact of their independence." (1)

It would appear that the attitude taken up by Sir Austen, as expounded in the British note, truly reflects the consensus of opinion on this point. The validity in international law of any Persian claims to Bahrein at the present time - assuming that Persia did, in fact, enjoy a title to the islands sometimes in the past - is to be examined in the light of the considerations whether the various Persian protests were sufficient to deprive the factual situation prevailing in the islands of its "peaceful and uninterrupted"

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1) Ibid. May 1929, pp. 790-793, at p. 791. (Italics added).

character and to keep alive the Persian claims. This question, however, touches upon the problem of the relevance of mere protest in the prevention of an historic title from maturing and its discussion has thus to be deferred to the section dealing _in extenso_ with this problem.[1]

The problems relating to "effective occupation" arose in recent years with regard to the possibility of acquiring sovereignty over polar regions, and, as has been shown by Waldock,[2] it is in this particular context that the relativity of the notion of "effectiveness" and its adaptation to the peculiar features of the territory involved can be best understood. Surveying doctrinal authorities on this point, Waldock explains that "effectiveness" was in the past identified with the actual settlement or use of territory and, because the polar regions were thought to be uninhabitable, they were also considered as being incapable of appropriation. Waldock rejects this argument - rightly, it is believed - on two grounds:

(a) The difficulty of establishing a permanent settlement on a given spot does not, by itself, prevent sovereignty

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1) See section III.D below; for a more detailed investigation of the legal status of the Bahrein Islands, see Smith, op. cit. vol. II, pp. 62-76.

2) Waldock, _Disputed Sovereignty in the Falkland Islands Dependencies_, in 25 BYIL (1948) p. 311, at pp. 314-318.

being acquired over it. "It is scarcely less difficult," says Waldock, "to settle permanently in deserts like the Sahara or in mountain ranges such as the Himalayas, but no one has on that account denied that deserts or mountains may be the subject of sovereignty ..... barren and virtually uninhabitable land [is] in law susceptible of occupation and therefore of sovereignty." (1)

(b) The relativity of the notion of "effectiveness" with regard to territorial situations is clearly emphasized in the second argument advanced by Waldock when he states that:

> "the view that polar regions are not susceptible of sovereignty was in fact based on the now exploded theory that actual settlement or use of territory is essential to its effective occupation. That theory had behind it most respectable authorities ...... But this theory has been decisively rejected by arbitral and judicial decisions of the present century." (2)

Waldock further maintains that "the requisites of effective occupation depend on the circumstances of the territory and that settlement or local administration is not necessarily required in the case of uninhabited territory." (3) He cites in support of this contention, inter alia, passages from the Legal Status of Eastern Greenland case, from which it emerges

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1) Ibid. p. 315.

2) Ibid.

3) Ibid. p. 317.

that Denmark was held to have maintained her sovereignty over the disputed territory during long periods when no settlement existed there at all [(1)] and the Clipperton Island case, where it was laid down that, in the case of an uninhabited territory, the mere arrival of the agents of the occupying State might amount to taking of possession of the territory in question, even without the establishment of local administration. [(2)] He sums up the matter by saying that regarding the present-day meaning of the notion of effectiveness "emphasis has shifted from the taking physical possession of the land .... to the manifestation and exercise of the functions of government over the territory ..... The alleged impossibility of obtaining sovereignty by occupation of polar lands on the grounds of their uninhabitability is founded on a false premise." [(3)]

These views of Waldock were expressed with regard to the problems relating to the occupation of the Falkland Islands Dependencies, which, in turn, are, so to speak, "superimposed" on the questions pertaining to the legal

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1) Ibid. p. 316, citing PCIJ, Series A/B, No.53, pp. 45-46.

2) Ibid, quoting the Clipperton Island Award as reproduced in English in 26 AJIL (1932), p. 390, at p. 394.

3) Ibid.

status of the Falkland Islands themselves. British sovereignty over those islands has been hotly contested by Argentine ever since her emergence as an independent nation in the 19th century. The Falkland Islands (in French "les Malouines"; in Spanish "las Ilas Malvinas") were discovered by the British towards the end of the 17th century. In 1765 a British settlement was established at Port Egmont in West Falkland (one of the two main islands of the group), following the foundation of a French colony in East Falkland the year before. East Falkland was handed over by the French in 1767 to the Spaniards. Subsequently the title to the whole group was disputed between Great Britain and Spain.

The serious controversy regarding the islands originates in 1770 when a Spanish military unit forcibly captured Port Egmont. After lengthy negotiations the Spaniards in 1771 apologized and withdrew, and Port Egmont was duly restored. In 1774 the British garrison was withdrawn from the island after having left behind an inscription stating that sovereignty over the islands was retained by Great Britain. For the following sixty years the islands seem to have been regarded in practice as no man's land.

In 1820 a vessel belonging to the Government of Buenos Aires (which had in the meantime seceded from the Spanish

Crown) visited the islands and its commander took formal possession of them in the name of the Buenos Aires Government. No acts of occupation followed and no effective control was exercised there by the Buenos Aires authorities, who confined themselves to the appointment of a governor of the Falklands. This official, however, never visited the islands.

An atmosphere of unreality surrounded these islands until they were re-occupied by the British in 1832. Indignant Buenos Aires protests soon followed, and Argentina has ever since challenged the British rights of sovereignty over this group of islands.

In analysing the legal status of the Falkland Islands to-day, Smith takes the view that "in the eyes of modern international law the British title to these islands should be deemed to rest upon the re-occupation of 1832 rather than upon the dubious claims of sovereignty reserved by a leaden inscription in 1774." (1)

This assertion is warranted by the fact that British policy recognised, according to Smith, rights over territories only where such territories "had been effectively occupied." (2) Upon this principle, Smith goes on to say,

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1) Smith, op.cit, vol. II, p. 62.

2) Ibid, p. 61. (Italics added).

there was a complete gap in the occupation of the islands in the period preceding British re-occupation and any power, which established there effective authority, was therefore to be regarded as the territorial sovereign. (1)

It is impossible to lay down a general rule of universal applicability as to what acts amount to an effective display of State authority and what acts do not meet these requirements. The criterion of effective possession to be applied in a particular instance will in each case turn upon the facts and circumstances themselves. The main questions which will pose themselves in determining whether or not a State claiming a title to territory has in fact been in effective possession of the territory to which such claim has been laid are as follows:

a) Has the exercise of authority been continuous?

b) Has authority been exercised "with the intention and will to act as sovereign"?

c) Is there sufficient evidence of the manifestation of State authority in a manner appropriate in the circumstances?

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1) Ibid. pp. 61-62; for a more detailed survey of this case, including some of the relevant documents exchanged between Great Britain, Spain, and the Government of Buenos Aires, see ibid. pp. 45-62. For the presentation of the case of Argentina see Goebel, The Struggle for the Falkland Islands, 1927, p. 411 et seq.

It is now proposed to turn to each of these questions in turn and to examine in some detail the considerations determining the answers to each of the foregoing questions.

B. The notion of continuity in respect of territorial situations.

The meaning of the requirement of continuity which is one of the prerequisites for effective possession has been explained by Verykios in the following words:

> "Cette condition signifie qu'il ne doit pas y avoir de lacunes dans l'exercice de la souveraineté territoriale." (1)

The author, however, qualifies the meaning of the term "lacune" in this context by stating that it "ne comprend pas tous les cas d'intermittence de la possession, car il existe des territoires qui ne sont pas susceptibles de possession continue. Dans ces cas il suffit que l'exercice de la souveraineté territoriale soit régulier, malgré son intermittence." (2)

This passage seems to convey the idea that too much meaning should not be read into the requirement of continuity. It would appear that a "continuous" possession is not identical with a constant display of authority. It seems rather to

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1) Verykios, op.cit. p. 82.

2) Ibid.

indicate an exercise of authority in a manner which is appropriate in the light of the circumstances prevailing in the territory in question. The claimant State will not be called upon to prove a continuity in its possession going beyond what would have been normally expected elsewhere in similar circumstances. The real criterion for the continuity of possession is its regularity, i.e. its conformity with what is commonly regarded as regular practice in respect of the type of territory in question. Thus a higher degree of continuity will be required for inhabited territories than for the uninhabited ones; the standard of continuity applied to land territories will be naturally set higher than that applied to maritime areas. The test applied in each case will consequently vary according to circumstances.

This principle has been succinctly stated by Judge Huber in the Island of Palmas case when he maintained:

> "Manifestations of territorial sovereignty assume ...... different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of a 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." (1)

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1) UNRIAA/vol.II. at p. 840.

As further illustrations for his contention the arbitrator mentions the case where there is not in existence a conventional border-line of sufficient topographical precision, or if there are gaps in the frontiers otherwise established.(1)

Similarly, in the Legal Status of Eastern Greenland case the Permanent Court of International Justice held that:

> "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 very little in the way of the actual exercise of sovereign rights ..... This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (2)

From the foregoing and other pronouncements of international tribunals it seems to emerge that in those cases in which State authority cannot be exercised for one reason or another in the normal manner, namely, in a manner which is properly suited for inhabited territories having a fairly high density of population and being ruled by an effective administration, a rather high degree of leniency will be shown towards the claimant State. International law is most likely to content itself in these cases with lesser manifestations of sovereignty - intermittent in space and

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1) Ibid.

2) PCIJ Series A/B No.53 at p. 46; see also to the same effect the Clipperton Island case, UNRIAA, vol.II at p. 1110.

sporadic in time - which would not have been normally considered as sufficient to meet the requirements of continuity.[1]

In the _Island of Palmas_ case Judge Huber was prepared to regard as "continuous" a possession which would not have been recognized as such in less remote and more densely populated areas of the globe. His readiness to dispense with a high degree of continuity was based on the realities prevailing on the Island of Palmas, taking into account its geographical isolation and its remoteness from the more populated and civilised parts of the world. The arbitrator commented on this aspect of the problem in the following words:

> "The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the eighteenth and early nineteenth centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But ..... manifestations of sovereignty over a small and distant island inhabited only by natives, cannot be expected to be frequent." (2)

Likewise, in the _Legal Status of Eastern Greenland_ case the Permanent Court of International Justice was faced with

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1) Such lesser manifestations of State authority will suffice, however, only in the absence of competing territorial claims. For a detailed discussion of the problems relating to the assessment of the relative strength of competing claims, see chapter 5, section IV below.

2) UNRIAA vol.II, p. 867.

the question whether the display of authority by Denmark over Eastern Greenland was sufficiently continuous to warrant the conclusion of Denmark having exercised effective authority over that territory. Again, the Court conceived the notion of continuity as a relative one, varying from case to case in accordance with the peculiar circumstances. The Court concluded that:

> "bearing in mind .... the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from ..... 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty." (1)

From the foregoing quotations it would appear that the term "continuity" coined to denote this requirement may be somewhat misleading in as much as it is apt to indicate a need to prove an absolutely uninterrupted possession - both in space and in time. As has been shown, the test applied by international law is much less stringent. Reference to the term "regularity" may perhaps better express what is really understood when requiring a "continuity" of possession. "Regularity", by its very definition, differs from place to place and from time to time. A practice that may be rightly considered "regular" at a given place and time will not be necessarily viewed in the same light in different circum -

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1) PCIJ, Series A/B No. 53, p. 51.

sovereignty to which attention has now to be drawn.

C. Intention and will to act as sovereign.

Earlier in this chapter passing reference was made to a passage in the judgment of the Permanent Court of International Justice in the Legal Status of Eastern Greenland case where the Court held that a claim to sovereignty based "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 of display of such authority." (1)

It is now proposed to focus attention on the italicized portion of the foregoing quotation and to make it the starting-point for an analysis of what is understood by "a will to act as sovereign" and by "some actual exercise or display of ..... authority."

The present section will deal with the questions relating to the expressions of a State's will to act as sovereign, while the next one will be devoted to the problems attendant on the actual display of State authority. "The intention and will to act as sovereign" seems to mean, according to Waldock, "no more than that there must be

1) Ibid. pp. 45-46.

positive evidence of the pretensions of the particular state to be the sovereign of the territory."(1) The usual way for States to display their intentions is by means of their domestic legislation. Acts of legislation - assuming different names and forms - give expression to a State's claim to a particular area, and indicate the extent of its pretensions. In fact, such assertions of a State's claims carry considerable weight in assessing the scope of its rights.

The conviction that State legislation is indicative of what a given State considers to be its rightful claim and reflects its will to act as sovereign over the area to which such act of legislation refers, is, apart from its being a rule of genuine common-sense, a legal maxim of comparatively long standing.

Thus, in his well-known opinion of 1793, following the capture by the French of the British vessel "Grange" within the waters of Delaware Bay, Attorney General Randolph of the United States, commenting on the territorial status of the bay, took the view that it constituted in its entirety American territory. Among the considerations prompting him in this conclusion, Randolph mentioned the fact that

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1) Waldock, in 25 BYIL (1948) p. 334.

"under the [British] and present governments the exclusive jurisdiction has been asserted; by the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself and all the waters thereof, theretofore within the jurisdiction of the State of New Jersey, are comprehended in the district of Bridgetown." (1)

In Stetson v. United States the Court of Commissioners set up to deal with claims arising out of the American civil war was seised of the problem of the territoriality of Chesapeake Bay. This question arose as a consequence of the capture of the British vessel "The Alleganean" by Confederate forces within the said bay. The Court held that Chesapeake Bay should be regarded American territory, justifying this conclusion, inter alia, by the fact that "the legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States." (2)

In the Direct United States Cable Co. v. Anglo-American Telegraph Co. the Judicial Committee of the Privy Council was called upon to pronounce on the territorial status of Conception Bay and found that it formed part of the territory of Newfoundland. Ranking high among the reasons given for this decision was the fact that

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1) Moore, International Law Digest, 1906, vol. I, p. 738.

2) Scott, Cases on International Law, 1922, p. 232, at p.236.

> "the British legislature has by Acts of Parliament declared it to be part of the British territory and part of the country made subject to the legislature of Newfoundland." (1)

The Privy Council took the view that:

> "no stronger assertion of exclusive domination could well be framed ...... This is an unequivocal assertion of the British legislature of exclusive dominion over this bay as part of the British territory." (2)

A striking and illuminating illustration of this point is the considerable role which the Norwegian Decrees - from 1812 up to 1935 - played in the course of the deliberations in the Fisheries case in evaluating the precise extent of Norway's exceptional rights over her coastal waters. Among the various manifestations of Norwegian sovereignty over certain maritime areas the Court mentioned the fact that "Norway has been in a position to argue that neither the promulgation of her delimitation Decrees in 1869 and in 1889 nor their application gave rise to any opposition on the part of foreign States." (3) Thus the promulgation of

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1) 2 A.C. (1876-1877) p. 394, at p. 420.

2) Ibid. at p. 421.

3) ICJ Reports, 1951, p.138; see also to the same effect Judge Hsu-Mo's separate opinion where - though criticising the Norwegian Rescripts prohibiting fishing by foreigners on the account of their lack of precision - he stresses the fact that "prohibition by the Norwegian Government of fishing by foreigners ..... is undoubtedly a kind of State action which militates in favour of Norway's claim of prescription" (see ibid. at p. 157).

these Decrees and their enforcement by Norway were considered by the Court as clear manifestations of sovereignty in the face of which other countries - wishing to dissociate themselves from the Norwegian claim - would have been expected to raise a clear and unequivocal protest. The promulgation and application of the Norwegian Decrees were therefore among the factors enabling the Court to infer a presumption of international acquiescence in Norway's exceptional claim.

The United Kingdom too relied in her applications in the *Antarctica* cases on numerous acts of legislation relating to the territories in question as on one type of the manifestations of British sovereignty over these territories. (1) As a "convincing proof of the effectiveness of Great Britain's display and exercise of sovereignty" the applications mention the various acts of legislation promulgated by the Falkland Islands Government with a view to regulating whaling and sealing and conserving the fishing stocks in the area. (2)

It is clear, however, that while acts of domestic legislation are indicative of a State's will and intention and are conclusive for its own national tribunals, the

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1) ICJ, *Antarctica* cases, *Pleadings, Oral Arguments, Documents*, pp. 13, 16, 53 and 56.

2) Ibid, p. 16 and p. 56.

national pretensions finding expression in such enactments do not thereby acquire legal validity from the point of view of international law. Thus in the _Fisheries_ case the International Court of Justice, while giving full weight to the Norwegian Delimitation Decrees in appraising the legal validity of the Norwegian claims under international law, could not refrain from pointing out that:

> "the delimitation of sea areas cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." (1)

The conclusion, according to which a State cannot simply invoke the provisions of its own domestic law as evidence for the validity in international law of an exceptional territorial claim - otherwise derogatory of the normally applicable rules of international law - is no more than the logical extension of the concept which postulates, rightly, it is believed, that acts of national legislation have in international law no higher legal significance than any other facts from which the degree and intensity of the exercise of State authority by the claimant State can be inferred. The answer to the question whether or not such acts of municipal

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1) ICJ Reports, 1951, at p. 132.

legislation provide sufficient evidence for the existence of a valid legal title under international law depends, of course, not on the nature of the acts of the national legislature, their contents and professed purposes, but solely on the rules governing international law itself.

This point appears to have been clearly stated in the award rendered in the Guatemala-Honduras Boundary Arbitration where the tribunal, headed by Chief Justice Hughes of the United States, held that in assessing the weight of rival and conflicting territorial claims "the constitutions of the States ...... are of special importance." (1) The tribunal left, however, no room for doubt that it did not consider the unilateral acts and declarations of a State claiming territorial rights as having conclusive and binding legal validity from the point of view of international law. The Court regarded such unilateral declarations merely as assertions of national pretensions the primary function of which - from the point of view of international law - is to invite the opposition of all those States who believe that their rights have been adversely affected by such unilateral acts or are liable to be infringed as their result. This section may be therefore fittingly closed with the relevant

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1) UNRIAA vol. II, p. 1307, at p. 1325.

passage of the tribunal's award, which, it is submitted, correctly states the legal position on this point:

> "While no State can acquire jurisdiction over territory in another State by mere declarations on its own behalf, it is equally true that [the] assertions of authority by Guatemala .... show clearly the understanding that this was her territory. These assertions invited opposition if they were believed to be unwarranted." (1)

D. Manifestation of State sovereignty.

While the legislative measures adopted by States - assuming a variety of names - usually provide the proof of the claimant State's intention to establish its authority over a given territory, such measures will, as a rule, not be regarded as adequate and sufficient manifestations of State sovereignty. This aim will be achieved either by applying and implementing the provisions of such legislative measures or by otherwise carrying out certain governmental functions which are usually exercised by State authorities and in a fashion in which the rightful sovereign would have exercised such authority. The manner in which such exercise of authority expresses itself, the frequency and intensity of the manifestations of State authority and the nature of the acts required as proof for the establishment of State

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1) Ibid. at p. 1327.

authority vary according to the circumstances and the character of the territory in question. The generality and vagueness of this statement bear witness to the variety of territorial situations which renders the laying down of a more precise rule both impossible and impracticable.

In fact, there seems to exist a rather close relationship between the requirements of continuity and manifestation of State authority, inasmuch as the continuity of possession displays itself in manifestations of State authority. Thus these two elements - though not interchangeable from the doctrinal point of view - are virtually interdependent and on occasions hardly distinguishable from one another. The amount and intensity of the manifestations of State authority required as regards a given territory are in direct proportion to the degree and nature of the display of continuity required in that case. The stricter the requirements for the proof of continuity, the greater the need for concrete and numerous manifestations of State authority and *vice versa*. "Manifestations of territorial sovereignty", says Judge Huber in the *Island of Palmas* Award, "assume .... different forms, according to conditions of time and place." (1) The nature of these manifestations of sovereignty required in each particular case cannot be laid down with reference to any

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1) Ibid. at p. 840.

general rule. Their character will be determined in each case by the characteristics of the territory in question. This, in fact, has been the course followed by international tribunals in assessing the adequacy of the acts of sovereignty relied upon by a State claiming a title to a disputed territory. The answer to the question what acts have been regarded by international tribunals as manifestations of State sovereignty is to be found through the perusal of the decisions rendered by these tribunals on the topic.

The present survey has no pretensions of completeness. It is meant rather as an illustration of the subject indicating international legal practice on this matter. It is not intended to present an exhaustive list of acts of sovereignty (such attempt would in all likelihood be doomed to failure); all it endeavours to do is to submit a selection containing illustrations of various governmental acts that have come to be considered as sufficient manifestations of State sovereignty.

One of the most revealing decisions on this point is the judgment delivered by the International Court of Justice in the Minquiers and Ecrehos case [1] where the Court elaborated at great length on this question, enumerating the manifestations of sovereignty which led it to the conclusion

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1) ICJ Reports, 1953, p. 46 et seq.

that the British claim to the disputed islets was the stronger one and that they should be awarded accordingly to the United Kingdom.

Among the manifestations of British sovereignty over the Ecrehos the Court mentioned the institution in Jersey of criminal proceedings against Jerseymen charged with having committed criminal offences on the Ecrehos (the Court cited six instances of this kind during the period 1826-1921) concluding that "these facts show ..... that Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years." (1) Similarly, Jersey authorities had for centuries held inquests on corpses

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1) Ibid. at p. 65. In order to forestall the argument that the exercise of jurisdiction by Jersey Courts in respect of acts committed by Jerseymen at the Minquiers and Ecrehos did not warrant an assumption of territorial jurisdiction, (jurisdiction ratione soli) but amounted merely to an assumption of personal jurisdiction, (jurisdiction ratione personae), the United Kingdom submitted to the Court an affidavit of a former Solicitor-General and Attorney-General of Jersey, in which it was stated that "the Royal Court of Jersey has ..... no jurisdiction in the matter of a criminal offence committed outside the Bailiwick [of Jersey], even though that offence be committed by a British subject domiciled or ordinarily resident within the Bailiwick." (see ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. I, p. 602, Annex No. A 153 to the United Kingdom Reply).

found on the Ecrehos. (1) In 1877 they had entered a fishing boat belonging to a Jersey fisherman who lived permanently on the Ecrehos island in the Jersey register of fishing boats, and Jersey customs officials paid occasional visits to the Ecrehos for the purpose of endorsing the licence of the boat until it was cancelled in 1882. (2) The Court also established that contracts of sale relating to real property on the Ecrehos had been registered in the public registry of deeds of Jersey island, after having been passed before the competent authorities of that island. (3) In 1886 Jersey customs authorities established a custom-house on the islet and in 1901 an official enumerator visited the island for the purpose of taking the census, thus including the said custom-house within the scope of the Jersey census enumerations. (4) Jersey authorities also carried out various works and constructions on the islet, such as the construction of a slipway in 1895, a signalpost in 1910 and the placing of a mooring buoy in 1939. (5) It was largely on these grounds

1) Ibid.

2) Ibid.

3) Ibid.

4) Ibid. at p. 66.

5) Ibid.

that the Court reached the conclusion according to which "these various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time." (1)

In upholding the United Kingdom sovereignty over the Minquiers the Court relied on evidence of very similar nature. It is nonetheless noteworthy that the Court rejected one of the contentions made on behalf of the United Kingdom, invoking two judgments of the Royal Court of Jersey (of 1811 and 1817, respectively) relating to salvage services rendered by Jerseymen to two ships wrecked at the Minquiers. The Court's rejection of this contention was grounded on the fact that "it was not shown that the Royal Court of Jersey would have lacked jurisdiction if the salvage had taken place outside the territory of Jersey." (2)

On behalf of the French Government various acts, alleged to be governmental acts, were cited as constituting manifestations of French sovereignty over the Minquiers. Among these acts there are a hydrographical survey prepared by a French national in 1831, (3) a visit of the French Prime Minister and Minister of Air to the Minquiers in 1938 in

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1) Ibid.

2) Ibid.

3) Ibid. at p. 70.

order to inspect the buoying of the islet, [1] the erection by a Frenchman in 1939 of a house on one of the islets with a subsidy from the Mayor of Granville, [2] and certain French hydro-electric projects for the installation of tidal power plants in the region of the Minquiers islets. [3] It was further contended on behalf of France that since 1861 the French had assumed the sole charge of the lighting and buoying of the Minquiers without having encountered any opposition from the United Kingdom, for more than 75 years.[4] It was also asserted that in 1888 a French mission, appointed to carry out a hydrographic survey of the islets, erected provisional beacons on some of them in order to facilitate the survey. [5]

The Court declined, however, to regard all these acts as manifestations of the exercise of French authority over the Minquiers, and contented itself with pointing out in a rather laconic manner that it "does not find that the facts invoked by the French Government are sufficient to show that

1) Ibid.

2) Ibid. at pp. 70-71.

3) Ibid. at p. 71.

4) Ibid. at p. 70.

5) Ibid.

France has a valid title to the Minquiers ..... Such acts can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets." (1) It is a matter for regret that the Court did not think it appropriate to enlarge further on the reasons prompting it in its decision on this point.

In his individual opinion Judge Basdevant, while concurring in the operative part of the judgment awarding the disputed islets to the United Kingdom, dissociated himself from some of the conclusions which had led the majority to decide in favour of the United Kingdom. He challenged the majority's view which regarded the census activities of the Jersey authorities on the Ecrehos and Minquiers as manifestations of British authority over the islets. In Judge Basdevant's opinion "census operations extending to persons on the islets or to acts carried out there do not imply the exercise of a territorial competence." (2) He went on to say that "the same is true of rates imposed upon Jerseymen

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1) Ibid.

2) Ibid. at p. 82.

in Jersey, in respect of property belonging to them on the islets; there is nothing to prevent a State's taxation of its nationals in respect of property abroad or its compilation of statistics of facts occurring abroad." (1) Commenting on the majority's decision to take certain customs activities performed by Jersey authorities as yet another expression of display of sovereignty by the United Kingdom, Judge Basdevant stated, that "it must not be forgotten that international practice recognizes or tolerates customs control carried out by a State outside its territorial waters." (2)

Judge Basdevant also voiced his reluctance to regard the assumption of jurisdiction by the United Kingdom in this case as amounting to the assumption of territorial juris - diction, since the islets in question were, in his view, not more than emerged rocks on which there was no established authority and the assumption of jurisdiction over them might therefore easily be construed as the extension of jurisdiction "just as if the wrong had been committed or the wreckage had been gathered on the high seas." (3) He found nonetheless for the United Kingdom on the ground that "there was, to the

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1) Ibid.

2) Ibid.

3) Ibid; see on this point, p. 214, note 1 above.

extent permitted by the character of these islets, greater and more continuous activity on the part of the Jersey authorities," [1] i.e. the British authorities displayed a more profound interest in the happenings in those islets. In this display of interest by the British, Judge Basdevant saw the confirmation of an intrinsically valid medieval title held by the British ever since the fourteenth century and it was this feudal title that was in his view the real basis for the British claims over the two islets.

The circumstances enumerated by the International Court of Justice in the Minquiers and Ecrehos case as manifest - ations of State authority bear a close resemblance to those referred to in the award rendered in 1909 by the Permanent Court of Arbitration in the Grisbadarna case. There, as will be recalled, a dispute arose between Norway and Sweden in respect of the Grisbadarna banks. Among the reasons given by the Court for assigning the Grisbadarna to Sweden there were the factual considerations that "Sweden has per- formed various acts in the Grisbadarna region ..... as, for instance, the placing of beacons, the measurement of the sea, the installation of a light boat." [2] It is worth comparing

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1) Ibid. at p. 83.

2) Scott, Hague Court Reports, 1st Series, 1916, vol.I, p.130.

these conclusions of the Permanent Court of Arbitration with the majority decision of the International Court of Justice in the Minquiers and Ecrehos case, where, as has been shown, the Court declined to accept the establishment of beacons by the French on the Minquiers and the conduct of a hydrographic survey by a French mission as evidence for the assertion of French sovereignty. The seeming contradiction between the two decisions might be perhaps resolved when bearing in mind that in the Grisbadarna case the Swedish manifestations of State authority met with no competing Norwegian measures of any kind, whereas in the Minquiers and Ecrehos case, the French acts were heavily outweighed - both numerically and qualitatively - by rival British manifestations of authority.[1]

A further list of acts that may be regarded as mani - festations of State authority can be found in the decision given by the Permanent Court of International Justice in the Legal Status of Eastern Greenland case where the Court was confronted with a dispute between Denmark and Norway relating to the territorial sovereignty over Eastern Greenland. Among the manifestations of Danish sovereignty over that area - by reason of which the case was decided for Denmark - the Court referred to the granting in 1863 of a concession by the

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1) On the problems relating to the appraisal of the weight of rival claims in general, see chapter 5, section IV below.

Danish Government to an Englishman. The concession was to run for 30 years and was to enable him to establish on the East Coast of Greenland stations for the purpose of trading with natives, hunting, fishing or working any metalliferous or mineral-bearing mines. (1) Reference was also made to the concessions granted by the Danes for the erection of telegraph lines across the same area. (2)

Various manifestations of State authority have also been relied upon in support of the British claims to the Falkland Islands Dependencies. Among these manifestations of British State activity Waldock mentions the promulgation of different British ordinances regulating the whaling activities in the area and imposing royalties on them, as well as the enforcement of these regulations. (3) He also refers to the granting of various licences by the Falkland Islands Government to companies of different nationalities, (4) to the appointment by the British of a stipendiary magi - strate for South Georgia and to the establishment of police,

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1) PCIJ, Series A/B, No.53, pp. 31-32.

2) Ibid. at p. 53.

3) Waldock, 25 BYIL (1948) pp. 327-329.

4) Ibid. p. 329.

customs and post-offices there.[1] Regarding the South Orkneys he refers to the erection of a British meteoro - logical station there and to seasonal visits made by administrative officers and in 1928 by the Governor himself.[2] As a further manifestation of State authority he also mentions extensive surveys made during the period 1927-1939 both of the South Shetlands and of Graham Land.[3]

It is not proposed to enlarge further on this point, since the number of instances that may be cited as manifest - ations of State authority is virtually legion. Attention is, however, drawn also to the decision delivered by the now defunct Central American Court of Justice in the Gulf of Fonseca case,[4] and to the awards rendered by various arbitral tribunals in the Island of Palmas case,[5] in the Clipperton Island case,[6] in the Guatemala-Honduras

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1) Ibid.

2) Ibid. at p. 330.

3) Ibid. at p. 331; For a list of various alleged manifest- ations of State activity in this region see also the British applications in the ICJ, Antarctica cases, Pleadings, Oral Arguments, Documents, pp. 16-21 and pp. 56-61.

4) 11 AJIL (1917) p. 674 et seq.

5) UNRIAA vol. II, p. 829 et seq.

6) Ibid. at p. 1105 et seq.

Boundary Arbitration,[1] and in the Colombian-Venezuelan Boundary Arbitration,[2] all of which abound in valuable examples of acts that may be regarded as manifestations of State authority.

E. Possession à titre de souverain.

Writers and international tribunals seized of the problems attendant on the acquisition of a territorial title are at one that the possession of the State purporting to have acquired such title must have been exercised à titre de souverain. The meaning of this principle is that the manifestations of State authority relied upon in support of the acquisition of a territorial title must be such as to imply a claim of sovereignty. Since in international law it is only the States and not private individuals who are endowed with the rights of sovereignty, it necessarily follows that the manifestations of State sovereignty relied upon in support of a territorial title must be the acts of the State, i.e. acts performed by persons who are in the service of the State or otherwise authorised to act on its behalf. Activities of private individuals acting on their own, however numerous and extensive, cannot confer on their States a title

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1) Ibid. at p. 1307 et seq.

2) UNRIAA, vol. I, p. 223 et seq.

of sovereignty over the areas in which such activities were carried out. "The acquisition of sovereignty", says Waldock, " is a state act and if the act of a discoverer is to have any validity in international law it must be endorsed by the state; the _animus occupandi_ ultimately must be that of the state, not of the individual. Accordingly, an annexation to have any effect must either have been carried out under a prior commission from the state or must have been adopted subsequently by the state - through express ratification." (1)

This principle - which is one of general application as regards the acquisition of a territorial title in international law - is of particular significance in the establishment of an historic title, the legal validity of which rests on the assumption that other States, affected by the formation of such a title, have acquiesced in claimant State's rights. Such acquiescence - which is inferred from the exercise of sovereign rights by the claimant State without encountering opposition from other States - can, however, not be presumed, unless the manifestations of authority emanate from the claimant State and can be imputed to it. Consequently, there can be no presumption of acquiescence

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1) Waldock in 25 BYIL (1948) p. 323. (Italics in original).

without the existence of possession *à titre de souverain*; the requirement of the possession being *à titre de souverain* is therefore a prerequisite for the formation of an historic title.

While it appears to be generally accepted that no territorial title can be established without having fulfilled this requirement, criticism has been forthcoming from some quarters against this condition on the ground that it is self-evident and therefore superfluous. Thus Verykios describes the requirement of the possession being *à titre de souverain* as "absoulument inutile car ..... il est évident que l'exercice de la souveraineté territoriale se fait à titre de souverain, autrement on ne l'appelerait pas ainsi."(1)

Admittedly, there is little that can be said against Verykios' line of argument from the doctrinal aspect; international practice, however, supplies ample evidence of the tendency of States to rely upon the activities performed by private individuals on their own as the basis for exceptional territorial rights. It is this tendency that justifies the consistency with which international lawyers have time and again insisted on the inclusion of this condition among the requirements laid down for the formation of an historic title. One needs only to mention the *Fisheries* case, where it was

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1) Verykios, op.cit. at p. 75.

asserted on behalf of Norway that:

> "les eaux litigieuses ont été placées sous l'autorité exclusive de la Norvège et l'exploitation de pêche que s'y trouvent a été réservée aux populations côtières, soit sous la forme de propriété privée, soit sous celle de propriété collective, soit en vertu des interdictions de droit public prononcées par les pouvoirs compétents à l'égard des pêcheurs étrangers." (1)

The Norwegian assertion was met in the United Kingdom Reply with the following words, which, it is submitted, correctly state the legal position on this point:

> "The [Norwegian] Counter-Memorial .... makes no distinction between individual acts of appropriation by fishermen or by parishes for their own benefit and acts of the Norwegian State asserting a claim to these areas as Norwegian territorial waters. Mere actions of individuals, unaccompanied by any act of State, could not, of course, confer upon Norway any rights under international law." (2)

And further:

> "Fishing by Norwegian fishermen in waters outside the generally recognized limits of maritime territory, even if proved from prehistoric times, is no evidence of, or basis for, Norwegian sovereignty over the waters concerned." (3)

The attitude of the United Kingdom on this point was summed up in the following words:

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. I, p. 572.

2) Ibid, vol. II, p. 318.

3) Ibid. at p. 658.

"It is acts of State sovereignty, not acts of individuals, which may provide the foundation for a title to territorial sovereignty." (1)

Faced with an impressive array of authorities relied upon by the United Kingdom in support of her contention, Norway deemed it appropriate to relinquish her former position on this question and in her Rejoinder she maintained that:

"sans doute des activités privées, qui s'exerceraient sans aucune intervention directe ou indirecte de l'Etat, n'auraient elles pas d'influence sur la situation juridique de ce dernier. Mais il est fréquent que l'attitude de l'Etat se manifeste extérieurement à travers l'action de personnes privées ..... Les activités privées des pêcheurs norvégiens qui avaient pour base et pour garantie le droit norvégien .... constituent par conséquent des faits à retenir." (2)

One can hardly fail to notice the difference between the contentions contained in the Norwegian Counter-Memorial and Rejoinder, respectively. Whereas in the Counter-Memorial the acts of private individuals were invoked as one of the sources of Norway's exceptional claims, the Rejoinder is at pains to make it clear that such acts cannot form the basis of any legal rights of sovereignty and may be taken into account merely as evidence of the provisions of the domestic law, in pursuance of which they had been performed. There

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1) Ibid.

2) Ibid. vol. III, at p. 451.

seems to be nothing basically wrong with this modified version of the Norwegian argument, which will be dealt with at some length further below.

In the majority judgment delivered in the *Fisheries* case, the International Court of Justice did not refer to this question, which was, however, taken up by the minority judges in their separate and dissenting opinions. Both Judges Hsu-Mo and Sir Arnold (now Lord) McNair came out in no uncertain terms in what is apparently a clear and unmistakable refutation of the original Norwegian concept. Thus Judge Hsu-Mo stated:

> "In support of her historic title, Norway has relied on habitual fishing by the local people and prohibition of fishing by ..... foreigners. As far as the fishing activities of these coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries." (1)

Judge McNair gave expression to the same principle when he said:

> "[A] rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of *State* jurisdiction, and that the independent activity of private individuals is of little

1) ICJ Reports, 1951, at p. 157.

"value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments and that in some other way their Governments have asserted jurisdiction through them." (1)

While the activities of private individuals performed on their own cannot form the basis for any claims to a territorial title, such activities may, in certain circumstances, be construed as evidence of an already existing sovereignty. Thus in the Minquiers and Ecrehos case, Counsel for the United Kingdom relied heavily on the fishing activities of Jersey fishermen on the disputed islets, (2) and this argument evoked strong criticism on the part of the French Agent on the ground that "le seul fait que des Jersais venaient jadis pêcher souvent aux Minquiers et Ecréhous .... est sans pertinence aucune dans la présente affaire. Il s'agit de propriété privée, par conséquent, d'une question entièrement étrangère au problème de souveraineté ... " (3) He also suggested "qu'il fallait distinguer entre les actes de pêches proprement dits ..... et les actes que nous appellerons pour plus de commodité les actes

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1) Ibid. at p. 184. (Italics added); as to further authorities on this point see Johnson in 27 BYIL (1950) pp. 344-345.

2) See e.g. ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. II, pp. 157-159.

3) Ibid. at p. 267.

de souveraineté." (1) In what was apparently an attempt on the part of the United Kingdom to forestall the French contention, it was claimed in the United Kingdom Memorial, that:

> "For more than a hundred years Jersey fishermen, with the support and encouragement of the Jersey authorities, have regularly carried on fishing operations on the Ecrehous on the basis that they were British territory." (2)

The italicized portion of the above quoted passage seems to indicate that, in the opinion of the United Kingdom, activities of the nature and on the scale of those carried out by the Jersey authorities could not have been undertaken unless British sovereignty had been established over the disputed islets. In fact, this is how the British argument was interpreted by Sir Gerald Fitzmaurice, who had acted as Counsel for the United Kingdom in the *Minquiers and Ecrehos* case. In an article published subsequently, he took the view that the activities of Jersey fishermen on the Minquiers and Ecrehos were invoked by the United Kingdom solely as evidence of the already existing British sovereignty, "since many of [the activities] were such as would not have been undertaken by those individuals if they had not thought British sovereignty

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1) Ibid. at p. 397.

2) Ibid. vol. I, p. 110(Italics added).

existed." (1)

One can hardly fail to note the striking similarity of Sir Gerald's assertion to the argument advanced in the Norwegian Rejoinder in the _Fisheries_ case, where it had been maintained by Norway that "si .... une personne privée agit conformément à son droit national, ce qui apparait dans les actes qu'elle accomplit, ce n'est pas seulement une volonté privée, c'est aussi l'ordre juridique étatique. Les activités privées des pêcheurs norvégiens qui avaient pour base et pour garantie le droit norvégien ... constituent par conséquent des faits à retenir." (2)

In the majority judgment delivered in the _Minquiers and Ecrehos_ case the long list enumerating the acts that were regarded by the Court as manifestations of British sovereignty over the disputed islets, does not include the fishing activities of Jersey fishermen. Judge Levi Carneiro, however, in his dissenting opinion, struck a rather surprising note when he stated

> "that in certain cases, and in certain circumstances, the presence of private persons who are nationals of a given State may signify or entail occupation by that State .... Such individual actions are particularly important in

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1) 30 BYIL (1953) p. 48, n. 3.

2) ICJ, _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. III, p. 451.

> "respect of territories situated at the border of two countries which both claim sovereignty." (1)

Judge Carneiro went on to say that British fishermen in the Minquiers and Ecrehos region have always been much more numerous than French fishermen and this fact was one of the reasons which led him to award the islets to the United Kingdom.

It is felt that Judge Carneiro's sweeping statement concerning the acquisition of State rights through the private activities of individuals does not accurately reflect the practice followed by international tribunals. From a closer perusal of his dissenting opinion it would appear that his attitude on this subject was clearly motivated by certain historical events in South America, where Brazil, for instance, greatly increased her territory through persons who had crossed the borders in search of gold and emeralds and thereby acquired uti possidetis rights for their State. (2) It is at least debatable whether the views advocated by Judge Carneiro express more than a particular Latin-American concept on this point; this is particularly so in view of the fact that, in the opinion of many writers, the uti possidetis rule itself has not achieved in international law more than a

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1) ICJ Reports, 1953, pp. 104-105.

2) Ibid.

regional status and cannot be regarded as a principle of general validity.

It should be conceded, however, that the principle referred to by Judge Carneiro is of considerable importance in all those cases where the question of the acquisition of non-exclusive rights arises. Claims to sovereignty - whether over land territory or over maritime areas - are claims of exclusive character. In addition to claims belonging to this category, there exist also claims aiming at the preservation of non-exclusive rights, habitually referred to also as "international servitudes." (1) Such claims to non-exclusive rights are usually raised in respect of maritime areas and it is their objective to safeguard a right to exercise some vested interest.

It is submitted that, in the acquisition of non-exclusive rights (e.g. the traditional right to exploit a given maritime area and to fish in it, without raising a claim of sovereignty), the activities of private individuals, even if acting on their own, may be of considerable legal significance, and a State may acquire such vested and non-exclusive rights in respect of a particular maritime area through the exercise of such rights on the part of its nationals.

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1) See Chapter 3, section VII above.

Since, however, this problem arises primarily - if not exclusively - in respect of maritime areas, it is dealt with further in the chapter devoted to an investigation of the specific aspects attendant on the acquisition of maritime historic rights. (1)

III. Acquiescence in the display of State authority.

A. Introductory.

As will be recalled, the formation of an historic title is contingent upon the existence of two concomitant factors, both of which are required for its establishment:

(a) Effective display of State authority by the claimant State; and

(b) Acquiescence in such display of authority on the part of other States, affected or liable to be affected by the perfection of a new territorial title.

In the foregoing part of this chapter the meaning and scope of the first requirement was examined; as has been shown, its function is to contribute towards raising the presumption of acquiescence, which, it is submitted, ultimately

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1) See Chapter 6, section VIII below.

sets the seal of legal validity on the historic claim.

Whereas the previous part of this chapter was devoted to the requirements to be complied with by the claimant State, it is proposed in the present part to focus attention on those aspects of the formation of an historic title which relate to the attitude of a State confronted with such an historic claim. For it turns primarily on the conduct and reaction - or lack of reaction - of the State likely to be affected by a claim deviating from the generally applicable rules of international law, when it has to be determined whether a claim - otherwise derogatory of the normally accepted norms of international law - will be allowed to ripen into a valid legal title.

The State affected by the exceptional territorial claim cannot, however, be expected to signify its attitude in respect of the new territorial situation unless it may be reasonably assumed that it has acquired knowledge - actual or constructive - of the new situation. Thus the condition of notoriety of a territorial situation - at least vis-à-vis the affected State - cannot be dispensed with if a presumption of acquiescence is to be raised. For only the assumption of such knowledge on the part of the affected State can warrant the expectation of its coming out openly against the new territorial claim. The remedy resorted to by the States in order to signify their objection to a new state of affairs, and

consequently to prevent a new title from maturing, is the device of diplomatic protest.

When faced with a dispute concerning the alleged formation of an historic title, international tribunals will therefore pose for themselves the following questions:

(a) Has protest been forthcoming against the purported infringement of the hitherto sovereign's rights?

(b) The reply to the first question being in the negative, would a State wishing to dissociate itself from the new territorial situation be normally expected to make its opposition known by lodging a formal protest with the claimant State?

Thus the preeminence of the device of protest - or rather absence of protest - in the formation of an historic title becomes obvious. Indeed, the absence of protest may be regarded as the cornerstone of the doctrine of acquiescence.

The foregoing statement deserves, however, to be slightly qualified: the absence of protest is relevant in the formation of an historic title only in those cases in which protest would have been expected to be forthcoming, had the affected State really wished its objection to be made known. There are situations - and they will be dealt with further below - in which an inference of acquiescence cannot be justifiably drawn

from the simple fact of absence of protest.

The present part of this chapter will accordingly be devoted to a closer investigation of the meaning of the term "acquiescence", to an analysis of the problems relating to the notoriety of territorial situations and to an examination of the relevance of protest in the formation of an historic title.

B. What is acquiescence?

It would appear that the divergence of opinion relating to the process of formation of an historic title in international law may have arisen to a large extent because of the fact that the precise meaning of the term "acquiescence", the very pillar of historic rights, has not been free from controversy. In fact, writers and publicists seem to have espoused different concepts as to the exact meaning of this notion, and the pronouncements of international tribunals invoking this doctrine are also far from being unequivocal on the point.

The question constituting the main stumbling-block in this respect seems to be whether "acquiescence" properly so-called should be confined merely to those cases where there is evidence of some positive acts indicating consent and capable of being construed as such, or whether it connotes

exclusively a passive toleration on the part of a State faced with a situation which purportedly constitutes an encroachment upon its rights. In other words: is acquiescence a positive or negative concept?

The first assertion amounts to virtually equating the notion of acquiescence with the concept of express consent. This, in fact, is the view advocated by Fauchille, who conceives acquiescence as meaning positive consent. (1) Similarly, Ross, discussing the notion of consent in international law, maintains that "in all cases it is a condition that there should be real consent and not merely passivity in the face of inevitable facts." (2)

This idea of the meaning of acquiescence seems to have been conveyed as recently as 1951, and was contained in a French Note of 7 April of that year delivered in reply to a United Kingdom request urging France to state her position as regards the unilateral extension of territorial waters

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1) Fauchille, op.cit. vol. I, part II, p. 382; Fauchille quotes there with approval Perels in whose opinion "l'exercice unilatéral de prétendus droits même quand il ne soulève pas les réclamations d'autres Etats .... ne peut jamais être opposé à ceux qui n'ont pas acquiescé expressément ou par les actes dont l'intention est évidente." (see Perels, Manuel de Droit Maritime International, French translation, edited by Arendt, 1884, p. 44).

2) Ross, A Text-Book of International Law, 1947, p. 244.

beyond the generally accepted limits. In the French note it was asserted that:

> "aucun Etat ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auraient pas formellement acceptée." (1)

Similarly, in the course of the voluminous correspondence that followed the outbreak of the dispute between Great Britain and Spain over the "Cuban Cays", Harding, the then Queen's Advocate, maintained that the attempt of Spain to rely on a Spanish Royal Order of 8 July, 1859, extending the limit of territorial waters, as a proof "that this limit has been conceded, merely because no Nation has reclaimed upon this point (i.e. I presume because no Nation has formally protested against the Order) is in my opinion preposterous."(2)

It is felt that this approach not only amounts to an absolute denial of the role and function of acquiescence in international law, but that it rests, when applied in respect

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1) The text of the French Note has been printed in the ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. IV, p. 605.

2) Opinion of 11 November, 1859, F.O. 83/237, as reproduced in Smith, Great Britain and the Law of Nations, 1935, vol. II, p. 230.

of historic titles, on a fundamental misunderstanding of the theory of historic rights. As has been already pointed out elsewhere, in cases where a State has expressly consented to a departure by another State from the normal rules of international law or to an exercise of rights derogatory of the normal rules, or has behaved in such a manner that its consent may be positively inferred from its attitude, there is no need whatsoever to invoke the theory of historic rights. This theory comes into play solely in those cases where "other States have neither consented expressly, nor by their conduct implied their consent, but have simply been *in-active.*" (1) It is the function of this theory to supply "the necessary presumption of (tacit) acquiescence." (2)

It is therefore submitted that, when used in connection with the formation of an historic title, acquiescence should be interpreted as a purely negative concept indicating "the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights, ... a silence or absence of protest in circumstances which generally call for positive reaction signifying an objection." (3)

1) Fitzmaurice in 30 BYIL (1953) p. 29. (Italics in original).

2) Ibid.

3) MacGibbon in 30 BYIL (1953) p. 143.

This concept is based on the assumption - which seems to be also a rule of common sense - that States will not look on idly and without any reaction whilst their alleged rights are being infringed and violated. The silence of the affected States in these circumstances cannot be regarded as devoid of any meaning and, from their conduct, an inference of their acquiescence in the new situation may properly be drawn. It is common ground that long silence, without any valid reason, is equivalent to consent. This principle has found its clear expression in the maxims "_quis tacet - consentire videtur_" and "_qui ne dit mot - consent_". According to Verykios "l'interprétation la plus généralement admise est que celui qui se tait si longtemps et sans raison consent à l'état de choses actuel; autrement il aurait protesté." (1)

The precise scope of this principle has been subject to controversy. For some writers this rule has absolute validity, (2) whereas others maintain that it is only of relative scope. (3) It would, however, appear that silence _per se_, even if persisting for a long period of time, should

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1) Verykios, op.cit. at p. 26.

2) e.g. Strupp, _Grundzüge des Positiven Völkerrechts_, 1921, p. 96.

3) e.g. Brüel, _La Protestation en Droit International_, 3 ASJO (1932) p. 75.

not be credited with absolute validity, unless the circumstances would have required and enabled anybody wishing to signify his disapproval to do so.

Thus, both the doctrine which denies any legal consequences flowing from mere silence and the concept which equates silence in all circumstances with consent seem to misrepresent the problem and, in the light of those conflicting opinions, the middle-of-the-road course suggested by Anzilotti is all the more commendable. "La simple manière de se comporter d'un Etat" says Anzilotti, "y compris, _dans des circonstances déterminées, même son seul silence,_ peut signifier la volonté de reconnaître comme légitime un état de choses donné." (1) Similarly, Schwarzenberger points out that acquiescence "differs from recognition ..... in its mode of expression: _passive toleration_; for even implied recognition presupposes some acts which are capable of being interpreted as such." (2)

This moderate approach, adapting itself to the changing circumstances, is borne out also by international practice. Thus, for instance, in a Russian Memorandum to Great Britain concerning the _Alaska Dispute_ between the two States,

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1) Anzilotti, _Cours de Droit International_, (French ed. by Gidel) 1929, p. 348; (Italics added).

2) Schwarzenberger in 87 _Hague Recueil_, (1955), vol.I, p. 257.

reference was made to Britain's failure to protest against certain Russian claims in the following words:

> "La Russe était donc pleinement autorisée à profiter d'un consentement qui, pour être tacite, n'en était pas moins solennel." (1)

It is, however, not difficult to visualize circumstances in which sheer silence maintained by a State is more likely to indicate its indifference than actual acquiescence. "Whether silence is to be interpreted as amounting to acquiescence" states one author, "depends primarily on the circumstances in which silence is observed." (2) This statement, while apparently summing up correctly the legal position, nonetheless introduces a dangerously subjective element into this sphere which renders the evaluation of a situation allegedly warranting an inference of acquiescence a delicate task. At the same time it cannot be denied that there are, in fact, situations which do not readily lend themselves to an "objective" analysis. Silence may on occasions indicate the approval of a State in a certain situation, whereas such a conclusion may be ill-founded on other occasions. One certainly does not have to go as far as Vattel who suggested that acquiescence be not imputed to a State which "sets forth valid reasons for [its] silence such as the impossibility of

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1) Smith, op.cit. vol. II, p. 5.

2) MacGibbon in 31 BYIL (1954) p. 150.

speaking, a well-founded fear etc." (1) Having regard to the harsh realities of international life the admission of the pleas suggested by Vattel would indeed be tantamount to depriving international relations of the least chance of stability and certainty. The inadmissibility of these pleas, however, does not affect the fate of other pleas of substance which, if well-founded, serve to rebut the presumption of consent which might have been otherwise raised by a long and unexplained silence. Ranking high among these pleas is the plea of ignorance put forward by the affected State which maintains that it was not aware of the new situation that had arisen over a part of what it considers its own territory and that, as a result of its lack of knowledge, it cannot be presumed to have acquiesced in the new situation. This plea raises the problem of the notoriety of the territorial situations and will be dealt with presently, while other pleas aiming at the rebuttal of the presumption of acquiescence will be touched upon at a later stage with reference to the relevance of protest in the formation of an historic title.

C. Notoriety of territorial situations.

If acquiescence is to be regarded as the legal basis for the formation of an historic title, then the State presumed to

1) Vattel, op.cit., book II, chapter XI, para. 144 (English translation by Fenwick, Washington, 1916).

have acquiesced in the territorial situation giving rise to the historic claim must be shown to have acquired knowledge of that situation. In other words: the new territorial situation must have achieved a degree of notoriety or publicity the existence of which is a prerequisite for the presumption of knowledge. "Publicity", says Johnson, "is essential because acquiescence is essential .... Acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all." (1) Only if the affected State's knowledge can be proved or may be properly presumed, can the State against which the adverse possession is meant to operate be expected to make known its objection to it. (2)

True, the very necessity of this requirement as one of the conditions for raising the presumption of acquiescence has been called in question by many an author, not because they deemed it superfluous or unnecessary, but because they took the view that a clandestine exercise of territorial possession was hardly conceivable on the international

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1) Johnson in 27 BYIL (1950) p. 347.

2) See to this effect Fauchille, op.cit. vol. I, part II, p. 761.

plano.[1] Thus Verykios maintains that "on peut critiquer de même l'exigence de la publicité comme étant absolument inutile en droit international, où on ne peut concevoir une possession clandestine."[2] This argument seems to be founded on the situations prevailing on land territories which, in fact, have achieved a very high degree of notoriety. It overlooks at the same time the fact that this is by no means true in respect of maritime territorial situations where there exists the possibility "to acquire not only a piece of territory at the expense of another State, but also a number of rights at the expense of the international community."[3] Moreover, as has been pointed out by Fauchille, there still exists the possibility of a clandestine adverse possession of land territory remaining for long unknown to the owner

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1) It may be perhaps argued that any clandestine possession would not fulfil the requirement of the possession being à titre de souverain, since it is not the practice of the State exercising its sovereign authority over a given territory to do so in a clandestine manner. Thus the conditions of possession à titre de souverain and notoriety would be embraced under a single heading. However, as will be subsequently shown, there are circumstances in which a possession exercised in the normal manner and à titre de souverain may appear to have remained unknown to other States.

2) Verykios, op.cit. at p. 75.

3) Johnson, loc.cit.; see also to this effect De Visscher, op.cit. at pp. 200-201.

in the case of territories - the number of which is rapidly diminishing nowadays - which are either distant or of slight importance. (1)

International practice also requires the proof of knowledge as a prerequisite for the presumption of acquiescence. Thus, in the dispute between Great Britain and the United States relating to the Title to Islands in Passamaquoddy Bay, the United States Agent contended that "to form a rule of future action it was required that it should .... have been known and acknowledged." (2) In the Alaskan Boundary Dispute between the same parties the United States asserted that Britain's failure to protest ought to be construed as her acquiescence in the American exercise of authority over the disputed territory. This argument was met with the following reply on behalf of Great Britain:

> "They say all these things were done and we never protested. Well, you cannot protest against a thing you have never heard of." (3)

And further:

> "How is Great Britain on any ground of justice or fairness to be affected with knowledge of

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1) Fauchille, op.cit. vol. I, part II, p. 761.

2) Moore, International Adjudications (Modern Series) 1933, vol. VI, p. 95.(Italics added).

3) Proceedings of the Alaskan Boundary Tribunal, vol. VII, p. 531.

> "such proceedings and acquiescence in them? ... Surely at least we should have had some notice of it, and there is not even a shadow of pretence that we knew it." (1)

Similarly, the failure of Spain to challenge the rights of the Netherlands over the Island of Palmas was explained in the United States Memorandum by the fact that "the Spanish Government had no reason to suppose that the Netherlands Government claimed sovereignty over the island." (2)

Judge Huber in his award appears to have rejected the United States' submission on this point. He referred to the fact that the display of governmental functions over the island

> "has been open and public ..... A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible." (3)

The "open and public " character of the Netherlands' display of authority over the disputed island seems to have led the eminent arbitrator to the conclusion that Spain must have been aware of the situation prevailing there and could not consequently invoke a plea of ignorance in support of her claim.

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1) Ibid. at p. 533.

2) Island of Palmas Arbitration: Memorandum of the United States of America, p. 94.

3) UNRIAA vol. II, p. 868.

The outcome of the Anglo-Norwegian dispute in the _Fisheries_ case also turned to a very large extent on the same considerations. Both the majority and minority judges subjected the question of the validity of the Norwegian system of delimitation, _inter alia_, to the test of the notoriety of the system, and it was common ground between them that, only if it could be proved that the United Kingdom had in fact acquired knowledge of this system and its methods of application, could the Norwegian system be held enforceable against her. The differences of opinion which divided the Court in that case were not of a legal character; they were derived from different interpretations given to the same facts. The majority found that the application of the baselines system by Norway had achieved a degree of notoriety and that Great Britain must have been aware of it. It was on this ground that the Court held the Norwegian system to be enforceable, in any case against the United Kingdom. (1) The minority judges, on the other hand, held that the Norwegian system was not made known to the world, that the United Kingdom

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1) ICJ Reports, 1951, p. 138 where the Court stated: "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."

was not aware of it and that she could not be regarded as having acquiesced in it. Thus Judge McNair said:

> ".... I do not consider that the United Kingdom was aware .... of the existence of a Norwegian system of long base-lines connecting outermost points before this dispute began." (1)

And Judge Read follows suit by summing up the question in the following words:

> "I cannot avoid reaching the conclusion that it has not been proved that the Norwegian system was made known to the world in time and in such a manner that other nations, including the United Kingdom, knew about it." (2)

Similarly, in the _Antarctica_ cases the United Kingdom stressed the fact that the British Administration over the Falkland Islands Dependencies had been "utilised and administered .... openly." (3)

It appears pertinent at this juncture to turn attention to some of the questions attendant on the principle of noto - riety, the most important of which are the following:

(a) Is notification of the establishment of a new terri- torial situation a prerequisite for its achieving the required degree of notoriety and for its

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1) Ibid. at p. 180.

2) Ibid. at p. 205. Both Judge McNair and Judge Read denied the existence of a "Norwegian system" in the disputed areas, but discussed the problem of notoriety on the assumption that such a system did, in fact, exist.

3) _Antarctica_ cases, ICJ, _Pleadings, Oral Arguments, Documents_, p.9; see also to the same effect ibid. at p. 49.

imputability to the States adversely affected by its inception?

(b) To what extent may the concept of constructive knowledge be resorted to in cases where actual knowledge of the affected State cannot be proved?

(c) In what circumstances may a plea of excusable ignorance be raised?

It is these problems that will be presently dealt with in this section.

(1) Is notification a prerequisite of notoriety?

"Notification", says Oppenheim, "is the technical term for the communication to other States of certain facts and events of legal importance." (1) He further points out that a distinction should be drawn between voluntary and obligatory notification. In most cases notification takes place voluntarily because "States cannot be considered subject to certain duties without knowledge of the facts and events which give rise to them." (2) Notification is, however, obligatory in cases where it has been expressly

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1) Oppenheim, op.cit. vol. I, p. 874.

2) Ibid.

stipulated. [1] Apart from these cases there does not exist in international law any duty of formal notification. Notification, though, may undoubtedly have its salutary effects in so far as it precludes any affected State from claiming ignorance at a later stage. Thus, while its desirability cannot be called in question, the requirement of formal notification is not an obligatory rule of law, save where express provision has been made to this effect. Judge Huber seems to have stated correctly the legal position on this point when he asserted in his award in the Island of Palmas case that:

> "..... notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions." (2)

It was on this ground that he dismissed the American contention that Spain could not have been attributed with a knowledge of the Netherlands' display of authority over the disputed island owing to an absence of notification on her

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1) See e.g. Article 34 of the General Act of the 1885 Berlin Congo Conference, where it was laid down that the validity of any future occupation of African territories was contingent on its prior notification to the other Powers.

2) UNRIAA, vol. II, p. 868. (Italics in original).

part to that effect. The Arbitrator held that "an obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist." (1)

Similarly, in the Clipperton Island case, King Victor Emanuel III of Italy in his award rejected the Mexican argument that formal notification was a prerequisite for a lawful occupation and that France should not be recognized as the lawful occupant of Clipperton Island because she had not notified other Powers of her occupation. The arbitrator dismissed this assertion in the following words:

> "La régularité de l'occupation française a aussi été mise en doute parce qu'elle n'a pas été notifiée aux autres Puissances. Mais il faut observer que l'obligation précise de cette notification a été stipulé par l'art. 34 de l'acte de Berlin, ...,.. qui ..... n'est pas applicable au cas présent, Il y a lieu d'estimer que la notoriété donnée d'une façon quelconque à l'acte suffisait alors ...." (2)

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1) Ibid.

2) Ibid. p. 1110; In this case, though, the French consulate in Honolulu published in the local English paper "The Polynesian" of 8 December, 1858, the text of the French declaration of sovereignty over the island. From a perusal of the just-quoted passage of the award it emerges, however, that this publication was not regarded by the arbitrator as a formal notification, but merely as one of the acts through which the sovereignty of France over the island manifested itself in a manner appropriate to the circumstances prevailing there.

For the sake of completeness it should be mentioned, however, that States have in the past tended to question other States' rights over certain territories on the ground that they had not been formally notified of such instances of occupation. Thus in a note delivered on 10 August, 1863, to Señor Tassara, the Spanish Minister in Washington, the then United States Secretary of State, Mr. Seward, maintained that the Spanish claim to a six-mile marginal belt of territorial waters off the coast of Cuba was not enforceable as against other States, unless "it could be shown that on its being brought to their notice [the United States] acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime powers of the world." (1) More recently the French Government seems to have taken up the same line of argument when in a Note of 7 April, 1951, given in response to a United Kingdom request to state its attitude towards the unilateral extension by States of the generally accepted limits of territorial waters, it was asserted that:

> "le Gouvernement français n'a jamais reçu, par la voie diplomatique, notification des resolutions ou propositions adoptées, de 1945 à

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1) The text of this note has been printed in Moore's International Law Digest, 1906, vol. I, pp. 709-712.

> "1950, par le Mexique, le Chili, le Perou, Costa Rica et le Salvador, ayant pour effet de changer la limite de leurs eaux territoriales." (1)

It is submitted, however, that these isolated manifestations do not truly reflect the attitude taken up by international law on this topic and that they are heavily outweighed by those authorities which have dispensed with the condition of notification as one of the requirements for the legal validity of a territorial change. Moreover, it should be borne in mind that both the American and French notes referred to above were concerned with maritime territorial claims, and since maritime territorial situations, by their very nature, are less "notorious", owing to there being in general fewer opportunities of manifesting State authority, a requirement of notification as regards such claims may be perhaps more understandable, even if not justifiable, from the legal point of view. In an article commenting on the judgment rendered in the _Fisheries_ case, Johnson makes the interesting observation that "States are often ignorant of each other's legislation in the matter of territorial waters. Even a maritime State, such as the United Kingdom, had no knowledge of some of the Decrees of other States put in as

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1) The text of this note has been reproduced in the Anglo-Norwegian _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. IV, p. 605.

evidence by Norway during the proceedings." (1)

It may be safely maintained that an obligation for formal notification is not incumbent upon a State claiming an historic title and that its main value rests in the evidential sphere, since it facilitates the proof of other States' knowledge of the territorial situation giving rise to the historic claim. According to Ross - who gives expression to the trend currently governing the field - "a formal declaration of occupation or notification is not required but of course is often to be recommended by way of proof." (2)

(2) Constructive knowledge.

The abandonment of the condition of formal notification necessarily leads to the adoption of the concept of constructive knowledge. In fact, more often than not, it is

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1) Johnson, The Anglo-Norwegian Fisheries Case, 1 ICLQ (1952) p. 145, at p. 166, n. 34. This problem will be further elaborated upon when discussing the problem of constructive knowledge.

2) Ross, op.cit. p. 147; see, however, Fauchille, who maintains that "la notoriété d'une prise de possession ne saurait dispenser de sa notification; l'admettre serait ouvrir la porte aux abus et rendre possibles bien des conflits." (see Fauchille, op.cit. vol. I, part II, p. 739).

virtually impossible to prove a State's actual knowledge of a given territorial situation. Consequently, international law has to satisfy itself by resorting to the concept of constructive knowledge, thus substituting an inference based on the conduct of States and the general circumstances surrounding a situation for an express proof of actual knowledge.

There is little doubt that international law readily imputes such constructive knowledge to the States affected or likely to be affected by the acquisition of new territorial rights, provided the evidence - which is by its very nature of circumstantial character - unmistakably points in that direction and is not open to different interpretations. Perhaps the most striking example of the recognition of this principle in international law is the _Fisheries_ case where the Court attributed to the United Kingdom a constructive knowledge of the Norwegian system of straight baselines. The majority of the Court took the view that:

> "as a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom _could not have been ignorant_ of the Decree of 1869 which had at once provoked a request for explanation by the French Government." (1)

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1) ICJ Reports, 1951, p. 139. (Italics added).

Thus the Court, being unable to invoke the United Kingdom's actual knowledge of the system applied by Norway, contented itself with relying on her constructive knowledge of that system, which was inferred from a variety of circumstances which indicated to the Court's satisfaction that the United Kingdom had in fact been aware of the Norwegian system. And it was because of their disagreement with the majority on this point that the dissenting judges reached a diametrically opposed legal conclusion. They too started from the same legal premises and posed the question whether the United Kingdom ought to have been aware of the Norwegian system. In fact, the greater part of Judge McNair's dissenting judgment is devoted to a searching analysis of the question "when, if at all, did the United Kingdom Government become aware of this system, or when ought it to have become aware but for its own neglect; in English terminology when did it receive actual or constructive notice of the system?" (1) Judge McNair took the view that the United Kingdom could not be attributed with either actual or constructive knowledge of the Norwegian system and this was one of the grounds for his final conclusion that Norway had not succeeded in proving her historic

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1) Ibid. at pp. 171-172. (Italics added).

title. (1)

Similarly, Judge Read raised the question whether the Norwegian system "was made known to the world in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge." (2) He also reached the conclusion that "it has not been proved that the Norwegian System was made known to the world in time in such a manner that other nations, including the United Kingdom, knew about it or <u>must be assumed to have had constructive knowledge.</u>" (3)

The concept of constructive knowledge had been also expressly referred to by Counsel for the United States in the course of the proceedings in the <u>Alaskan Boundary Dispute</u>. There it had been maintained on behalf of Great Britain that she had been completely unaware of the acts of authority performed by the United States in the disputed territory. To this plea of ignorance Counsel for the United States replied

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1) Ibid. at p. 180 where Judge McNair states: "I do not consider that the United Kingdom was aware, or ought but for default on her part to have become aware, of the Norwegian system of straight base-lines ....."

2) Ibid. at p. 194; see also to the same effect at p. 199.

3) Ibid. at p. 205.

in the following words:

> "These acts were not in the dark, but publicity was given to them. All Governments of this day - that is first class Powers - are generally informed in regard to public documents ....The Treaty of Purchase was the subject of lengthy debate in Congress in 1868 and it is a violent presumption to say that the British Minister at Washington had no knowledge of it. On the contrary, we may safely assume that he had full knowledge, for being there, an alert and able Representative of his Government, you may be sure that nothing appeared in the official publications that did not pass under the eyes of his secretaries." (1)

It is rather revealing to contrast this statement, made in open Court by a duly accredited representative of the United States, with a statement that had been made some forty years earlier by the American Secretary of State Mr. Seward in his note to Señor Tassara which has been already referred to above. In a manner which is hardly compatible with the basically correct view put forward by Counsel for the United States in the Alaskan Boundary Dispute, Mr. Seward in his note had asserted that "nations do not equally study each other's Statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation." (2)

While the first part of Mr. Seward's statement is

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1) Proceedings of the Alaskan Boundary Tribunal, vol. VII, p.91(

2) Moore, International Law Digest, 1906, vol. I, p. 710.

obviously correct, the conclusion to which it led him appears to be a non sequitur. It is certainly true to say that "nations do not equally study each other's Statute books", but as has been pointed out by Johnson, following the judgment in the Fisheries case, "ignorance as to another State's legislation on territorial matters, however excusable, can be fatal and .... States may neglect, at their own risk, to study each other's Statute books." (1) Mr. Seward's assertion is, it is felt, certainly out of tune with the present practice adopted by international law and, according to one author, it is even doubtful whether it had any legal foundation at the time of its enunciation. (2)

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1) Johnson, in 1 ICLQ (1952) p. 166; Johnson, though, criticizes the Court's judgment on this point on the ground that "it may be doubted if this interpretation of the law, emphasising, as it does, the duty of States to ferret out the details of each other's legislation and protect in the widest possible terms every time there is an implied threat to their rights, under penalty of losing these rights, will make for international harmony." (ibid.)

2) MacGibbon, in 31 BYIL (1954), p. 179; see, however, Waldock, in whose opinion "Secretary Seward's dictum that a state is not chargeable with notice of a claim expressed merely in municipal law and not brought to its attention seems to be correct in principle and reasonable in practice." (Waldock, in 28 BYIL [1951] p. 166).

The problem touched upon by Mr. Seward, raises, however, a much wider and more complex question: to what extent may a State be attributed with knowledge of another State's legis - lative acts? In other words: can a State rely on it unaware-ness of other States' domestic acts as the basis for a plea of excusable ignorance?

(3) The plea of excusable ignorance.

The plea of excusable ignorance of other States' official acts, has, on the whole, rarely been successful. It appears to be nowadays a generally accepted principle that the legis - lative and other public measures of a State, enacted and applied in the ordinary manner, are presumed to to known to other States. This is particularly true of legislative acts having unmistakably implications reaching beyond the frontiers of the enacting State, which are therefore expected to be more closely scrutinized by other States. "In the case of a legislation by a State in which it makes a claim of an international character, the legislation is itself the international act by which the State has declared its intention." (1)

Thus, in the Fisheries case, as will be recalled, the International Court of Justice, in assessing the legal validity

1) Ibid. at p. 180.

of the exceptional Norwegian system of delimitation, took account of various Norwegian acts of legislation, Royal Rescripts and Decrees and made these legislative acts the starting-point of the presumption that the United Kingdom was aware, or at any rate ought to have been aware, of the Norwegian system of delimitation and of Norway's extensive claims.

The question of the imputability of knowledge of another State's legislative activities was again raised in the _Anglo-Iranian Oil Company (Preliminary Objection)_ case. (1) There the Court was seized, _inter alia_, of the problem of its jurisdiction. One of the arguments advanced there against the Court's jurisdiction was that the Iranian Imperial Declaration of 2 October, 1930, and the law of 14 June, 1931, whereby the Mejlis approved the Imperial Declaration in which Iran had adhered to the Optional Clause (Article 36 of the Statute), were purely domestic instruments, were unknown to other Governments, were written only in the Persian language, and were not communicated to the League of Nations or to any other States. The Court, however, declined to accept this argument since it was "unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian Laws voted and

1) ICJ Reports, 1952, p. 92 et seq.

ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years." (1) The Court held therefore that foreign Governments could not have been considered to have been un - aware of this piece of Iranian domestic legislation.

It is worth noting that Judge Hackworth in his dissenting opinion strongly dissociated himself on this point from the majority view and declined to take into account the said Iranian law because of its being "a unilateral act of a legislative body of which other nations had not been apprised. National Courts may, as a matter of course, draw upon such acts for municipal purposes but this Court must look upon the public declarations made for international purposes and cannot resort to municipal legislative enactments to explain ambiguities in international acts." (2)

Similarly, Judge McNair, in his individual opinion, took the view that the Iranian domestic legislation "should be excluded from the consideration of the Court. Its admissibility in evidence is open to question and its evidentiary value is slight." (3)

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1) Ibid. at p. 107.

2) Ibid. at pp. 136-137.

3) Ibid. at p. 121.

In spite of the above quoted reservations made by two distinguished authorities on international law, it is felt that the weight of opinion seems to be in favour of the presumption that States are aware of each other's legislative acts. This presumption is, in fact, borne out in most cases by the realities and rests on the well-founded assumption that the diplomatic missions of the various States are in general eager to acquaint themselves with the legislative developments taking place in the countries to which they are accredited. Thus this common-sense presumption is far from being fictitious. (1) This is the reason why international tribunals will rarely be persuaded of a State's ignorance of other States' domestic legislative activities. The onus of satisfying a tribunal in this matter is a heavy one "commensurate with the sense of responsibility and vigilance traditionally displayed by States in defence of their rights." (2)

The hypersensitiveness of States as to every actual or imaginary threat to their rights is well illustrated by their

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1) See, however, Johnson who maintains that "surprising as it may seem States are often ignorant of each other's legislation ..... the United Kingdom had no knowledge of some of the Decrees of other States put in as evidence by Norway during the proceedings [in the Fisheries case]." (1 ICLQ p. 166, n. 34).

2) MacGibbon in 31 BYIL (1954) p. 181.

readiness to oppose even territorial "map claims", i.e. territorial claims which are reflected in maps printed by the authority or under the auspices of the claimant State. Thus, in a letter dated 2 August, 1837, written by Lord Salisbury to the British Minister in Lisbon, exception was taken to some Portuguese maps contained in a Portuguese White Book. (1) Honduras, likewise, protested against the "incorporation" of Swan Island by the United States in an official United States map. (2) In a Russian Memorandum delivered to the Duke of Wellington in respect of the Alaska Dispute between Russia and Great Britain it was pointed out that:

> "depuis près d'un siècle, des établissements Russes ont pris .... une extension progressive ..... comme le porte la première charte de la Compagnie Russe-Américaine, charte qui a reçu dans le temps une publicité officielle, et qui n'a motivé aucune protestation de la part de l'Angleterre." (3)

Thus Russia's rights were based, inter alia, on Great Britain's refraining from voicing any opposition against the Russian "map claims". This assertion was most emphatically

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1) The text of this letter is reproduced in Smith, op.cit. vol. II, p. 8.

2) Foreign Relations of the United States, 1935 (1953) vol. IV, pp. 750-752.

3) Smith, op.cit. vol. II, p. 5.

challenged by the United Kingdom in the course of the Alaskan Boundary Dispute. Counsel for Great Britain vigorously denied that it was the practice of States "to keep a vigilant watch over the maps published by the civilized nations, and by the efflux of time to become bound by what these maps indicate." (1) More recently, various Chinese maps showing parts of Indian territory as being under Chinese sovereignty have evoked strong protest on behalf of the Indian authorities. In a note presented on 10 September, 1959, in Peking, the Indian Government expressed its regret "that large areas of Indian territory should continue to be shown on official Chinese maps as part of China ..... It is most extraordinary that the Government of China have not found time during the past ten years to withdraw these faulty maps. The continued circulation of these maps is a standing threat to India's integrity and evidence of unfriendliness towards India ..." (2) These Chinese maps, as published by the Indian Government on 29 September, 1959 (3) show big inroads into Indian territory, mainly in the north-east of the country. On 15 September, 1959, Mr. Jigme Dorji, the Prime Minister of Bhutan,

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1) Proceedings of the Alaskan Boundary Tribunal, vol.VII, p.528.

2) Quoted after Keesing's Contemporary Archives for 1959, p. 17118.

3) See "The Times" of 30 September, 1959, p. 9.

protested against Chinese map-infringements of his country's territory which affected an area of approximately 200 square miles. (1)

Similarly on December 8, 1960, it was reported from Bonn that the West German Foreign Ministry had complained to The Times Publishing Company because of a map in Volume III of The Times Atlas of the World in which the Oder-Neisse line is shown as Germany's eastern frontier. It was reported that Herr von Brentano, the Foreign Minister, answering a question in the Bundestag, complained that "the German frontier which was still 'valid in international law' was marked by a 'barely visible dotted violet line', described in the key at the foot of the page as 'boundary of Poland, 1939'". The West German Foreign Ministry had made representations to The Times Publishing Company against "these false statements." (2)

These recent instances of protests lodged against "map claims" seem to indicate that States do, in fact, "keep a vigilant watch over the maps published by civilized nations", contrary to what had been asserted on behalf of the United Kingdom in the course of the deliberations in the Alaskan Boundary Dispute. On the whole, it seems to emerge that

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1) See "The Times" of 16 September, 1959, p. 8.

2) "The Times" of 8 December, 1960, p. 12.

States will be imputed with knowledge of each other's domestic legislative activities and other acts done under their authority, and that the plea of ignorance will be accepted only in the most exceptional circumstances. States desirous of reserving their rights will be therefore well advised to follow with a substantial amount of self-interested awareness the official acts of other States and to raise an objection to them - through the legitimate means recognized by international law - should they feel that their rights have been affected or are likely to be affected by such acts. Such objections will usually be raised in the form of a formal protest. The relevance of this remedy to the prevention of an historic title from maturing as well as the relevance of the absence of protest to the formation of an historic title will be considered in the next section.

D. The relevance of protest to the formation of an historic title.

The relevance of protest - or rather absence of protest - to the formation of an historic title is not far to seek. As will be recalled, the existence of an historic title in international law depends on the proof of continuous and peaceful possession. Since "peacefulness" in this context is understood as meaning other States' acquiescence in a certain situation giving rise to territorial

claims, (1) it is only too obvious that the question whether the States affected or likely to be affected by the formation of such exceptional rights raised any objection against the new territorial situation is of crucial importance. Thus the lodging of a diplomatic protest is of overriding legal significance in determining whether a State has taken all the necessary and adequate measures to prevent an historic title from maturing. Because acquiescence is instrumental in the establishment of an historic title, it is only proper to investigate at some length the device by means of which the States wishing to dissociate themselves from a new and unwelcome territorial situation are expected to signify their objection.

It is the function of protest to rebut the presumption of acquiescence which might have been otherwise inferred from the circumstances viewed as a whole. This is why doctrine

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1) "Peacefulness" is not intended to denote the positive attitude of the local population and its approval of the territorial sovereign. From the point of view of international law the attitude of the local population and the degree of its support of the internal regime is immaterial. Thus, when referring to "peacefulness", international tribunals are concerned with the attitude of other States towards the alleged territorial sovereign. This point was clearly brought out by Judge Huber in the Island of Palmas case where he explicitly stated that "the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as title." (see UNRIAA vol. II, p. 839; italics added).

and practice alike have consistently maintained that protest is necessary for the preservation of the rights of the protesting State and for the prevention of another State's exceptional rights from maturing in circumstances where a failure to protest would amount to acquiescence. Thus Drůel asserts that "toujours facultative, la protestation n'est juridiquement nécessaire que dans le cas où le silence équivaudrait à un assentiment tacite." (1)

The device of protest fulfils, in fact, a twofold purpose; In the first instance the lack of protest on the part of other States may be interpreted as meaning that the States refraining from formulating reservations have accepted the situation as being in conformity with the existing law. In addition to this - and from the point of view of the formation of historic rights this aspect appears to be the decisive one - "absence of protest may ..... in itself become a source of legal right inasmuch as it is related to ..... estoppel or prescription." (2) Protest is, according to Lauterpacht, "an essential requirement of stability [which] prevents states from playing fast

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1) Drůel in 3 ASJG (1932) at p. 89.

2) Lauterpacht, Sovereignty over Submarine Areas, 27 BYIL (1950) p. 376 et seq. at p. 395.

and loose with situations affecting others." (1) The same author also points out that the relevance of the failure to protest is particularly conspicuous in the international sphere where "the normal avenues for ascertaining disputed rights through the compulsory jurisdiction of tribunals are not always available." (2)

The consensus of writers on this point is well reflected in international practice where the lack of protest is frequently resorted to as the proof of acquiescence. Thus, in the course of the proceedings in the Alaskan Boundary Dispute, Counsel for the United States contended that, had Britain believed her rights to be menaced, she would have protested rather than "permit a claim of this sort to go unchallenged and grow into a right or at least something by which a right can be perfected." (3)

Similarly, in the Printed Argument submitted by Venezuela in the Venezuela-British Guyana Boundary Arbitration, it was pointed out that "no holding by force, against the protest of the State whose territory has been seized, will ever ripen

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1) Ibid. at p. 396.

2) Ibid; see to the same effect Verykios, op.cit. at p. 99; see also Hyde, op.cit./vol.I. at p. 387 and Gidel, op.cit. vol.III, at p. 634.

3) Proceedings of the Alaskan Boundary Tribunal, vol. VII, p. 868.

into a title by prescription ..... There is no tribunal to which an injured State can appeal to recover the territory of which it has been deprived by force. Its maintained protest has the effect to arrest the maturing of her title ..."(1)

Commenting on the legal status of the Falkland Islands Dependencies, Waldock points out, in support of the British claim, that the Letters Patent issued formally in 1908, declaring the territories in question to be Dependencies of the Falkland Islands,"evoked no protest from any other State." (2)

Likewise, the absence of any protests on the part of Argentina and Chile against various British manifestations of sovereignty was invoked by the United Kingdom as a proof of these countries' recognition of British authority over the Falkland Islands Dependencies. Thus it was claimed that:

> "Argentina made no protests against the issue of the British Letters Patent of 1917. Nor did she make any protests or reservations against the promulgation of British Laws for the Dependencies nor against the applications of those laws to [an] Argentine company .... These facts establish beyond any question that ... Argentina recognised British sovereignty over the Dependencies." (3)

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1) Cmd. 9501 (1899) p. 45.

2) Waldock, in 25 BYIL (1948) p. 328.

3) ICJ, <u>Antarctica</u> cases, <u>Pleadings, Oral Arguments, Documents</u>, p. 23; similar considerations were relied upon regarding the presumed recognition by Chile of United Kingdom rights in the area in question;(ibid. pp. 63-64).

The purpose of diplomatic protest was stated by the Agent for the United Kingdom in his oral pleadings in the Fisheries case as being a registration of the fact that the protesting States "have not acquiesced and to prevent a prescriptive claim being built up against them." (1)

In the Minquiers and Ecrehos case Counsel for the United Kingdom observed that in general protest records "the opinion of the protesting State that the act protested against is invalid and is not acquiesced in." (2)

In the award rendered in the Chamizal Arbitration between the United States of America and Mexico the Commissioners rejected the American claim of the United States having acquired a title by possession over the Chamizal tract, since they found that "the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged [American] encroachment." (3)

Thus the absence of protest may be regarded as the corner-stone of the doctrine of acquiescence. It rests on the assumption that States will not remain silent when faced

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. IV, pp. 375-376.

2) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. I, p. 155.

3) 5 AJIL (1911) at p. 807.

with a situation likely to affect adversely their rights, if there is the slightest justification for any objection on their part. "Governments are not prone to understate their claims," says Judge McNair in his judgment in the <u>Fisheries</u> case. [1] They will usually give air to their grievances by the formulation and dispatch of a protest the purpose of which is to build up an almost instinctive defence mechanism designed to vitiate any possible interpretation of silence as acquiescence. Thus protest may be considered as the remedy resorted to by international law in order to prevent the excessive application of the principle "<u>quis tacet consentire videtur</u>" and the scope of the principle reflected in this maxim is buttressed by what Verykios terms "l'existence du mouvement instinctif de la protestation." [2]

In order to fulfil its role in the prevention of an historic title from maturing, a protest must comply with various requirements. The conditions for the validity of a protest will therefore be discussed presently.

(1) The conditions for the validity of a protest.

(a) The origins of the protest.

Protest has been defined by Oppenheim as "a formal

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1) ICJ Reports, 1951, p. 162.

2) Verykios, op.cit. at p. 26.

communication from one State to another that it objects to an act performed or contemplated by the latter." [1] The governmental origin of the protest - a requirement that has been clearly brought out in this definition - has found widespread support among writers who have devoted more than cursory attention to this problem. [2] It is common ground among these writers that a protest designed to serve the purpose of preservation of rights and of rebutting any presumption of acquiescence in certain acts or situations should emanate from or on behalf of the State the rights of which are purported to be safeguarded thereby. A protest which has not emanated from official and duly authorized sources and which has not been given at least subsequent ratification may turn out to have been lodged in vain. This principle was emphatically relied upon by the United States in the course of the Alaskan Boundary Dispute. During the proceedings of that case Great Britain referred to the so-called "Dawson letter" of 1884, which, she alleged, gave notice to the United States of the Canadian claims. The United States,

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1) Oppenheim, op.cit. at p. 874.

2) E.g. Erdel, loc.cit. at pp. 81-82; see also Rousseau, Principes Généraux du Droit International Public, 1944, vol. I. p. 144; see also Anzilotti, op.cit. at p. 349.

practice provides ample proof that Governments are aware of these advantages. Thus the British Foreign Secretary Canning, in a dispatch dated 8 December, 1824, explaining the reasons for Great Britain's protest against the Russian pretensions to dominion over vast areas of the Pacific, stated that the Russian Ukase of 1821 in which these pretensions had been raised for the first time "could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it ...... [A] private disavowal of a published claim is no security against the revival of that claim." (1)

(c) The nature and contents of the protest.

Protests are expected to indicate clearly the wrongs against which they are directed. States have been insistent that their position should not be affected by mere rumours and possible future eventualities. A diplomatic protest will usually indicate the reasons which prompted its initiators to believe that the acts which it is directed against run counter to the generally accepted rules of international law. Some States - and this practice has been consistently followed by the United States of America - would explicitly add that they reserve their rights as regards the point in issue. In view of the fact that it is the essence of a protest and its very

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1) Behring Sea Arbitration Case, Cmd. 6918 (1893) p. 46.

purpose to preserve such rights, this express stipulation appears to be superfluous. As a matter of course the rights in the defence of which a protest is made must in fact pertain to the protesting State, and a protest made in order to safeguard another State's rights will be normally devoid of any legal effect.

(d) The purpose of the protest.

The purpose of the protest has been already dealt with above at some length. Its aim is to make it known that the protesting State does not recognize the validity of the acts against which the protest is directed, does not condone them and does not acquiesce in the situation created or likely to be brought about by such acts. In G.F. Martens' view protests are designed "pour empêcher que des actes qu'on prévoit ne pouvoir éviter ne soient interprétés comme faisant preuve de consentement." (1) Rousseau states that "la protestation est une déclaration de la volonté de ne pas reconnaître comme légitime une prétention donnée, une conduite donnée, un état de choses donné." (2) Adopting

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1) See G.F. Martens, Précis du Droit des Gens Moderne (revised edition, of 1831), p. 175.

2) Rousseau, op.cit. vol.I. at p. 149; see also to the same effect Vattel, op.cit. book 2, chap. 11, para. 145; see also Fauchille, op.cit. vol. I, part II, p. 760 and Strupp, Eléments du Droit International Public, 2nd edition, 1930, vol. I, p. 260.

the same line of thought Sir Edward Grey, indicating the motive of the British protest against the Panama Canal Act of 1912, explained that the British Government "were unwilling to give ground for an assertion that their silence had been taken for consent." (1) The British Foreign Secretary Canning, likewise, resorted to a similar reasoning when he stressed, in a dispatch relating to the Russian Ukase of 1821 that:

> "we have seen in the course of this negotiation that the Russian claim .... rests in fact on no other ground than the presumed acquiescence of the nations of Europe ..... It becomes us to be exceedingly careful that we do not, by a similar neglect on the present occasion, allow a similar presumption to be raised as to an acquiescence in the Ukase of 1821." (2)

(2) Anticipatory protest.

It is generally agreed that States should not, as a rule, protest prior to the actual occurrence of the wrong alleged to have been done to them, i.e. before the objectionable measure has not been enforced against them or their nationals. However, there seems to be no express obligation to refrain from such a course of action. Thus States are known to have protested on the conclusion of treaties which

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1) Foreign Relations of The United States, 1912, (1919) p.470.

2) Cmd. 6918 (1893) p. 46.

they considered as likely to infringe their rights, (1) or even at an earlier stage, i.e. at the time when they acquired knowledge that the conclusion of such treaties was being contemplated. Similarly, States have also protested against legislative enactments of other States - whatever their names may be - which, if enforced, would, in the protesting State's opinion, prejudice its rights. (2) Instances are

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1) For authorities on this point see MacGibbon, in 30 BYIL (1953) p. 299, n.3.

2) Having regard to the views put forward in Section C, (2) and (3) above, where it was suggested that States are normally imputed with knowledge of each other's legislation, the lodging of protests at such an early stage would be expected to be the rule rather than the exception to it. The hesitancy of States on this point is explained by the fact that the delivery of protests is usually construed by the recipient State as an act of unfriendliness on the part of the protesting State and is therefore the subject of much pondering, especially if the chances of any practical result are slight. Moreover, the transfer of a latent international dispute into the limelight of international publicity frequently has the effect of driving the rival State into an entrenched position of marked intransigence and thus creates an atmosphere of mounting tension which is not favourable for the settlement of disputes. States will therefore normally postpone the delivery of protests as long as possible. These considerations of statesmanlike wisdom and practical expediency were recently voiced by the Lord Privy Seal in the House of Commons. Asked by Mr. William Yates, M.P. why he did not "send a strong Note" to Portugal because of her recent policies in Angola, Mr. Edward Heath replied: ".... When one is dealing with other countries and trying to influence their policy, sending strong Notes is not necessarily the way to do it." (Hansard [Commons] of 28 June, 1961, vol. 643, No. 136, col. 446).

also known where States protested against contemplated legislative measures of other States, pending their promulgation or during their enforcement. (1)

The practice of States on this topic was accurately summed up in the course of the proceedings in the Fisheries case, when the Agent for the United Kingdom stressed that:

> "Governments do often protest against Decrees ... even when they have not yet been enforced against their nationals." (2)

After citing various instances in which protest was made against acts of domestic legislation - prior to their enforcement - Counsel for the United Kingdom gave the reasons for lodging such anticipatory protests in the following words:

> "Sometimes a protest is made at once against a decree because of the potential threat of enforcement against the protesting State's own vessels .... Sometimes a protest is made at once simply to place on record objection to the claim and to reserve the rights of the protesting State; Sometimes a protest is made at once in the hope of modifying the views of the State." (3)

The relevance of protest as a vital criterion in the

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1) For references on this point see MacGibbon, ibid, at p.301.

2) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. IV, p. 375.

3) Ibid. at pp. 396-397.

assessment of other States' attitude towards an act of domestic legislation was also clearly borne out in the pleadings of Bourquin who - on behalf of Norway - observed that there had been an absence of protest on the part of international community against the 1935 Norwegian Decree. Bourquin commented on this lack of objection in the following words:

> "Si [les autres nations] avaient cru que le décret de 1935 portait attente à leurs droits, il est probable qu'elles seraient intervenues. Or, aucune d'elles n'a manifesté une véritable opposition." (1)

Bourquin, equally, registered the fact that the United Kingdom had, on previous instances, lodged protests with various Governments against the promulgation of laws which she regarded as objectionable, even though these protests had been made prior to the enforcement of the laws against British nationals or vessels and were aimed at the mere existence of those laws. Referring to the protests made against the unilateral extension of territorial waters by means of domestic legislation, Bourquin observed:

> "La protestation porte sur les dispositions mêmes qui ont ete édictées par ces Etats pour délimiter leurs mers adjacentes .... Mais l'objet de la protestation, c'est la délimitation elle même et ce ne sont pas du tout des actes d'exécution qui auraient été accomplis sur la

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1) Ibid. at p. 234.

"base de cette délimitation. Il n'y en a pas eu." (1)

In fact, the most conspicuous number of "anticipatory protests" has been forthcoming in respect of domestic legislation - taking sometimes the form of proclamations or decrees - purporting to extend by way of unilateral legislation the width of the area of marginal waters over which they claim sovereignty. Such unilateral pretensions of the extension of territorial waters have frequently met with the opposition of other States and have evoked numerous protests - even prior to their enforcement. (2)

(3) Protest as a bar to the acquisition of an historic title.

The question has been frequently raised whether protest in itself can constitute a bar to the growth of an historic title. The authorities on this point do not appear to be unanimous. There are indications to the effect that simple protest was regarded in some instances as a sufficient means for the prevention of an historic title from coming into being. Thus Andinet would maintain that a weak State might remain passive not because it acquiesced in the situation

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1) Ibid. at p. 241.

2) For a detailed list of such protests, see MacGibbon, loc. cit. at pp. 303-4.

which appeared to be detrimental to its interests, but "parce qu'il ne sera pas à même de soutenir au besoin ses réclamations par les armes." (1)

Later authorities, however, and particularly authors writing after the advent in 1919 of a permanent international machinery for the judicial settlement of international disputes, seem to have displayed a more cautious and reserved attitude on this point. From a perusal of these autho - rities it seems to emerge that a single and simple protest - which is not followed up by further action - cannot be regarded now as an adequate remedy for preventing indefinitely an historic title from maturing. Protest, according to the prevailing trend, will be sufficient only in those cases where the circumstances were such that a protest constituted the only feasible method for the assertion by a State of

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1) Audinot, loc.cit. at p. 322.

its rights. [1]

Protest alone will, however, not suffice in those cases - to which the overwhelming majority nowadays belongs - where the protesting State could be reasonably expected to take further steps in order to prove its seriousness, its good faith and its sincere intention to oppose the alleged encroachments upon its rights. Among such measures one might mention acts such as the severance of diplomatic relations, measures of retorsion, and the reference of the

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1) The role of protest as a bar to the acquisition of State rights was discussed also - in a somewhat different context - by the International Law Commission when it dealt with the draft articles relating to the continental shelf. At the fifth session of the Commission, its Secretary, Mr. Liang, raised the question whether "in view of the protests directed against [the various national shelf proclamations] by other governments .... those declarations reflected the practice of States .... The most that could be claimed was that they indicated a tendency." (Year book of the International Law Commission, 1953, fifth session, vol. I, p.86). Sir Hersch Lauterpacht, referring to this argument, did not basically challenge the role of protests in general in preventing the emergence of a practice, but confined himself to stating that "the protests entered by governments against the proclamations expressed opposition not to the claim that the continental shelf appertained to a certain coastal State, but to claims of rights over the superincumbent seas, which was a very different matter." (ibid. p. 88).

dispute to the United Nations or to the International Court of Justice.

The diminishing importance of protest as an obstacle to the acquisition of an historic title and its reduction to the status of a mere temporary bar, to be followed up by additional and more effective means, is warranted by the establishment in 1919 of the Permanent Court of International Justice and subsequently in 1945 of the International Court of Justice. According to Johnson, "the advent of this new machinery for settling international disputes has largely altered the role of protest ..... The result is that diplomatic protest is of reduced significance." (1)

However, this tendency has been partly offset by the conclusion of the General Treaty for the Renunciation of War, in conjunction with the provisions of Article 2 (4) of the Charter of the United Nations, which severely restricted the possibility of using force, or threatening the use of it, in international relations. The outcome of this development is that international tribunals can no longer insist, in addition to protest, on evidence of a readiness to support the protest by force or show of force.

1) Johnson in 27 BYIL (1950) p. 346.

The changing climate of international judicial opinion as regards the role of protest in preventing the acquisition of an historic title can be readily appraised by contrasting decisions rendered by international tribunals before 1919 and after that date, respectively.

In the award delivered in 1911 in the Chamizal Arbitration the Commissioners observed that Mexico had, in fact, succeeded in preventing the United States from perfecting a territorial title to the Chamizal tract by consistently protesting against repeated American encroachments on the said territory. The Commissioners felt that Mexico "had done all that could reasonably be required of it by way of protest against the alleged encroachment." (1)

Dismissing the suggestion according to which Mexico should have followed up her protests by more drastical steps, the Commissioners took the view that "however much the Mexicans may have desired to take physical possession of the district [of El Chamizal], the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic

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1) 5 AJIL (1911) at p. 807. (Italics added).

correspondence." (1)

The award rendered in the Chamizal Arbitration case was invoked by France in the course of her pleadings in the Minquiers and Ecrehos case. The French contention was that sporadic French protests against various manifestations of British sovereignty over the disputed islets were sufficient and adequate means to keep alive the alleged French rights over the Minquiers and Ecrehos. Judge Levi Carneiro in his dissenting judgment dismissed this French argument in the following words:

> "The French Government has referred to the arbitral award in the Chamizal Case .... This award was made in 1911 and relates to facts in the period of 1848-1895. At that time there was no international court .... But such a tribunal has now been created and has existed for many years. Why did France not at least propose that the dispute should be referred to this tribunal, as England has done, after more than half a century of intermittent and fruitless discussion? The failure to make such a proposal deprives the claim of much of its force; it may even render it obsolete .... I consider that the action of the Court might easily be restricted or even nullified if disputes were allowed to be prolonged indefinitely

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1) Ibid; a similar note was struck in the Printed Argument submitted by Venezuela in the course of the proceedings in the Venezuela-British Guyana Boundary Arbitration, where it was stated that "Venezuela's claims and her protests against alleged British usurpation have been constant and emphatic and have been enforced by all means practicable for a weak power to emply in its dealings with a strong one, event to the rupture of diplomatic relations." (see Cmd. 9501 [1899] p. 45).

> "without good reason and if an attempt were not made to obtain the Court's decisive intervention but preference was given to mere periodical and ineffectual paper protests. This state of affairs would be incompatible with the régime under which the rights of each State would be specified and guaranteed." (1)

Thus doctrine and practice alike seem to support the view that ever since 1919, having regard to the availability of permanent international tribunals, a mere protest appears to amount to no more than a temporary bar to the formation of historic rights.

In order to preserve alleged rights, protests must be followed up by some evidence of positive initiative intended to bring about the settlement of the dispute in question by utilising all proper and available means which are recognised by international law for this purpose. These means

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1) ICJ Reports, 1953, at pp. 107-108. The same view was also clearly reflected in the United Kingdom Reply in the Fisheries case where it was asserted that "a diplomatic protest is by itself effective to manifest the objection of the protesting State and for a certain period reserve its rights ..... A State which contents itself with paper protests and does not use the available means of pressing its objections may after a certain lapse of time be debarred from further questioning what has become part of the established legal order. (ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p. 654). For further authorities to the same effect see ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p. 656 and p. 678; see also the Reply of the United Kingdom in the Corfu Channel case, ICJ, Pleadings, Oral Arguments, Documents, vol. II, p. 277; see also ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol.I, p. 554.

will usually comprise the active prosecution of the objection through diplomatic negotiations, the arrangement of some kind of _modus vivendi_, or the seeking of a solution by enquiry, mediation or conciliation. The dispute may also be referred to the United Nations General Assembly or to the Security Council, in accordance with the provisions contained in Chapter VI, Articles 33-37, of the United Nations Charter, laying down the rules for the pacific settlement of disputes.

All the attempts for the settlement of the dispute on the diplomatic and political level having failed, the matter may be referred to international arbitration or to the International Court of Justice.

If both parties to the dispute are signatories to the "Optional Clause" (Article 36(2) of the Statute of the International Court of Justice), or to any treaty which makes adjudication before the Court compulsory for them (in accordance with the provisions of Article 36(1) of the Statute), proceedings may be instituted by unilateral application. Where, however, the parties, or one of them, have not submitted to the Court's compulsory jurisdiction, such proceedings will be normally instituted by a special agreement (_compromis_).

There exists also the basis for a unilateral arraignment of a State before the Court in cases where the respondent is

not subject to the Court's jurisdiction, neither by virtue of the "Optional Clause", nor of any other treaty provision, nor of any special agreement. In such cases the respondent will be entitled to accept, or reject, the jurisdiction of the Court after the proceedings have been formally instituted, in accordance with the provisions of Article 40(1) of the Statute of the Court. (1)

There are, however, certain situations in which the general trend of the constantly diminishing significance of diplomatic protest has been - if not outweighed - at least slowed down by a wide range of exceptional circumstances, some of which would appear to deserve further consideration. As has been pointed out by Lauterpacht - rightly, it is believed - protest is still the only appropriate, and consequently an adequate, course of action in all those cases "where the normal avenues for ascertaining disputed rights

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1) See e.g. the proceedings in the Antarctica cases, where the United Kingdom unilaterally instituted proceedings against Argentine and Chile. (ICJ, Antarctica cases, Pleadings, Oral Arguments, Documents, pp. 35-37 and pp. 72-74); both Argentine and Chile having rejected the British offer for the judicial settlement of these disputes, contained in the United Kingdom applications, the International Court of Justice duly declared its lack of jurisdiction on this matter. (see ICJ Reports, 1956, pp. 12-17); as to a more detailed analysis of the legal implications on this point see Rosenne, The International Court of Justice, 1957, pp. 258 and 295.

through the compulsory jurisdiction of tribunals are not .... available." (1) The distinguished writer apparently alludes to those cases in which States, which are not bound by any commitment of obligatory judicial or arbitral settlement, refuse to submit voluntarily to international adjudication. As a further instance in which protest may be regarded as a proper and sufficient way of objection to any exceptional territorial claims or pretensions, Lauterpacht mentions the case where a legislative or administrative measure was adopted in the form of a proclamation of intention and assertion of a right, without being followed up by any actual attempt of enforcing such assertion by the application of the law in question. Lauterpacht expresses the view that "until an injury has actually occurred, it is probable that no judicial remedy will lie." (2) Similar considerations will apply to those cases in which the remedy of appealing to a political agency such as the United Nations is not available, because, according to its constitution, "the controversy is not of sufficient importanse in terms of preservation of international peace to warrant action .... in relation to the subject-matter of the dispute." (3)

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1) Lauterpacht in 27 BYIL (1950) p. 396.

2) Ibid.

3) Ibid.

In such cases a protest, which was promptly presented and subsequently maintained, would suffice to reserve the rights of the protesting State, at least until an attempt is made to enforce the legislation. This appears to have been the situation envisaged by Counsel for the United Kingdom in the course of the oral arguments in the Minquiers and Ecrehos case when he remarked that the type of action taken by the protesting State ought to be related to the type of acts ... against which objection has been raised and that sometimes a mere protest might be adequate to nullify claims of minor significance. (1)

The same argument had been advanced by the Agent for the United Kingdom in the Fisheries case where he suggested that:

> "the decree made by a State is only one aspect of the matter. The other and equally important aspect is the attitude of other States towards the Decree and in particular .... to its enforcement against their nationals or vessels ..... The paper protest is at least as important as the paper decree .... For the Court, as evidence of the practice of States .... protests are every bit as valuable evidence as the text of [a] decree." (2)

A protest will likewise be held to be sufficient in

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1) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. II, p. 367.

2) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. IV, p. 37.

situations of recent origin; in cases where the consolidating time factor is lacking, protest may be regarded as a sufficient and proper means for the preservation of the rights of the protesting State. Bourquin, pleading on behalf of Norway in the Fisheries case, seems to have given expression to this train of thought when he suggested that:

> "nous sommes également d'accord avec le Gouvernement britannique pour admettre que, si une prétention nouvelle est formulée par un Etat, cette prétention n'est pas opposable à un autre Etat qui dès le début, et d'une manière non équivoque, y aurait fait opposition. Une opposition même isolée suffirait en pareil cas pour préserver les droits de l'opposant, parce qu'il s'agit d'une prétention nouvelle et sur laquelle, par conséquent, l'action du temps n'a pas encore pu produire ses effets." (1)

Subject to the foregoing qualifications protest alone will, as a rule, not be sufficient to constitute a bar for the perfection of an historic title, unless it is followed up and supported by other appropriate and available remedies which are aimed at preventing such title from coming into being.

It is felt that this analysis may be fittingly closed with a passage written by Verykios in 1934, where the author seems to have summed up the legal position on this point in a manner which still holds good after the lapse of a quarter

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1) Ibid. at p. 308.

of a century. Commenting on the significance of protest in the assertion of rights by States, Verykios wrote:

> "Mais une protestation pure et simple par voie diplomatique suffit-elle a interrompre la prescription? En principe oui, mais il faut pour cela que la protestation sera suivie d'une contestation et d'un reglement de la question; sinon on a vu qu'un Etat pourra protester indéfiniment, s'il le fait sans résultat il ne pourra interrompre l'effet du temps." (1)

(4) The repetition of protest.

A question frequently arising in this connection is whether a repetition of a protest may be considered as an appropriate measure to prevent the perfection of an historic title, thus taking the place of other remedies which have been enumerated above. In MacGibbon's view "scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights." (2) He further asserts that "increased weight will be attached to the cumulative effect of protests which have been persistently reiterated." (3) The reason given for this assertion is that "failure to

1) Verykios, op.cit. at p. 101.

2) MacGibbon in 30 BYIL (1953) at p. 310.

3) Ibid, n.1.

supplement the initial expression of disapproval will not unreasonably give rise to the presumption either that .... opposition could not be supported by any show of legal right, or that, even if able to protest on the basis of a claim of right, [the State affected] was for some reason indifferent to the outcome." (1)

No doubt, a protest will lose much of its force and value once it is not supported by any other action at the time when the practice, against which the original protest was lodged, is being repeated. While it is generally admitted that a protest is necessary to constitute a temporary bar to the perfection of an historic title, this by no means indicates that such protest - even if repeated - will be sufficient to keep alive indefinitely the alleged rights of the protesting State.

Considerable doubt also persists as to the precise length of time during which the effectiveness of a protest lasts. The matter is of course without complications whenever a subsequent recognition of the claim against which objection was raised is forthcoming, as "les effets de la protestation cessent si l'Etat reconnait les prétensions ou les faits contre lesquels il avait protesté." (2) The

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1) Ibid.

2) Anzilotti, op.cit. at p. 349.

solution of this problem is, however, much more complex in those cases - and they are the typical cases of establishing an historic title - where no express recognition has been forthcoming, but acquiescence has to be inferred from all the surrounding circumstances. Thus the question has to be left open and must be dealt with specifically in each case, having regard to its particular circumstances.

It is, however, worth noting that, in the course of the oral proceedings in the _Fisheries_ case, it was suggested on behalf of Norway that the oral protest of the German Government against the Norwegian Decree of 1935, purporting to extend Norwegian territorial waters as a result of the enforcement of the Norwegian method of delimitation by base-lines, was devoid of any probative value, because "cette communication est restée sans effet et elle n'a été suivie d'aucune autre démarche. Après avoir fait ce geste, le Gouvernement allemand s'est abstenu d'en tirer la moindre conséquence." (1)

In an earlier stage of the proceedings it had been pointed out in the Norwegian Rejoinder that the French pro-test of 1870 against the principles contained in the Norwegian Decree of 1869 relating to the application of the

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1) ICJ, _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. IV, p. 234.

"Norwegian system" could not be regarded as a bar to the formation of exceptional rights by Norway, since France did not prosecute her objection further and the matter was allowed to drop. (1)

The Court in its judgment, while not pronouncing explicitly on this question, seems to have upheld by impli - cation the Norwegian contention, since it concluded that the Norwegian system "was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States." (2)

Thus this issue may be summed up by stating that a single diplomatic protest will not of itself prevent in-definitely the formation of an historic title, unless it is followed up by more effective measures of contestation. Protests which will not be supported in this manner will, as a rule, lose their force.

(5) The relevance of the protest of a single State.

It is felt that at this juncture reference ought to be made to the question of the effect of the protest of a single State on the formation of an historic title. This question

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1) Ibid. vol. III, pp. 481-484.

2) ICJ Reports, 1951, pp. 136-137 (Italics added).

is of negligible importance as long as one is faced with claims relating to an historic title to land territory, since the number of States affected, or likely to be affected, by such a claim is relatively small; it gains, however, considerably in significance when related to questions attendant upon the acquisition of a maritime historic title, since such a title - being acquired at the expense of the international community as a whole - is a matter for all of its member States. The question, therefore, arises whether a protest, emanating from one State or from a small number of States in circumstances where the rights of the international community as such are at stake, may be regarded as a sufficient measure to prevent the acquisition of a maritime historic title, in spite of the silence observed by the majority of States.

In approaching this problem, a proper distinction should be drawn between two basically different situations:

(i) the protest is made against a practice or a situation which has at this stage already become part and parcel of the international legal order;

(ii) the protesting State wishes to signify its objection to a <u>new</u> practice or situation while such practice or situation are still in their formative period and prior to their having become binding rules of international law.

It would appear that the protest of a single State will not be deemed sufficient to invalidate and nullify a practice which has been repeatedly resorted to and acquiesced in by other States to such an extent that "the conviction is generally prevalent that that practice has become part of the established legal order." [1] A State which has limited its objections to the raising of protests - without utilizing other available means - will have lost, in the face of international acquiescence, those rights which its protests are intended to preserve.

If, however, a State has vigorously and unambiguously opposed a new practice or situation from its inception and from the moment this practice or situation - otherwise derogatory to the prevailing international legal order - were taking shape, supporting and fortifying its initial objection by all other means and measures legally available on the international plane, then it can be hardly presumed that such a State will forfeit its rights merely as a result of other States' inactivity in the face of a new situation. In such circumstances the presumption of acquiescence, on which the acquisition of an historic title depends, will be rebutted by the facts themselves pointing

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1) MacGibbon in 30 BYIL (1953) p. 317.

towards the protesting State's lack of acquiescence in the new situation.

This fundamental distinction seems to account for the divergence of opinion which arose in the *Fisheries* case as to the relevance of the protest of a single State. Throughout the proceedings there seems to have persisted a disagreement between the parties to the dispute as to the legal effects of such a protest. Both parties to the dispute were at one in conceding that a State which has acquired certain rights will not lose them as a result of a change that has occurred in the appropriate rules of international law, provided that the State in question has unambiguously dissociated itself from the new rule from its period of gestation and initiation. However, Great Britain and Norway parted company once faced with the question of the acquisition of maritime historic rights. The United Kingdom maintained that any historic title must be regarded as an exception, derogatory to the generally accepted rules of international law, and will be recognized only if it can be proved that this exceptional claim has met with the tacit approval of other States. According to the United Kingdom Reply in the *Fisheries* case "the protest of a single State ..... is effective to prevent the establishment of a ..... title precisely to the extent that the State takes all necessary and reasonable steps to prosecute all available means of

redressing the infringement of its rights." (1)

The Norwegian Rejoinder does not basically challenge this concept, but expounds a somewhat different notion of historic titles. In Norway's view historic titles are not a departure from an otherwise applicable norm of international law; it is rather the generally accepted rules of international law that should be regarded as a deviation from formerly binding rules of international law. Historic titles are in fact, in the view of the Norwegian Government, the remainders of an earlier legal regime governing the seas and their validity has not to be based on any modern mode of acquisition. They derive their validity from the fact that these rights, although exceptional nowadays, were from time immemorial belonging to the claimant States and have never been relinquished by them. In the words of the Norwegian Rejoinder itself:

> ""Le Gouvernement norvégien ne croit pas nécessaire de discuter la question de savoir dans quelle mesure des parties de haute mer peuvent être incorporées au territoire maritime de l'Etat en vertu d'un titre historique, parce que la question ne se pose pas en l'espèce. Elle ne se poserait que si les règles générales que le Gouvernement britannique prétend applicables à la détermination du territoire maritime étaient réellement en vigueur. Or, le Gouvernement norvégien a

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol.II, p. 654.

"démontré qu'elles ne le sont pas; qu'elles n'ont jamais acquis la consistance de règles coutumières; et qu'elles ne sont certainement opposables à la Norvège, celle-ci s'étant toujours refusée, d'une manière non équivoque à abandonner son système traditionnel pour se soumettre aux règles en question." (1)

However, it is at least debatable whether a single State's constant and unambiguous protest against a novel practice can render this practice invalid indefinitely in respect of the protesting State in spite of the acceptance of such practice by the rest of the international community. The United Kingdom appears to have been at one with Norway on this point in the Fisheries case and asserted that a State signifying its unmistakable disapproval of a new practice from the time of its inception may thereby be left unaffected by the emergence of the new rule and its incorporation into the international legal order. In his pleadings before the International Court of Justice in the course of the oral proceedings in the Fisheries case the then Attorney General, Sir Frank Soskice, agreed that "a State with established rights does not lose its rights by reason of a change in the customary law if it has unambiguously and persistently manifested its dissent from the new customary

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1) Ibid, vol. III, pp. 461-462; see also to the same effect ibid, at pp. 442-443.

law." (1) It is, however, more controversial whether such an exceptional title is valid _erga omnes_ or only against States which have either expressly assented to or at least tacitly acquiesced in it.

Nor can protests coming from different States be always put on the same plane. It will be unrealistic to attach the same weight to a protest emanating from a remote country which is not directly affected by the practice against which the protest is directed as to a protest lodged by a State which in fact bears the brunt of the departure from the normally applicable rules of international law. Gidel seems to echo these considerations when he argues that:

> "les contestations ne peuvent .... être placées toutes sur la même plain, sans distinction de leur nature, de la situation géographique ou autre de l'Etat dont elles émanent." (2)

Thus, in Gidel's view, which on this point truly reflects the general consensus of opinion, protests should be distinguished according to their nature and to the geographical situation of the protesting State in relation to

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1) Ibid. vol. IV. at p. 136; see, however, Gidel who maintains that "une seule protestation émanant d'un seul Etat ne saurait infirmer un usage." (see Gidel, op.cit. vol. III, p. 634).

2) Gidel, op.cit. vol. III, p. 634.

the disputed area. The geographical propinquity of the protesting State, its interests in the area to which the protest makes reference, its position within the international community, these and other factors are of considerable significance in determining what weight should be attached to a protest made by that State. Each protest must be viewed against the background of the situation which gave rise to it and having regard to the specific circumstances of each case. No rigid rule can be laid down in this respect. To illustrate this point it may be suggested that a protest raised by the main maritime Powers of the world will be sufficient to prevent a new maritime practice from being recognised as a rule of international law, even though the numerical majority of the maritime States may have given their assent to this practice. Conversely, the acquiescence of these comparatively few main maritime Powers may set the seal of legal validity on a new maritime practice, although this practice may have met with the opposition of a considerable number of other States, whose part, however, in the shaping of the patterns of international maritime behaviour is inferior to that of the great sea-going nations.

(6) Lack of protest does not always indicate acquiescence.

In one of the foregoing sections reference was made to the plea of excusable ignorance, and it was submitted that, in those cases where it can be proved that a genuine and justifiable ignorance was the reason for the absence of objection on the part of the State adversely affected by the new practice, the mere fact of silence could not be regarded as proof of acquiescence.

For the sake of completeness it should be added at this stage that there exist other circumstances where such inference of acquiescence based on mere silence would be improper and unjustified. This applies to all those cases where the settlement of the question in dispute has been expressly and deliberately left open by the contesting parties with a view to preserving their original rights pending their search for a final settlement. This point was clearly brought out in the dissenting opinion delivered by Judge Read in the Fisheries case when he pointed out that the 1912 Report of the Norwegian Royal Commission appointed to investigate the problems relating to Norwegian maritime territorial limits was meant to constitute a draft modus vivendi to be enforced pending the negotiations with Great Britain. Judge Read expressed the view that:

> "by its very nature, a _modus vivendi_ implies the reservation and preservation of the legal positions of both parties to the controversy ...... I think that the British Government was justified in regarding all aspects of the negotiations ..... as covered by the basic reservation. The omission to make a specific reservation or objection at this stage cannot possibly be treated as proof of acquiescence in or acceptance of the Norwegian system." (1)

Judge Read's words seem to indicate that, in circumstances where it can be proved that the parties had in fact reserved their rights, the silence of one of them pending a permanent settlement of the dispute cannot be held out against it as amounting to acquiescence in the other party's alleged rights and cannot adversely affect the rights which it had hitherto claimed to exercise as of right.

The same principle seems to have underlied also the judgment rendered by the International Court of Justice in the case concerning the _Rights of United States Nationals in Morocco_, where the Court found that the lack of objection by Morocco to the exercise by the United States of consular jurisdiction over a period of many years could not be regarded as a tacit consent or recognition of the United States' right to do so, because during the relevant period negotiations were going on between the parties with a view to renouncing, amongst other matters, the exceptional capitulatory rights

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1) ICJ Reports, 1951, p. 203. (Italics added).

exercised by the United States. [1]

Likewise, in the British Argument in the _Alaskan Boundary Dispute_ it was asserted that "it was impossible to say that anything that was done so long as this question remained open ..... could come within any possible doctrine of acquiescence." [2]

Apart from such exceptional circumstances, however, it will be proper and permissible to draw an inference of acquiescence from a State's silence when faced with a situation that imperatively calls for reaction on the part of any State wishing to signify its objection to a new practice or situation.

IV. The geographical element in the formation of an historic title.

There is little doubt that geographical considerations determine to a very large extent the question whether or not certain acts performed over a given territory may be properly regarded as adequate manifestations of territorial

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1) ICJ Reports, 1952, pp. 200-201; see, however, the dissenting opinion of four of the judges, in which France's silence was construed as her acquiescence in American rights.

2) _Proceedings of the Alaskan Boundary Tribunal_, vol. VII, p. 715.

sovereignty over that territory. As will be recalled, the degree of effectiveness displayed by a State discharging its sovereign authority over a given territory varies from case to case according to circumstances, and one of the primary considerations to be taken into account is, no doubt, the geographical factor and the specific geographical character of the area to which an exceptional claim is being laid.

There exists, however, in international law a trend which conceives the "geographical factor" in the formation of an historic title as a concept of much wider scope. It is alleged by the supporters of this concept that in the growth of an historic title the geographical factor assumes an independent role, and it is asserted by them that a unique geographical situation, displaying exceptional geographical features, is in itself a sufficient ground for claiming an historic title regardless of whether there exists any evidence of the claimant State having manifested its pur - ported sovereignty in any manner.

It is therefore proposed to turn now to a closer investigation of the function of the geographical factor in the formation of an historic title and to an examination of the question whether a peculiar and exceptional territorial configuration, real or imaginary, can in itself give rise to exceptional territorial rights which would not have existed otherwise.

The acuteness of this problem became evident in the course of the deliberations in the _Fisheries_ case. There Norway appears to have asserted that geographical considerations _per se_ - in conjunction with political, economic and security considerations or without them - can sufficiently warrant the establishment of an historic title, irrespective of the existence of any manifestations of the claimant State's sovereignty and of other States' acquiescence in such claims. It was thus contended in the Norwegian Counter-Memorial in the _Fisheries_ case that the Norwegian method of delimiting territorial waters was not an arbitrary innovation of Norway, but constituted a natural consequence of the peculiar and unique geographical configuration of the Norwegian coast which was described in the Counter-Memorial in the following words:

> "Il serait difficile de trouver dans le monde entier une région, ou l'interpénétration de la mer et de la terre fût plus étroite et plus inextricable. Le dessin tourmenté de la bordure continentale et du 'skjaergaard', la multitude des îles, des îlots, des récifs qui parsèment la mer adjacente, donnent à cet ensemble une unité qu'on ne pourrait juridiquement briser qu'en fermant les yeux à la réalité." (1)

On these grounds the Norwegian Counter-Memorial maintained that "la géographie fait de ces eaux l'accessoire

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1) ICJ, _Fisheries_ case, _Pleadings, Oral Arguments, Documents_, vol. I, p. 571.

> "de la terre, les rattache au domaine de la Norvège, les soumet logiquement à la souveraineté du pays." (1)

Here clearly geography was invoked as the source and legal basis of an exceptional territorial title and it was contended that geography as such sufficed for the formation of an historic title.

The Norwegian concept was vigorously challenged in the United Kingdom's Reply in which the accuracy of both the factual and legal arguments contained in the Norwegian Counter-Memorial was called into question. The United Kingdom Government did not basically contest the relevance of geographical considerations in determining the territorial rights of States. Nor did it dispute the fact that the peculiar geographical configuration of the Norwegian coast entitled Norway to treat substantial areas of sea adjacent to her coast as internal waters in view of the generally accepted principle that an unusual configuration of the land (e.g. a continuous line of land enclosing the sea, or a line consisting of broken island fringes creating the same effect) may bring bodies of water within the territory of a State. The United Kingdom went as far as to

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1) Ibid.

concede that "these particular configurations are relevant in determining whether or not a Norwegian title to areas beyond the limits allowed under the general rules has been established as an exceptional territorial title." (1) Exception was, however, taken to the Norwegian contention according to which a particular geographical configuration will of itself be sufficient to serve as the basis and legal foundation of an historic title, irrespective of any manifestations of authority by the claimant State and other States' acquiescence in such an exceptional claim. The scope and function of the geographical factor, in the United Kingdom's submission, is not to found an historic title, but to strengthen, alongside other considerations of equal importance, the presumption of other States' acquiescence in such an exceptional claim. Thus the geographical factor also is relevant precisely to the extent to which an inference of such acquiescence may be drawn from it. The more unusual and peculiar the geographical configuration - the stronger the presumption of such an acquiescence. In the words of the United Kingdom Reply:

> "An exceptional title can be founded on the acquiescence of other States and it is where the configuration of the land tends to

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1) Ibid. vol. II, p. 660.

"enclose areas of sea that the acquiescence of other States in a larger claim may more readily be inferred from the absence of any reaction to the claim." (1)

The Court in its judgment did refer to the unusual geographical configuration of the Norwegian coast as one of the reasons prompting it to decide the case in favour of Norway. It is, however, not clear what exactly was the role assigned by the Court to the geographical factor in the formation of an historic title and how heavily it weighed with the Court in arriving at its final conclusions. The Court commented on the geographical peculiarities of the Norwegian coast in the following words:

"Another fundamental consideration of particular importance in this case is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast the geographical configuration of which is as unusual as that of Norway." (2)

From the above quoted passage of the Court's judgment it seems to emerge that the Court relied upon the geographical

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1) Ibid.

2) ICJ Reports, 1951, p. 133.

factor as only <u>one</u> of the considerations meant to strengthen the presumption of acquiescence on the part of other States in Norway's exceptional claim. This becomes abundantly clear in view of the fact, that in a later passage of the judgment the Court poses the question - which is the really decisive one from the legal point of view - "whether the application of the Norwegian system encountered any opposition from foreign States." (1) It is not unreasonable to assume that the Court would not have proceeded to the investigation of this matter had it adopted the Norwegian contention according to which the geographical configuration in itself - without other States' acquiescence - might suffice for the acquisition of an historic title.

Thus it may be safely maintained that while geographical considerations - alongside a variety of other considerations - may influence other States' attitude in determining whether and to what extent they ought to acquiesce in an exceptional claim, it is not the particular geographical configuration <u>per se</u>, but the acquiescence of other States that sets the seal of legal validity on such a claim.

No excessive significance should be therefore attached to the geographical factor in assessing the value of claims

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1) Ibid. at p. 138.

put up by different States. In the nature of things, States tend to overemphasize the uniqueness of their geographical configuration with the intent to justify thereby exceptional claims going beyond the generally accepted rules of international law. A striking illustration of this tendency is the line of argument adopted by Norway in the Fisheries case, which has already been referred to in this section; throughout her pleadings Norway endeavoured to create the impression that the geographical configuration of the Norwegian coast was unique to such an extent that the generally applicable rules relating to the delimitation of territorial waters could not be invoked in respect of the Norwegian coast, which, owing to its alleged peculiarities, merited the peculiar "Norwegian system" of delimitation. As has been already shown above, the majority judgment of the Court did not justify the Norwegian method by relying on the exceptional geographical configuration of the Norwegian coast, but preferred to rely on the acquiescence and toleration of the international community. The Norwegian line of argument did, however, evoke the vigorous opposition of the two dissenting judges both of whom had some unusually strong words for the rejection of the Norwegian contention. Judge McNair expressed the view that:

> "Norway has no monopoly of indentations or even of skerries .... there are many countries in

> "the world possessing areas of heavily indented coast-line ...... The coast of Canada is heavily indented in almost every part. Nearly the whole of the coast of Scotland and much of the west coast of Northern Ireland is heavily indented and bears much resemblance to the Norwegian coast." (1)

Judge Read in his dissenting judgment echoes the same view, adding a warning which, it is felt, is well worth being reproduced here word for word:

> "There could be no greater danger to the structure of international law than to disregard the general rules of positive law and to base a decision on the real or imaginary exceptional character or uniqueness of the case under consideration." (2)

The geographical factor in the formation of an historic title should not be confounded with the concept of contiguity which in the not too distant past used to be regarded as a valid title to territory. The doctrine of contiguity was usually invoked with regard to islands close to the shores of the mainland; the littoral State would in such cases assert that the islands too formed part of its territory by virtue of their geographical proximity. The theory of contiguity has been also invoked on occasions to support territorial claims over groups of islands which - so the argument runs - comprise a unit and the fate of the main

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1) Ibid. at p. 169.

2) Ibid. at p. 193.

island or islands of such a group should therefore determine the fate of the rest.

The concept of acquiring a territorial title by means of geographical contiguity has, however, been discarded in recent times. Judge Huber, in the Island of Palmas Arbitration, categorically denied the existence of such a rule in contemporary international law stating that:

> "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same States have on different occasions maintained contradictory opinions as to its soundness; ..... this ..... principle is lacking in precision and would in its application lead to arbitrary results." (1)

Commenting further on the question of contiguity with regard to groups of islands (or archipelagoes), Judge Huber pointed out that, while the act of first taking possession can hardly extend to every portion of territory, the display of sovereignty as a continuous and prolonged manifestation must make itself felt through the whole territory and the

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1) UNRIAA, vol. II, pp. 854-855. (Italics in original).

exercise of authority over certain portions would of itself not warrant a claim to the whole territory on the basis of contiguity. (1)

In rejecting the American claim which was founded, _inter alia_, on a title arising out of contiguity, the Arbitrator held that "the title of contiguity, understood as a basis of territorial sovereignty, had no foundation in international law." (2)

In a paper read in 1950 before the Grotius Society, Waldock took the view that these doctrines of contiguity, continuity or unity of territory "were seen to be merely pretexts for attempts to pre-empt the sovereignty of large areas which the States concerned were not yet in a position to acquire by effective occupation ..... Geographical proximity and other geographical considerations certainly have some relevance in determining the precise limits covered by an effective occupation .... But contiguity is not a title." (3)

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1) Ibid. at p. 855.

2) Ibid; as to the application of this notion to the doctrine of the continental shelf, see chapter 6, section IX below.

3) Waldock, _Legal Claims to the Continental Shelf_, in _Grotius Transactions_ for 1950, vol. 26, p. 115, at p. 120. As to the application ... of this principle to the "sector claims" relating to the territories bordering on Polar districts, see Waldock in 25 BYIL (1948) pp. 337-346 where this writer asserts that inasmuch as these claims are based on notions of "proximity" or "contiguity" they have no validity in law, because "proximity has been not .... a legal principle independent of effective occupation but .... a fact indicating the extent of an effective occupation." (ibid. at p. 344).

V. The role of "legitimate interests" in the formation of an historic title.

Closely resembling the concept which attaches primary importance to the geographical element in the formation of an historic title is the doctrine of "legitimate interests" (or "vital interests"). According to this theory the "legitimate" interests of the claimant State should be reckoned as a sufficient basis for the acquisition of an exceptional territorial title. The supporters of this concept assert that a State may acquire a valid title to territory solely on the ground that the acquisition of such exceptional territorial rights is deemed essential by the claimant State for safeguarding its legitimate interests. Here again, as in the case of exceptional territorial claims based on an allegedly unique and unusual geographical configuration, one is faced with the difficulty that it will invariably be the claimant State itself which will determine - unilaterally and arbitrarily - the nature and extent of its "legitimate" interests. This situation is of course symptomatic of the present structure of international society and of the immense diversity of international situations which renders the laying down of universally applicable standards in this field a formidable and virtually insurmountable task. It is not denied that the recognized interests of a State,

its paramount interests in the field of economy, national defence etc. do in fact play - and rightly so - an important part in the considerations of other States who are con - fronted with the question whether or not to recognize an exceptional territorial claim, raised by a member of the international society. But as in the case of the geographi-cal factor, here again, it is not the "legitimate interests" per se, as interpreted by the claimant State, but the recog-nition of these interests by other States and their acquies-cence in the exceptional claim that sanction and validate such a claim from the legal viewpoint.

The close relationship existing between the geographi - cal factor and the "legitimate interests" springs from the fact that it is usually a particular geographical configu - ration which lies at the root of particular State interests, such as the interests of national economy and self-defence. A State with an unusual geographical configuration like that of Norway will find more easily an attentive ear when it asserts that, because of its traditional dependence on fishing as the main source of livelihood for a fairly high percentage of its population, its primordial interests may be adversely affected by the application to its coasts of the general rules of customary international law regulating the regime of territorial waters.

Similarly, a State the territory of which encloses a

bay almost completely, as is the case with Chesapeake Bay, which is almost entirely surrounded by United States territory, will in all likelihood have the approval of foreign States in its assertion that its interests may be severely prejudiced by treating such a bay as part of the high seas.

It is, however, one thing to claim that "legitimate interests" of themselves can sanction an exceptional territorial claim going beyond what is generally accepted to be international law; it is quite another thing to maintain that "legitimate interests" may and should be taken into account in assessing the validity of a State's exceptional claim, not as the legal basis for such an exceptional claim but as evidence for the degree of recognition that such a claim has been granted by the international community. For it is the acceptance of such claims by the members of the international society that transforms a mere national pretension into an historic title valid under international law.

A conspicuous body of States - among which the countries of the Latin-American continent are prominent - have in recent decades advanced the claim that "vital" interests should be regarded as a sufficient ground for the recognition by the international community of exceptional territorial claims, in derogation of the normally applicable rules of international law. This phenomenon is explained by the fact that these comparatively "new" States - most of which came

into existence only in the nineteenth century - cannot invoke history - or, in other words, a practice sanctioned by the passage of time - in support of their exceptional territorial claims. Consequently these States find themselves at a disadvantage as compared with the "old" European States which are usually capable of tracing back their political history for many centuries. The South-American concept assigning "vital" interests a major role in the formation of an historic title was already foreshadowed in the dissenting opinion of Drago in the *North Atlantic Fisheries* Arbitration of 1910 between Great Britain and the United States where he observed that certain bays "undoubtedly belong to the littoral country ..... when such country has asserted its sovereignty over them and particular circumstances such as geographical configuration, immemorial usage and *above all, the requirements of self-defence* justify such a pretension." (1)

This passage of Judge Drago's dissenting opinion, and in particular the italicized portion thereof, have been frequently referred to as indicating a recognition on his part of the "vital interests" of the claimant State as the legal basis for an historic title. It would appear, however, that

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1) Scott, *Hague Court Reports*, 1st series, 1916, pp. 199-200 (Italics added).

a closer perusal of Judge Drago's words does not warrant such a sweeping conclusion, since he apparently did not consider the interests of self-defence of themselves as justifying an exceptional title - although he was prepared to accord to them, among the factors instrumental in the shaping of an historic title, a place ranking higher than geographical configuration or immemorial usage. What the supporters of the theory of "legitimate interests" are only too apt to overlook is the fact that, according to Drago, such "vital interests" have any value only in conjunction with the assertion of sovereignty by the claimant State, which in the long run would prove impossible without the acquiescence of other States.

That Drago had no intention of challenging the necessity of other States' acquiescence in an exceptional claim, as a condition and prerequisite for such claim to develop and ripen into an exceptional right, clearly emerges from an article written by him in 1912 where he commented on the North Atlantic Fisheries Arbitration of 1910. There Drago elaborated on the concept of historic bays, defining them as "une catégorie spéciale et distincte dont la propriété appartient aux pays qui les entourent." (1) He further maintained that the littoral States "lorsqu'ils ont procédé à

1) 19 RGDIP (1912) p. 5 at p. 37.

l'affirmation de leur souveraineté, en acquièrent la possession et les incorporent à leur domain, au consentement des autres nations." (1)

Thus it is evident that according to Drago too the positive attitude of other States towards the building up of an exceptional title cannot be dispensed with. This, however, has not prevented certain South-American jurists from carrying the idea further and from insisting on the self-determined "vital necessity" of a State being recognized as a sufficient ground for the acquisition of an exceptional territorial title. In a paper read before the 31st Conference of the International Law Association held in Buenos Aires in 1922, Captain Segundo Storni (the then Director of the Buenos Aires Naval Academy) maintained that the right of the littoral State to a marginal belt of water over which it was entitled to exercise rights of juridiction was founded on the vital needs of the State which he enumerated as being as follows:

"(a) les nécessités de la défense;

(b) les nécessités et les obligations de la neutralité;

(c) les nécessités de la surveillance de la police, du balisage, du dragage, de la

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1) Ibid.

"   conservation des canaux, etc....." (1)

Turning to the question of historic waters, Captain Storni suggested that estuaries, bays, gulfs and parts of the marginal sea in general be treated as being within the territorial waters of the littoral State if "un usage continu et séculaire aura consacré sa juridiction, ou qui, dans les cas où les précédents n'existeraient pas, seraient d'une nécessité inéluctable." (2)

Captain Storni also took the view that this suggestion properly fitted into "la doctrine des 'baies historiques' selon la manière dont cet ancien principe fut formulé par le docteur Drago," (3) and was capable of meeting the requirements of "les nations nouvelles (américaines par exemple) dont beaucoup parmi elles possèdent des côtes étendues, encore peu peuplées et chez lesquelles on ne peut présenter des antécédents d'un domaine séculaire comme chez les nations qui compte mille années d'existence ou d'avantage." (4)

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1) International Law Association, Report of the 31st Conference, Buenos Aires, 1922, vol. II, p. 95.

2) Ibid. at p. 98; the definition of what Captain Storni considers as "nécessité" has been quoted above.

3) Ibid.

4) Ibid. at pp. 98-99.

However, as has already been shown, Drago's dissenting opinion - if properly interpreted - does not lend itself to Captain Storni's concept of historic titles. Notwithstanding this fact, the concept of "vital interests" was further canvassed by some States at the 1930 Hague Codification Conference. During the discussion which took place in the Second Committee of the Conference on Basis of Discussions No. 8, Senhor Magalhães, representing Portugal, suggested that the definition of historic bays should be worded so as to include bays which are recognised as being absolutely necessary for the State in question to guarantee its defence and neutrality and to ensure the navigation and maritime police services." (1) In support of his proposal, Senhor Magalhães argued that:

> "if certain States have essential needs, I consider that those needs are as worthy of respect as usage itself or even more so. Needs are imposed by modern social conditions and if we respect age-long and immemorial usage which is the outcome of the needs experienced by States in long past times, why should we not respect the needs which modern life, with all its improvements and its demands imposes upon States?" (2)

This argument of Senhor Magalhães - which concisely summarizes the attitude taken up by the supporters of the

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1) Ser. L.o.N.P. 1930, vol. XVI, p. 107.

2) Ibid. at p. 106.

"legitimate interests" concept - appears to be fallacious inasmuch as it tends to overlook the cardinal feature of the historic title, namely, the fact that it is not historicity or the time element as such that lends to such a title the seal of legal validity, but that such title rests rather on the element of other States' recognition of the exceptional claim. True, this recognition usually takes the form of tacit acquiescence as evidenced by the passage of time. But the Portuguese argument certainly misrepresents the concept of historic titles in international law when it attaches to the time element more than probative value. Such being the legal construction of the historic title, it may be readily admitted that the consent of other States to the acquisition of an exceptional territorial title may be the outcome of a variety of considerations, among which one may mention the conviction of the international community that the security or economic interests of a given State justify acquiescence in such a claim. In such circumstances an historic title may come into being even if the period of time during which it developed cannot be measured in centuries or even decades, thus depriving the historic title of the historic element properly so-called. But the manner in which this concept has been described by Senhor Magalhães virtually amounts to the complete rejection of the notion of historic titles and

the substitution for it of what may be properly termed "vital titles". The adoption of such a principle and its introduction into international law would only increase the already prevailing chaotic conditions in this field of law and would in fact be tantamount to creating a state of things where every State would be authorized to determine in an arbitrary manner what should be regarded as its "vital interests". It would thus enable the State in question to fix unilaterally the territorial limits of its sovereignty. The practical results of such an approach are not far to seek. Gidel, commenting on this aspect of the problem, issued a clear and unequivocal warning when, referring to the notion of "vital bays", as distinct from "historic bays" proper, he said:

> "Ce seraient des prétentions arbitraires ..... qui seraient fondées purement et simplement sur des besoins ou des intérêts de l'Etat riverain, susceptibles d'être invoquées par d'autres Etats riverains de côtes d'une configuration géographique ou hydrographique différente." (1)

Writing in 1952, Bourquin expressed the view that, if the territoriality of a bay is to be determined in the light of all the circumstances which surround it, then clearly the vital interests of the coastal State must also be taken into

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1) Gidel, op.cit. vol. III, p. 635.

account.[1] He admitted, however, that Captain Storni's concept, as understood and interpreted by the Portuguese Government during the Hague Codification Conference, suffered from considerable oversimplification of the issues involved, since it raised one of the factors which are likely to determine the territorial status of a given body of water above all other factors, thus unduly ignoring various other elements which should also be reckoned with in establishing the legal status of a given maritime area. He went on to say that "vital interests", however widely and liberally interpreted, had no place in the theory of "historic titles", since, if it is solely the vital interests of the claimant State on which an exceptional territorial title rests, then the historic element, which, as the term itself indicates, is the very pillar of the historic title, will be lacking altogether.[2]

This approach by Bourquin is not entirely compatible with the attitude he had taken up a short time before the publication of his article, while pleading on behalf of Norway in the Fisheries case. There he suggested that the regime applied to territorial waters ought to be "realiste,

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1) Bourquin, Les Baies Historiques, Mélanges Georges Sauser Hall, 1952, p. 38 et seq. at p. 51.

2) Ibid.

qu'elle respecte des besoins légitimes des Etats et la diversité des situations particulières." (1) Sir Frank Soskice, in his statement on behalf of the United Kingdom, challenged the Norwegian contention - rightly, it is believed - by pointing out that "if a State has the right to fix its maritime territory by reference to what it conceives to be its legitimate interest and there is no other test of the legitimacy of those interests, why should the historic nature of a claim have any special importance?" (2)

It is certainly a matter for regret that the Court in its judgment did not indicate in a clear-cut manner which of the two conflicting concepts it favoured. On the one hand, there are to be found in the judgment passages which _prima facie_ appear to approve of the Norwegian contention. Thus, for instance, the Court held that:

> "In these barren regions [of Norway] the inhabitants of the coastal zone derive their livelihood essentially from fishing." (3)

And again:

> "There is one consideration not to be overlooked ..... that of certain economic interests peculiar to a region, the reality

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1) ICJ, Fisheries case, _Pleadings, Oral Arguments, Documents_, vol. IV, p. 512.

2) Ibid. at p. 122.

3) ICJ Reports (1951) p. 128.

"and importance of which are clearly evidenced by long usage." (1)

On the other hand, in summing up the legal considerations which prompted it to decide the case in favour of Norway, the Court did not mention at all the unusual circumstances referred to by Norway, but placed particular emphasis on the toleration by foreign States of the Norwegian practice, without any formal challenge or protest. (2)

Thus it would appear that the Court's reference to the peculiar economic interests of the local population is but one of the considerations which were taken into account by the Court in assessing Norway's claim. It is also worth noting that, in evaluating the scope of the economic factor in the formation of Norway's exceptional rights, the Court deemed it appropriate to add that these economic interests "are clearly evidenced by long usage," (3) a pronouncement virtually amounting to introducing the element of acquiescence in disguise, since it is mainly through the efflux of time that acquiescence normally finds its expression.

Whereas the wording of the majority judgment is on this point somewhat nebulous, Judge McNair, in his dissenting

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1) Ibid. at p. 133.

2) Ibid. at pp. 138-139.

3) Ibid. at p. 133.

opinion, made no bones of his opposition to the Norwegian concept. In the strongest possible terms he dissociated himself from the proposition which invoked Norway's economic interests as justifying from the legal point of view the Norwegian system of delimitation. Judge McNair observed that he was wholly unable to reconcile the Norwegian Decree of 1935 with the notion of territorial waters prevailing in international law. He explained this conclusion, _inter alia_, by the fact that:

> "the delimitation of territorial waters by the Decree of 1935 is inspired, amongst other reasons, by the policy of protecting the economic and other social interests of the coastal State," (1)

these being factors which, in his opinion, could not be taken into account in international law in delimiting territorial waters.

The _Fisheries_ case, which, no doubt, constitutes one of the leading cases in international jurisprudence, is, however, by no means the first decision in which an international tribunal was prepared to consider the peculiar economic interests of a littoral State in assessing its claim to an exceptional title which would not accrue to it without a departure from general international law. Thus, in the _North Atlantic Fisheries_ Arbitration between Great Britain and the United States the tribunal, defining the term

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1) Ibid. at p. 171.

"bay", remarked that such a definition should take into account

> "all the individual circumstances which for any one of the different bays are to be appreciated ..... the possibility and the necessity of its being defended by the State in whose territory it is indented, the special value which it has for the industry of the inhabitants of its shores .... and other circumstances not possible to enumerate in general." (1)

Similarly, in the Gulf of Fonseca case the now defunct Central American Court of Justice laid down the rule that:

> "in order to fix the international legal status of the gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography, and the vital interests of the surrounding States." (2)

Among the factors to which the Court explicitly referred as evidence for the existence of such vital interests of the United States, there may be mentioned the construction of a railway by Honduras, destined to develop the rich and extensive regions of the country and to promote the interoceanic traffic, a railroad under the control of El Salvador, a project concerning the prolongation of the Chinandega railroad to a point on the Real Estuary on the gulf of Fonseca and the establishment of a free port decreed by the

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1) Scott, Hague Court Reports, 1st series, 1916, p. 187 (Italics added).

2) 11 AJIL (1917) at p. 700.

Salvadorean Government on Meanguera Island. The Court also pointed out that the Gulf of Fonseca was surrounded by extensive departments of the three riparian States, was destined to play an important role in their commercial, industrial and agricultural development and must be therefore regarded as their lifeline of imports and exports. Having regard to the geographical configuration of the gulf, the Court remarked that its strategic situation was so advantageous that "the riparian States could defend their great interests therein and provide for the defence of their independence and sovereignty." (1)

True, the Court fully recognized the "vital interests" of the riparian States in assessing the legal status of the gulf; at the same time it must be, however, borne in mind that the Court deduced the legal validity of the alleged exceptional status of the gulf from the fact that "a secular possession such as that of the Gulf of Fonseca could only have been maintained by the acquiescence of the family of nations." (2)

The decisions of international tribunals referred to above appear to have in common a readiness to take into

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1) Ibid. pp. 704-705.

2) Ibid. at p. 700.

account the affected States' particular interests and needs, as far as these needs have been (at least tacitly) recognized by the international community. There is, however, no indication whatsoever that the tribunals faced with this problem ever regarded the "vital interests" of the claimant States as justifying in themselves an exceptional claim and as the legal basis for the formation of an exceptional territorial title. It is only through the interdependence and combination of a great variety of factors - historic, geographic, economic, strategic etc. - that the acquiescence of foreign powers in such an exceptional claim may be reasonably inferred. It is this legal presumption - always open to rebuttal - on which the legal validity of an exceptional title rests.

Thus the "vital interests" of the claimant State assume the role of one of the contributory evidentiary elements in the establishment of an historic title. The probative value of the "legitimate interests", as displayed in the practice of States, is of considerable scope indeed. This is clearly evidenced in that passage of the judgment delivered by the International Court of Justice in the Fisheries case where the Court, with reference to the baselines drawn across the Lopphavet, observed that:

> "the historical data produced in support of [the Norwegian] contention .... lend some weight to the idea of the survival of

"traditional rights reserved to the inhabitants over fishing grounds." (1)

The Court held that "such rights founded on the vital needs of the population and attested by very ancient and peaceful usage may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable." (2)

It is therefore evident that the "vital needs" *per se* would not have been regarded by the Court as a sufficient justification for the application of the Norwegian method of delimitation, had it not been "attested by a very ancient and peaceful usage", i.e. the acquiescence of the international community. It has therefore been rightly observed that "a country could not merely by reason of the alleged economic needs of some part of its population put forward a *legal* claim to delimit its waters in a manner not otherwise permitted by international law." (3) The invocation of the "vital needs" of a given State as the root of its legal rights would inevitably lead to the abandonment of any objective legal criterion as the basis for legal rights, a danger of which Judge McNair in his dissenting opinion in the

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1) ICJ Reports, 1951, p. 142.

2) Ibid.

3) Fitzmaurice in 31 BYIL (1954) p. 402; (Italics in original).

Fisheries case warned in the following words:

> "In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; ...... the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights, instead of conforming to a common international standard." (1)

It would be only proper to add that, according to a classification made by Sir Gerald Fitzmaurice, vital needs and exceptional necessities, while not constituting in themselves the source of any legal right, may nonetheless have a threefold effect:

Firstly, they serve as "evidence of a general need on the part of a State to depart from or to be recognized as entitled to a special application of the normal rule ..... the basis on which other States can condone such departure or special application." (2) The exceptional territorial title that will eventually emerge will, however, be based

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1) ICJ Reports, 1951, at p. 169; see, however, Judge Alvarez' Individual Opinion where he observed that "in fixing the breadth of its territorial sea, the State must indicate the reasons, geographic, economic, etc. which provide the justification therefor." (see ibid. at p. 150).

2) 92 _Hague Recueil_, (1957), vol. II, p. 115.

not on the State's exceptional needs, but on its having succeeded to build up an exceptional title, in accordance with the applicable rules of international law.

Secondly, they are "the basis of a change in law ..... the factual basis of, or motive for, a new practice which the generality of States will come to regard themselves as entitled and bound to observe; thus leading to the development of a new rule of customary law." (1) Sir Gerald points out that, seen from this aspect also, it is not the exceptional circumstances as such that lend legal validity to such a claim, but it is rather the new rule, if and when it has emerged, that constitutes the basis of the newly acquired exceptional right.

Thirdly, exceptional circumstances may also provide evidence of reasonableness. International tribunals are prone to attach a good deal of importance to the question whether a given conduct or course of action may be regarded as reasonable. "In such cases the existence of special interests or particular circumstances of, for instance, an economic, social or geographical character may well affect ...... the reasonableness of the action taken." (2) Sir

1) Ibid. at p. 116.

2) Ibid.

Gerald draws attention to the conclusion reached by the International Court of Justice in the Fisheries case, according to which, having regard to the exceptional configuration of the Norwegian coast, the manner in which Norway delimited her territorial waters was not unreasonable.(1) Thus the question of the validity of the Norwegian claim turned to a large extent on the reasonableness of the Norwegian measures, which, in the first place, depended heavily on the exceptional geographical configuration of the Norwegian coast.(2)

The matter may be fittingly summed up by saying that economic considerations and exceptional circumstances in general cannot of themselves constitute the basis of any legal right, but they have at the same time a decisive importance in evaluating the question as to whether or not an exceptional title came into existence. Thus their value rests completely in the sphere of evidence and they cannot endow any State with a new substantive right.

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1) ICJ Reports, 1951, pp. 133 and 142.

2) The adoption of the test of reasonableness has met with the criticism of Waldock on the account of its subjectiveness (see Waldock in 28 BYIL (1951) p. 150).

VI. The role of the time element in the formation of an historic title.

It was submitted elsewhere[1] that the role and primary function of the time factor in the formation of an exceptional territorial title in international law was to raise a presumption of acceptance of the new and exceptional situation on the part of the affected States. The efflux of time, it was asserted, was necessary because the circumstances from which such an acceptance might be inferred - and to the detailed analysis of which the present chapter has been devoted - could not arise unless a certain period of time had elapsed. The passage of time, coupled with an absence of protest on the part of the States affected or likely to be affected by the exceptional claim, serve to strengthen this presumption of acquiescence underlying the historic title.

Having regard to the manifold aspects of the manifestations of an historic claim, as described above in detail, it now becomes abundantly clear that what is usually referred to as the "historic element" or "time factor" in the establishment of an historic title is no more than the sum total of all those considerations which form the components of an historic claim and its contributory factors, all of which would in themselves be rather meaningless if they were not sanctioned by the efflux of time. It is the main function

1) See chapter 3, section V, above.

of the time element in the formation of an historic title to provide the framework necessary for the consolidation of those diverse and manifold factors, in proportion to their intensity and frequency. "Long usage" - the emphasis being now on the qualifying adjective "long" - is therefore the concise expression of the sum total of interests and relations the existence of which entitle the international lawyer to raise a presumption that an exceptional territorial title has indeed come into being. According to De Visscher, it is these interests and relations - varied as they are from case to case - and not the mere efflux of time - immaterial in itself in international law - which are taken into account when considering the question whether or not such an historic title has been consolidated. De Visscher's concept of the role and function of an historic title appears to have been influenced by a well-known and much-quoted passage of the judgment delivered by the International Court of Justice in the Fisheries case where the Court seems to have alluded to the theory which conceives the "historic title" as the product of an "historical consolidation". Commenting on the emergence of a Norwegian maritime historic title, the Court observed, *inter alia*, that the Norwegian system of fixing the baselines of Norway's territorial sea had acquired legal validity owing to "an historical consolidation which would make it enforceable as against all

States." (1)

From the passage in which the above-quoted portion occurs it emerges that Norway's "historical consolidation" of an exceptional territorial title is based on her effective application of a well-defined and uniform system in the face of which other States did not raise any objection. Thus "historical consolidation" embraces both the manifestations of sovereignty by the claimant State and a tacit acquiescence on the part of the international community. The qualifying adjective "historical" clearly brings out the function of the time factor in the process of the consolidation of an exceptional title. It relegates history to the rank of a probative element, thus incorporating this factor among the various considerations which come into play in the establishment of an historic title.

In an article published in 1955 Johnson dwelt upon some of the advantages that might be derived from the introduction of the notion of consolidation and its adoption as a starting-point for a better understanding of the theory of historic titles. One of its cardinal virtues is, he maintains, that in addition to its being concerned with the mode of acquiring a title to territory, it displays interest also in the

1) Ibid. at p. 138. (Italics added).

manner in which such a title has been _maintained_. The notion of consolidation, he asserts, takes account of the fact that the maintenance of a valid legal title is a process of complex character, frequently spread over a long period of time. By employing the notion of "historical consolidation", he goes on to say, it would be possible "to present the law relating to territory on a new basis ..... [which] would stress the close relation between the _acquisition_ and the _maintenance_ of titles," (1) thus avoiding "the ambiguities surrounding the present doctrine of acquisitive prescription." (2) By introducing the term "consolidation" the historical aspect of the process and its primary dependence on a great and multiple variety of factors - the operation of which is made possible only within the framework of time - is more clearly brought into light.

Although the term "consolidation" does not occur in the award rendered in the _Island of Palmas_ Arbitration, it may be safely assumed that the decision rendered by Judge Huber in that case practically rested on that concept and

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1) Johnson, _Consolidation as a Root of Title in International Law_, _Cambridge Law Journal_, (1955), p. 215 et seq. at p. 225. (Italics in original).

2) Ibid.

that the function of time was merely subsidiary in that it enabled the combined operation of all those factors which in their entirety justified an inference of acquiescence on the part of Spain in the Netherlands' exceptional claim. Thus, for instance, the Arbitrator asserts that, if the alleged title to territory is not based on one of the commonly accepted titles, like cession, conquest, occupation etc., but is based merely on the fact of display of actual sovereignty, "it cannot be sufficient to establish the title by which territorial sovereignty was validly established at a certain moment; it must also be shown that the territorial sovereignty has continued to exist." (1) Then follows the well-known phrase in which the Arbitrator held that "continuous and peaceful display of territorial sovereignty .... is as good as title." (2)

This statement, which has since been recognized as an authentic presentation of the state of affairs prevailing in international law, would, however, be completely deprived of any meaning if the efflux of a rather considerable period of time - varying, of course, according to circumstances - were not to be presupposed. For continuity and peacefulness - these very cornerstones of an historic title - can manifest

1) UNRIAA vol. II, p. 839.

2) Ibid.

themselves only through the operation and within the frame-work of time. The length of time required for the formation of an historic title is thus precisely relevant to the extent to which it helps to enhance the presumption of continuity (or effectiveness) and peacefulness (or acquiescence).

The requirement for the effective maintenance of an already acquired title - as distinct from its effective acquisition - has met sometimes with disapproval on the ground that it is liable to create instability and uncertainty in the international sphere, since "every State would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in law had necessitated, as it were, a reacquisition. If such a principle were applied to private law and private titles, the result would be chaos. Title insurance would be impossibility." (1)

Thus, in cases where the States affected by the practice alleged to have created certain exceptional rights have neither expressly nor by their conduct implied any recognition or consent of such a practice, it is only the historic element, or time factor, which supplies the necessary presumption of passive acquiescence arising out of the practice in question. This presumption is based on the effective

1) Jessup, The Palmas Island Arbitration in 22 AJIL (1928) at p. 740.

manifestation of the practice in question for a period of time the length of which is sufficient to raise an inference of acquiescence, provided no objection to this practice has been forthcoming.

Thus, while the time factor is in itself completely irrelevant from the legal point of view and neither creates nor determines any substantive legal rights, it is at the same time of immense evidentiary value, making up for the lack of evidence of recognition by the affected States of the practice in question; it is the time element which most forcefully raises the presumption of acquiescence, to be inferred from an alleged exercise of authority by the claimant State, in the face of which the adversely affected State refrained from formulating the objection which would have been reasonably expected from it, had it wished to signify its disapproval of the new practice.

The legal basis for the validation of an exceptional right remains, however, neither the exercise of authority, nor the efflux of time, but the acquiescence of the affected States which is inferred from the general circumstances surrounding the new territorial situation, thus consolidating the new exceptional right and imbuing it with legal validity.

This indeed seems to be the meaning of the above-quoted passage of the judgment rendered by the International Court of Justice in the <u>Fisheries</u> case, where the Court held that

the promulgation by Norway of the various Decrees relating to the delimitation of her territorial waters, and the application without any opposition of these rules of delimitation for a period of over sixty years, should be considered "the basis of an historical consolidation" of the Norwegian system. The role assigned to the time-factor in the formation of an historic right is perhaps even more clearly emphasised in another passage of the Judgment where the Court observed that "in respect of a situation which could only be strengthened by the passage of time, the United Kingdom Government refrained from formulating reservations." (1)

It is worth mentioning that Judge McNair in his dissenting opinion, though disagreeing with the majority as to its final conclusions, approached the problems attendant upon the acquisition of an historic title from a similar angle when he stated that, in his opinion, the Government of the United Kingdom were not aware of the application by Norway of the "Norwegian system" of delimitation "before this dispute began in 1906, or 1908 or 1911." (2) It is evident that, in challenging the existence of Norway's exceptional rights, Judge McNair took into account the relative brevity of the period during which, in his opinion, the Norwegian

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1) ICJ Reports, 1951, p. 139.

2) Ibid. at p. 180.

pretensions persisted.

The matter may be summed up by saying that the passage of an appreciable period of time is necessary for the building up of historic rights, because "if the essential rôle of the historic element is to supply an inference of acquiescence on the part of other States, arising from their inactivity coupled with the passage of time - then time must be allowed to pass." (1)

VII. Acquiescence and estoppel.

Closely related to the notion of acquiescence is the principle of estoppel, as understood in the common law countries. Although the term "estoppel" is not widely used among jurists educated under a legal system other than the Anglo-American school, the meaning of the principle is well known to them and, where an Anglo-American lawyer would refer to estoppel, his continental counterpart would say that a party is "precluded". (2) The same idea is known to Scottish lawyers as a "personal bar". (3)

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1) Fitzmaurice in 30 BYIL (1953) p. 30.

2) Lauterpacht, Private Law Sources and Analogies of International Law, 1927, p. 204.

3) MacGibbon, Estoppel in International Law, 7 ICLQ (1958) p. 468, n. 1.

The rule of estoppel "operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit." (1) In continental law the same result is achieved by relying on the principles of "venire contra factum proprium" and "allegans contrario non audiendus est". (2)

Until recently a certain hesitancy seems to have prevailed as to the operation of the rule of estoppel in the sphere of international law, (3) stemming from the belief that this concept is a rule of evidence rather than a rule of substantive law. (4)

For obvious reasons the doctrine of estoppel could be invoked as a root of title in international law only if it were considered a rule of substantive law, since otherwise its function would be limited to the field of procedure,

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1) Bowett, Estoppel before International Tribunals and its Relation to Acquiescence, 33 BYIL (1957), p. 176.

2) Strupp-Schlochauer, Wörterbuch des Völkerrechts, 2nd edition. Vol. I, 1960, p. 441.

3) McNair, The Legality of the Occupation of the Ruhr, in 5 BYIL (1924) at pp. 34-37.

4) Lauterpacht, op.cit. at p. 203, and Friede, Das Estoppel-Prinzip im Völkerrecht, 5 ZRV (1935), p. 517.

thus creating effects closely resembling those of extinctive prescription, as distinct from acquisitive prescription.(1)

However, recent trends in English and American laws have led towards a reconsideration of the scope of the rule of estoppel, and the tendency seems now to be in favour of treating it as a rule of substantive law. (2)

The close relationship existing between the doctrines of acquiescence and estoppel finds its explanation in the fact that in certain situations one party's failure to act or his acquiescence "will prejudice his rights against another who has been misled by that party's inaction or silence." (3) It is this inaction or silence - sometimes amounting to acquiescence - which operates like an estoppel.

Recourse to the doctrine of estoppel was made in the sphere of international law on various occasions, both in judicial decisions and in pronouncements emanating from competent State authorities.

Thus, in the Island of Palmas case, Judge Huber invoked this notion when he asserted that "the acquiescence of Spain

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1) Both terms are used here with reference to their respective meanings in municipal law.

2) Canada and Dominion Sugar Co. Ltd. v. Canadian National West Indies Steamships Ltd. (1947) A.C. (P.C.) p. 46, at pp. 55-56; see also Wigmore on Evidence, 3rd ed., 1942, s. 2589.

3) Bowett, loc.cit. at p. 198.

in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time." (1) More recently any doubt which may have persisted as to the applicability of this rule in the sphere of international law has been most explicitly removed by the International Court of Justice in its judgment rendered in the case concerning the Arbitral Award made by the King of Spain on 23 December, 1906. (2) Here the Court was confronted with a dispute between Nicaragua and Honduras with regard to an arbitral award made in 1906 by King Alfonso XIII of Spain. In this award the King of Spain fixed the frontier line dividing between the two rival States. The arbitral award handed down by King Alfonso was, on the whole, in favour of Honduras, and this fact was recognised in a telegram dispatched by the President of Nicaragua to the President of Honduras on the day following the rendering of the award. In this telegram, the President of Nicaragua stated that "having regard to this decision, it appears that you have won the day, upon which I congratulate you. A strip of land more or less is of no importance when

1) UNRIAA, vol. II, p. 869; see also to the same effect the Costa Rican-Nicaraguan Boundary case, as reported in Moore's International Arbitrations, vol. II, p. 1961; see also the Chamizal Arbitration Award, as reported in 5 AJIL (1911) p. 785, at p. 805.

2) ICJ Reports, 1960, p. 192.

it is a question of good relations between two sister nations." (1)

The Arbitral Award was, however, never put into effect, for ever since 1912 Nicaragua challenged its validity on different legal grounds, and a protracted dispute ensued among the parties until they finally agreed in 1957 to submit this dispute to the International Court of Justice.

On behalf of Nicaragua it was argued before the Court that the Arbitral Award of 1906 never came into effect for various legal reasons, which may be summarized under the following headings:

(a) King Alfonso had been appointed arbitrator in violation of the Arbitration Treaty of 1894 concluded between the rival parties;

(b) The Arbitration Treaty had expired at the time when King Alfonso was designated Arbitrator and, alternatively, at the time of handing down his award;

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1) Ibid. at p. 210. Commenting on the Court's judgment in general, Johnson observed that "although there is little reason to dispute the finding that Nicaragua acquiesced in the Award of December 23, 1906, some of the evidence relied upon (e.g. the telegram of December 25, 1906 from the President of Nicaragua to the President of Honduras ....) is not very convincing." (Johnson, 10 ICLQ [1961], pp. 336-337).

(c) The Arbitrator exceeded his jurisdiction;

(d) The arbitral award was beset with obscurities and contradictions.

The Court dismissed the first two Nicaraguan contentions in the following words:

> "Having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator on the ground that the [Arbitration] Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator and that Nicaragua fully participated in the arbitral proceedings before the King, *it is no longer open* to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the award." (1)

As to the two remaining Nicaraguan contentions the Court noted the fact that:

> "Nicaragua, by express declaration and by conduct, recognized the award as valid and *it is no longer open to Nicaragua to go back upon that recognition* and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court had arrived." (2)

The Court went on to say that the recognition by Nicaragua of the award, as evidenced by various acts and by

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1) Ibid. at p. 209. (Italics added).

2) Ibid. at p. 213. (Italics added).

her conduct, "debars it from relying subsequently on complaints of nullity." (1)

It is noteworthy that the Court - having found for Honduras by a majority of 14 to 1 - carefully avoided the use of the term "estoppel", which occurs only in the legal literature of the common law countries, and contented itself with paraphrases virtually amounting to the same effect. Judge Sir Percy Spender, the only judge to append an individual opinion of his own to the majority judgment of the Court, followed the same line and cautiously steered his way by circumventing the term "estoppel", while at the same time relying on this principle in rejecting the Nicaraguan contentions. Judge Spender thus maintained that the Nicaraguan claim was bound to fail "because that State is precluded by its conduct prior and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the award." (2)

As to the two arguments of substance put forward by Nicaragua, Judge Spender once again stated that this aspect of the case also rested "exclusively on the ground of preclusion. It is unnecessary to determine whether but for this preclusion any of these contentions of Nicaragua would

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1) Ibid. at p. 214. (Italics added).

2) Ibid. at. 219. (Italics added).

have afforded a cause of nullity. To attempt to do so would be, in my view, an irrelevant excursion." (1)

It can be readily seen that Judge Spender's dismissal of the Nicaraguan argument rested solely on the ground of preclusion, yet he too carefully avoided the invocation of the term "estoppel". This ominous reluctance to have recourse to a well-known legal term of the common law school of jurisprudence can only indicate Judge Spender's intention to forestall any possible objection to his individual opinion on the ground that this doctrine was not recognised by international law. Hence, it is believed, his attempt to evade the controversial term. In this respect he merely follows the pattern set by the majority judgment which, as will be recalled, makes no explicit mention of this term. (2) Yet the very applicability of the principle underlying the doctrine of estoppel and the permissibility of its invocation as the legal basis of the Court's decision can hardly be called in question.

It is also worth mentioning that the only dissenting

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1) Ibid. at p. 220. (Italics added).

2) According to Johnson, "the use of the neutral term 'preclusion' is perhaps to be preferred in international law to the essentially Anglo-American and somewhat technical doctrine of estoppel." (Johnson, in 10 ICLQ [1961] p. 335).

judge in this case, Judge _ad hoc_ Urrutia Holguín, of Colombia, who had been appointed by Nicaragua, did not challenge the assumption that the doctrine of estoppel was a principle recognized in international law, and his objectionto the majority judgment on this point was prompted by his belief that Nicaragua's acts and conduct on this particular issue did not debar her from challenging the validity of the 1906 award. (1)

Some passages in the judgment delivered by the International Court of Justice in the _Fisheries_ case seem to have created the impression that the Court treated the United Kingdom's acquiescence in the Norwegian system of delimitation as an estoppel and that the Court's decision rested in fact on applying the doctrine of estoppel against the United Kingdom. (2) But, as has been already pointed out

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1) Ibid. at p. 222 where Judge Urrutia Holguín states: "The objection on the grounds of good faith which exists in all legal systems and which prevents a party from profiting by its own misrepresentation and which in Anglo-Saxon law is known as estoppel, would be applicable in the present case if it were proved that the action and behaviour of one of the States caused the other State to place reliance upon its acts of acquiescence."

2) ICJ Reports, 1951, p. 116 at p. 130 and p. 139; Judge McNair in his dissenting opinion seems to have approached the whole problem from this angle, by saying: "The question would arise whether the United Kingdom had precluded herself from objecting to [the Norwegian system of delimitation] by acquiescing in it." (ibid. at p. 171).

by Bowett - rightly, it is believed - "the similarity in effect tends to confuse the notion of acquiescence with the doctrine of estoppel." (1) Another writer has expressed the same view by saying: "A measure of ambiguity is perhaps introduced by treating estoppel as the equivalent of recognition or acquiescence rather than their consequence." (2)

Different reasons seem to militate against such an identification of the doctrines of acquiescence and estoppel.

Firstly, one of the essential conditions for the operation of the rule of estoppel is the ignorance of the State purporting to have acquired some right or interest as to another State's conflicting rights or interests; conversely, it is this same element of ignorance which prevents the concept of acquiescence from coming into operation, since acquiescence, as is submitted elsewhere, cannot be presumed without the knowledge of the acquiescing State.

Secondly, the rule of estoppel presupposes - ex definitione - some detriment suffered by the State which claims to have acquired some right or interest as a direct result of its reliance upon another State's silence or inaction. However, in the sphere of acquisition of title to territory such a detriment would be more frequently than not on the other

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1) Loc.cit. at p. 200.

2) MacGibbon in 7 ICLQ (1958) at p. 475.

side [1] and "the doctrine of estoppel cannot operate to protect the State which has been placed in an improved position as a result of the silence or inaction of another." [2]

Thirdly, it should not be overlooked that the invocation of the doctrine of estoppel would be inconceivable without the assumption that the State claiming the benefit of estoppel has acted in good faith. This was made abundantly clear by the late Sir Hersch Lauterpacht when, in his capacity as Special Rapporteur to the International Law Commission on the Law of Treaties, he commented as follows on paragraph 2 of draft article 11 of his report:

> "A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance

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1) There are of course instances where a State in genuine ignorance of another State's rights over a portion of territory considered by the first State to be within its own boundaries undertakes some scheme involving considerable financial expenses. Considerations of this kind seem to have motivated - amongst other reasons - the award given in the Grisbadarna Arbitration between Norway and Sweden and are clearly reflected in the following passages of the award: "Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that those regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea and the installation of a light-boat, being acts which involved considerable expense ...." (see Scott, Hague Court Reports, 1st series, 1916, p. 121, at p. 130). And again: "Sweden had no doubt as to her rights over the Grisbadarna and she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks." (see ibid. at p. 131).

2) Bowett, loc.cit. at p. 201.

> "becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith. The former is probably no more than one of the aspects of the latter." (1)

This dependence of the doctrine of estoppel on the element of good faith was also clearly brought out in the case concerning the Arbitral Award made by the King of Spain on 23 December, 1906, where Judge Sir Percy Spender stressed the close relationship existing between the principle of estoppel and the presumption of good faith on the part of the State relying on this doctrine. He declined to accept the Nicaraguan arguments as to the nullity of the Arbitral Award rendered by the King of Spain, giving as one of his reasons the fact that:

> "it would be contrary to the principle of good faith governing the relations between States were it permitted now to rely upon any irregularity in the appointment to invalidate the Award. Its conduct up to the moment the award was made operated in my opinion so as to preclude it thereafter from doing so, irrespective of any subsequent conduct on its part."(2)

As will be recalled, Judge Urrutia Holguín also, in his dissenting opinion, emphasized the close relationship between the doctrines of good faith and preclusion by virtually

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1) Report on the Law of Treaties, U.N. Doc. A/CN.4/62 of March 24, 1953, p. 166.

2) ICJ Reports, 1960, p. 220.

equating "the objection on the grounds of good faith" with what "in Anglo-Saxon law is known as estoppel." (1)

Good faith, however, may be lacking altogether in some cases in which States claim rights over territories, relying upon other States' acquiescence in the acquisition of their alleged rights. Commenting on Vattel who postulated good faith as one of the requirements for the operation of acquisitive prescription in international law, Johnson states that "if the doctrine of acquisitive prescription ..... was in the interests of international order and stability, it was hardly to be supposed that the requirement of good faith would be maintained." (2)

Fourthly and lastly, the plea of estoppel is made solely _inter partes_ and does not therefore affect third parties. On the other hand, any claim to territory is aimed at ulti - mately achieving validity _erga omnes_. (3)

It is therefore submitted that the doctrine of estoppel cannot be invoked as the basis of the formation of an

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1) See p. 358, n. 1 above.

2) Johnson in 27 BYIL (1950) at p. 337, and the authorities cited there.

3) This aspect of the problem is of particular significance when national pretensions are being put forward over mari- time areas, since in such cases it is international commu- nity as a whole whose interests are affected.

historic title in international law, in spite of the wide application of that doctrine (1) and its close resemblance to the concept of acquiescence. In applying the rule of estoppel in the sphere of international law one should be always mindful of Schwarzenberger's warning and avoid "the temptation of pressing the available judicial and diplomatic material into apparently ready-made molds of private law analogies .... which [are] more often than not - fallacious analogies from private law." (2)

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1) The pliability of the rule of estoppel has been vividly illustrated by MacGibbon in 7 ICLQ (1958) at p. 475.

2) Schwarzenberger, "Title to Territory: Response to a Challenge" 51 AJIL (1957) pp. 308-9.

CHAPTER 5.

MISCELLANEOUS PROBLEMS OF INTERPRETATION AND EVIDENCE RELATING TO THE ACQUISITION OF AN HISTORIC TITLE.

I. General.

In one of the previous chapters it has been submitted that the notion of acquiescence - being one of the main devices employed in the development of customary inter - national law - underlies the process of formation of historic titles. In another chapter the elements from which such acquiescence may be inferred were investigated at some length.

The present chapter is devoted to some general problems of interpretation and evidence relating to the acquisition of an historic title.

First problem: Historic claims being founded, by their very nature, on distant events of the past, it may well happen that the allegedly acquired rights of a State claiming such an exceptional title were created under a legal regime greatly differing from the international law of our days. Thus the question of the role of intertemporal law in the formation of an historic title has to be faced and dealt with.

Second problem: Since historic claims built up by States usually rely on a variety of acts, omissions, events and patterns of behaviour which have been spread over long periods of time - sometimes centuries - it is essential to fix the "final date", or, in other words, the date after which no further proof will be admissible and no happenings will be taken into account in the evaluation of the contesting States' respective rights. This brings us up against the problem of the "critical date" in general and with regard to territorial disputes in particular.

Third problem: The typical territorial dispute being a controversy between two litigants each of whom will normally adduce a good deal of evidence in support of his claim, the tribunal faced with such a dispute will have to determine which of the rival claims is to prevail. This will be done by resorting to the method of comparing the relative weight of the competing territorial claims, and the method of assessing such claims will be accordingly dealt with in one of the following sections.

The remaining sections of this chapter are devoted to the investigation of the following topics:

(a) The problems relating to the onus of proof of an historic title (i.e. on which of the parties is it incumbent to discharge the burden of proof in a case in which an historic claim is raised).

(b) The strict geographical interpretation of an historic claim. This principle means that an historic claim - even if recognized - should be given the narrowest possible construction. In fact, this is no more than the logical extension of the concept of acquiescence which implies that no State can be presumed to have acquiesced in any situation or claim unless its alleged consent can be unmistakably shown and proved.

The present chapter will thus deal with the problems of intertemporal law, the critical date, the assessment of the relative worth of two competing territorial claims, the onus of proving an historic title and the strict geographical interpretation to be given to an historic claim.

II. The application of intertemporal law in the interpretation of an historic title.

The problem of "the temporal conflict of laws" (1) is a general problem facing jurisprudence, both on the national and international level. It is a rule generally recognised by civilized nations that in principle no retroactive application should be given to any legal norm. This rule found its expression as early as 440 A.D. in an order issued by

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1) This is the expression used by Verzijl in 1 NTIR (1953-1954), p. 265, n.1.

Emperor Theodosius, and was restated in the Justinian Code in the following words:

> "Leges et constitutiones certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim et de praeterito tempore et adhuc pendentibus negotiis cautum sit." (1)

The principle embodied in this rule has found acceptance also in the Canon Law and gained later almost universal currency among civilized nations. (2)

The requirement for the non-retroactivity of laws is particularly insisted upon in the field of criminal law and found its clear formulation in the maxim "*nullum crimen sine lege*" or "*nulla poena sine lege*."

The precise meaning of the principle of non-retroactivity of laws is not free from doubt. In a paper read before the *Grotius Society* in 1955, Woodhouse rightly pointed out that "laws cannot be said to operate on past events in the same way as they operate on future events .... It is of course impossible to change past events." (3) He asserted

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1) C.1, 14, 7 (440).

2) For a detailed survey of the States which follow the principle of non-retroactivity of laws see Baade, *Intertemporales Völkerrecht*, 7 *Jahrbuch für Internationales Recht*, (1957) p. 229, at pp. 230-231.

3) Woodhouse, *The Principle of Retroactivity in International Law*, 41 *Grotius Transactions* (1955), p. 69, at p. 70.

at the same time that:

> "though a law cannot change past facts, it can <u>alter the rules applicable</u> to those facts. Moreover, a law can go further and .... declare that those rules are changed as from some date in the past, i.e. those responsible for the law enforcement are directed to ignore the rules previously governing past events and to pretend or assume that other rules governed." (1)

Thus Woodhouse appears to regard as "retrospective" a law which affects vested rights and he cites to this effect an utterance by Buckley, L.J. in <u>Datt v. Metropolitan Water Board</u>, where his Lordship took the view that:

> "a law is correctly said to be retroactive when it enacts that something which was not the law at a date anterior to its passing shall be treated as having been the law at that date." (2)

Seen in this light the principle of the non-retroactivity of laws transcends the limits of a rule of interpretation properly so-called and becomes a rule of substantive law; it implies at the same time the requirement for a "<u>contemporanea expositio</u>" of any given norm of law.

The impact of this rule in the sphere of international law is not far to seek; owing to the relative brevity of time that has elapsed since the emergence of modern international law, coupled with the relative longevity of

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1) Ibid. at p. 78. (Italics added).

2) (1911) 2 K.B. p. 970.

international persons, the international lawyer is likely to be called upon to state his views with regard to the present day validity of juridical facts which were undoubtedly valid in law at the period of their inception but which may be devoid of any legal meaning according to the legal concepts prevailing in contemporary international law. This is particularly true of the acquisition of historic titles the origins of which are frequently uncertain and the acquisition of which were, more often than not, governed by rules which have since been abrogated or modified by international society.

It is only in recent years that specific attention has been given to this problem in the sphere of international law. The reason for the dearth of learned authority on this subject is most probably the still overwhelmingly customary character of international law. The majority of the scholarly treatises and dissertations relating to the problems attendant on the principle of non-retroactivity of laws in the domestic sphere may be properly regarded as a side-product of the great codificatory movements of the nineteenth century, which involved in most cases the introduction of new legal norms, abrogating the older ones. By contrast, changes in customary law take place in what may be termed an "unconscious" manner. As has been stated by Anzilotti, in

customary law:

> "il s'agit d'une formation lente, souvent quasi inconsciente, par le moyen de laquelle de simples normes de la coutume voient s'ajouter peu à peu à elle cette opinio juris qui les transforme en normes juridiques; généralement nous constatons l'existence d'une coutume, mais nous sommes bien difficilement à même de dire quand elle a commencé d'exister."(1)

Customary law is mainly judge made law and is therefore dependent to a very large extent on legal precedent. But as has been observed by Blackstone:

> "this rule admits of exception where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was bad law, but that it was not law; that is that it is not the established custom of the realm, as has been erroneously determined." (2)

This "classical" concept of common law explains the difficulty in tracing the changes and evolutions which do, in fact, take place within the framework of customary law. The judge who to all intents and purposes assumes the function of a law-maker, does not in theory create law; he merely declares and applies it. And since in theory no

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1) Anzilotti, op.cit. p. 93 (Italics in original).

2) Blackstone, Commentaries on the Law of England, 7th edition, 1775, vol. I, pp. 69-70. (Italics in original).

changes take place in such a law, the problem of the temporal conflict of laws is rendered superfluous. Needless to say that practice does not bear out theory on this point and that customary law also is undergoing a constant process of change and development, with the aid of various legal devices specially designed for this purpose, such as the well-known device of "distinguishing". Notwithstanding this fact, it is true to say that in most cases it will be virtually impossible to fix the exact moment at which such an alleged change took place, since in all probability the change will have occurred gradually and will have been spread over a long period of time. This difficulty, inherent in the very structure of customary law, does, however, not detract from the fact that in those cases where it can be reasonably ascertained that a change did in fact take place - regardless of the exact moment of such a change - the rule of non-retroactivity of laws will equally apply to customary rules of law.

Lauterpacht adopts the principle of the non-retroactivity of laws for international law on the ground that "it is a general principle of law that legislation unless it specially provides to the contrary or unless irresistible consider - ations of justice so require, is not retroactive. This is not a principle confined to the field of criminal law." (1)

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1) Lauterpacht, Nationality of Denationalised Persons, Jewish Yearbook of International Law, (1948), p.162, at p. 168.

He further states that "non-retroactivity is a general principle of interpretation ..... it is a principle which may be overridden by the clearly expressed will of the legislator, or, in extreme cases, by judicial construction intent upon avoiding a result patently inconsistent with justice." (1)

Kelsen, on the other hand, maintains, that "no positive norm restricting the temporal validity of general international law exists. It is vain to object that international law has appeared in the course of time, that formerly there were periods when international law did not exist. This is without importance, for the norms of international law can also have retroactive effect." (2) He does, however, admit that "in the course of time, general international law has undergone certain changes, that norms of general international law which were valid at an earlier time, have ceased to be valid or have been modified. A legal relation implying duties of one state and corresponding rights of another state is to be judged by that international law under which the legal relation has been established." (3)

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1) Ibid. at pp. 170-171; see also Lauterpacht, The Function of Law in the International Community, 1933, pp. 283-285.

2) Kelsen, Principles of International Law, 1952, p. 95.

3) Ibid; see also Guggenheim, Traité de Droit International Public, 1953, vol. I, pp. 111-112.

International tribunals faced with problems attendant upon the application and recognition of norms of international law which have no longer validity under the currently prevailing concepts of international law have, in fact, recognized the existence of this principle of non-retroactivity in the field of international law.

In the well-known Grisbadarna Arbitration the Permanent Court of Arbitration was called upon to decide in a dispute between Norway and Sweden. The origins of this dispute go back to the 17th century when Norway and Sweden formed a united kingdom. In accordance with the peace treaty of Roskilde, concluded in 1658 between Denmark and Sweden, Denmark ceded to Sweden the area known as the Bohuslän territory. Towards the end of the 19th century it became apparent that the Grisbadarna banks, which bordered on this territory, were rich in lobster. As a consequence a dispute arose between Norway and Sweden as to the precise demarcation of the border along the Grisbadarna banks. In 1900 this controversy was submitted by the parties for judicial settlement and the Permanent Court of Arbitration was called upon to decide whether the maritime boundary between the two countries had been fixed, in whole or in part, by the boundary treaty concluded in 1661, i.e. 3 years after the conclusion of the Treaty of Roskilde, and if not - to fix this boundary in conformity with the principles of international law. In

its award of 23 October, 1909, the tribunal found that the boundary line had indeed not been fixed by the 1661 treaty beyond a certain point and that a portion of it was uncertain. The arbitrators thereupon proceeded to fix the boundary and in doing so applied the principles which were in force at the time when the original treaty was concluded, and which would have been applied by Norway and Sweden during the 17th century. Turning to the question of fixing the precise boundary line dividing the two countries, the tribunal held that:

> "in order to ascertain which may have been the automatic dividing line of 1658 [when the territory was ceded by Denmark] we must have recourse to the principles of law *in force at that time*."(1)

The tribunal declined to apply either the "median-line" or the "thalweg" methods of demarcation, since neither of these methods had achieved a degree of validity in international law in the 17th century. In the tribunal's own words:

> "The rule of drawing a median line midway between the inhabited lands does not find sufficient support in the law of nations in force in the seventeenth century .... it is the same way with the rule of the *thalweg* or the most important channel in as much as the documents invoked for the purpose do not demonstrate that this rule was followed in the present case." (2)

The tribunal therefore decided to follow the "general

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1) Scott, *Hague Court Reports*, 1st series, 1916, p. 121, at p. 127 (Italics added).

2) Ibid. at p. 129 (Italics in original).

direction of the coast" rule, explaining this decision by the fact that:

> "we shall be acting much more in accord with the ideas of the seventeenth century and with the notions of law prevailing at that time if we admit that the automatic division of the territory in question must have taken place according to the general direction of the land territory of which the maritime territory constituted an appurtenance and if we consequently apply this same rule at the present time in order to arrive at a just and lawful determination of the boundary." (1)

Thus the tribunal applied the "general direction of the coast" principle on the assumption that this principle - while no longer valid in modern international law - must be preferred in this case to the currently prevailing concepts of demarcation (median line, thalweg, [illegible]), because it was the "general direction of the coast" principle and not the other methods referred to that was in force at the time when the disputing parties had acquired their original rights.

Incidentally, this assumption of the tribunal may be regarded as having been reversed - though in a different context - some forty years later by the International Court of Justice in the Fisheries case where the majority of the Court adhered to the principle that "the belt of territorial waters must follow the general direction of the coast." (2) This

1) Ibid.

2) ICJ Reports, 1951, p. 129.

passage of the Court's judgment may be properly considered as having effected a sort of revival of the ancient principle which, in the view of the tribunal in the Grisbadarna case, had lost its validity in modern international law. (1)

It is worth noting at the same time that, while considerations relating to the temporal sphere of validity of laws were pleaded at some length by the parties to the Fisheries case, (2) the Court appears to have evaded this issue in its judgment and apparently endeavoured to give the impression that the problems attendant upon the application of inter-temporal law were not really relevant in resolving this controversy. It would appear that the only reference there which may be taken as an endorsement of the principle of non-retroactivity of laws is that passage of the judgment where the Court, discussing Norway's title to the whole of the Lopphavet, pointed out that at the end of the 17th century the King of Norway had granted to Lt. Commander Erich Lorch an exclusive privilege to fish and hunt whales in the Lopphavet. (3) The Court found that these privileges

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1) This dictum of the Court has evoked criticism in many quarters; see e.g. Waldock, The Anglo-Norwegian Fisheries Case, in 28 BYIL (1951), p. 117, at p. 148; see also Johnson The Anglo-Norwegian Fisheries Case, 1 ICLQ (1952), p. 145, at pp. 161-163.

2) See e.g. ICJ, Fisheries Case, Pleadings, Oral Arguments, Documents, vol. I, pp. 342 et seq; vol. II, pp. 652-655.

3) ICJ Reports, 1951, p. 142.

included "all fishing banks, from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation at that time." (1)

In the course of the pleadings in the *Fisheries* case, as well as in the *Minquiers and Ecrehos* case, which was heard two years afterwards, the parties to these disputes relied heavily on, and referred frequently to, the arbitral award rendered by Judge Huber in the *Island of Palmas* Arbitration some quarter of a century earlier. In fact, Judge Huber's decision may be properly regarded as the leading case in international law on this topic. It was in this award that the arbitrator explicitly invoked the doctrine of intertemporal law as regards the legal validity of a territorial title which was acquired under a legal regime which has since given place to another. As will be recalled, the United States contended that, since Spain had acquired an original title to that island by means of discovery, she, by virtue of her being the successor to Spain, must be deemed to be the territorial sovereign over the Island of Palmas (or Miangas). Discovery was, in fact, recognized as one of the roots of a territorial title by international law in force in the 17th

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1) Ibid.

century (when the island was first discovered by Europeans), but no valid territorial title can be based on mere discovery, according to the concepts prevailing in contemporary international law.

The Netherlands accordingly challenged the United States' claim, relying on a title subsequently acquired by way of effective possession. The Arbitrator was thus called upon to decide what legal significance international law of the 20th century was prepared to attach to a title based on discovery. The Arbitrator commented on this aspect of the problem in the following words:

> "It is admitted by both sides that international law underwent profound modifications between the end of the Middle Ages and the end of the nineteenth century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilized peoples. Both parties are also agreed that a juridical fact must be appreciated _in the light of the law contemporary with it_ and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the sixteenth century." (1)

At this juncture, however, the arbitrator parted company with the United States' Argument by introducing the all-important distinction between the _acquisition_ of a territorial title and its _maintenance_. While the validity of the

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1) UNRIAA, vol. II, p. 845 (Italics added).

original act of acquisition is determined in the light of the rules in force at the moment of the acquisition, the questions relating to the maintenance of such a title are viewed, according to the Arbitrator, by the rules "required by the evolution of law." The arbitrator formulates this distinction in the following terms:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case, (the so-called intertemporal law) a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law." (1)

The arbitrator went on to say that international law in the 19th century "laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective." (2) It seemed therefore incompatible with this rule of positive law "that there should be regions which are neither under the effective soverignty of a state nor without a master, but which are reserved for the exclusive influence of one state, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such title

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1) Ibid. (Italics added).

2) Ibid. at p. 846.

ever conferred territorial sovereignty." (1)

It necessarily followed that, in the Arbitrator's view, the United States could not rely on a title based merely on simple discovery. He doubted, moreover, whether international law ever regarded discovery as more than an "inchoate title", which, in order to constitute a perfect and valid territorial title, must be followed up within a reasonable period by the effective occupation of the region alleged to have been discovered. "This principle", said the Arbitrator, "must be applied in the present case, for the reasons given above, in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law)." (2) The Arbitrator concluded that "an inchoate title [based on discovery] could not prevail over the continuous and peaceful display of authority by another state," (3) and accordingly rejected the United States' claim.

Thus the Arbitrator appears to require only for the acquisition of a territorial title the application of the rules in force at the time when such acquisition is alleged to have taken place, while the question whether or not such a title has been subsequently maintained must be viewed, in

1) Ibid.

2) Ibid.

3) Ibid.

his opinion, in the light of the legal principles in force at later periods.

The first proposition of Judge Huber was unanimously accepted as an accurate presentation of the legal situation; his second proposition, however, met with considerable opposition on the ground that the principle enunciated therein might create a situation where no State would know for certain if a title originally acquired by it was still valid in international law. According to Jessup, who is among those who emphatically challenged the views expounded by Judge Huber on this point, "every State would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition .... the result would be chaos." (1)

It would appear, however, that Judge Huber's award does not necessarily entail the far-reaching consequences ascribed to it by Jessup. All it means is that, if a State is in effective possession of a territory to which another State has laid a claim based on a purely abstract right, unaccompanied by any concrete act or manifestation of authority,

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1) Jessup, The Palmas Island Arbitration, 22 AJIL (1928), p. 735, at p. 740; see also to the same effect Verzijl, The Mianges Arbitration, 1933, pp. 14-16.

then, in the light of the rules of contemporary international law, the State in effective possession will be deemed to have a superior title; this will be so because in modern international law an abstract title without effective possession cannot prevail over a constant and effective manifestation of authority. (1)

This, in fact, was the interpretation given to Judge Huber's award by both parties to the Minquiers and Ecrehos case, in which the problem of the temporal conflict of laws was again brought to the fore. There the International Court of Justice was seized of a dispute concerning two islets to which both the United Kingdom and France claimed an original title going back to the Middle Ages. Both parties invoked in support of their claims what they understood to be the rules in force at the time when their alleged

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1) This aspect of the problem will be gone into more extensively in the section discussing the relative strength of competing territorial claims (section IV below); see to this effect Johnson in Cambridge Law Journal, (1955), pp. 224-225 and Beade, loc.cit. at p. 242. This second aspect of the application of intertemporal law is unlikely to be the source of any injustice because, as has been pointed out by Roche, "intertemporal law has never been applied where a change in the law has come about, as (or?) when there is an international convention. Generally speaking therefore, the intertemporal law will apply in cases where international customary law has changed gradually over the years. In which case, the change of the rule of law will usually be the result of the combined practice of many States. (Roche, The Minquiers and Ecrehos Case, 1959, p. 83).

rights took shape. Thus Sir Lionel Heald for the United Kingdom in his oral arguments stated that "not only must claims to sovereignty based on medieval feudal law be examined in the light of that law, but also..... any such claims, if put forward as still valid today, must be examined in the light of international law _as it has developed during the intervening centuries_, and in particular, in the light of what international law, as it now stands, requires in order to constitute a title to territory." (1)

Similarly, Professor Gros, on behalf of France, observed that "un titre doit être apprécié selon les conceptions et les règles en vigueur à l'époque où il est né." (2) He further pointed out that "un fait juridique doit être apprécié à la lumière du droit qui lui est contemporain et non à celle du droit en vigueur au moment où le différend s'élève ou est réglé." (3) Giving his interpretation of the _Island of Palmas_ case, Professor Gros contended that it clearly emerged from the award in that case that "lorsque disparaît le système juridique en vertu duquel le titre a

1) ICJ, _Minquiers and Ecrehos_ case, _Pleadings, Oral Arguments, Documents_, vol. II, p. 53. (Italics added).

2) Ibid, p. 206.

3) Ibid. p. 375.

été valablement créé, ce droit ne peut plus être maintenu dans le système juridique nouveau, à moins qu'il ne se conforme aux conditions exigées par ce dernier." (1) The application of such a rule was, in Professor Gros' opinion, vital in the interests of adapting international law to changing circumstances and realities "parce qu'elle exige que le titre ancien se conforme aux conditions du droit nouveau et évite aussi de prolonger à l'infini, isolé de tout le reste du milieu juridique contemporain, un droit acquis sous l'empire d'un ordre juridique aujourd'hui périmé." (2)

Thus the parties seem to have been at one as to the applicability of the rules of intertemporal law in international law, as regards the acquisition of a territorial title.

The Court in its judgment appears to have associated itself with the opinions voiced by the parties holding that:

> "even if the Kings of France did have an original title ..... in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years. Such an original feudal title of the Kings of France in respect of the Channel Islands could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement." (3)

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1) Ibid.

2) Ibid.

3) ICJ, Reports, 1953, p. 47, at p. 56; see also pp. 60-62.

Thus, the Court, following the rules laid down in the Island of Palmas Award, decided that the maintenance of a territorial title - in contradistinction to its acquisition - was to be determined not by the law in force at the period of the acquisition of the title but by the legal principles as they evolved through the periods during which such authority is purported to have been exercised. (1)

In a paper read before the Grotius Society in 1954, Wade expressed the view that in the Minquiers and Ecrehos case "the Court missed an opportunity of contributing a precedent to international law on the working of the intertemporal law doctrine." (2) In his opinion, the Court "could only have taken up the neutral attitude which it did to this material because it had at its disposal more cogent evidence of the ownership of the islets." (3) This statement, however, is hardly compatible with a further observation

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1) There has been some argument as to whether the examination of feudal law by the Court should be interpreted as an application of this law by the Court or not. Verzijl seems to hold the view that the Court in fact applied feudal law in this case (loc.cit. at p. 362); Roche, on the other hand, thinks that the Court's practice in this case merely amounts to "ascertaining as a fact the content of another system of law." (Roche, op.cit. p, 81, n. 5).

2) Wade, The Minquiers and Ecrehos Case, 40 Grotius Transactions (1954) p. 97, at p. 101.

3) Ibid.; a similar view is taken by Roche, op.cit. at p. 85.

made by Wade that "the Court was prepared to interpret two Charters of the early 13th century granting land in one of the groups, and also to interpret a record of litigation in the early 14th century which confirmed the effect of these grants." (1) Had the Court really declined to apply the rules of intertemporal law, as is asserted by Wade, the interpretation of these medieval documents must indeed appear to be irrelevant. As Wade himself points out, the Court could have declined "to decide the issue of ancient title at all and have based its decision on the exercise of authority in modern times." (2)

Both the Island of Palmas case and the Minquiers and Ecrehos case have clearly demonstrated the difficulties attendant upon the application on the international level of frequently contradictory rules of customary law. These difficulties are derived from the fact that, owing to the unique process of evolution which characterizes customary law, it will be virtually impossible to ascertain at what date a given rule of customary law lapsed and at what time another rule of law took its place.

In this connection it is worth mentioning another case - this time a case decided by a national court of law - in which

1) Ibid.

2) Ibid.

the United States Supreme Court came up against this stumbling-block of the temporal conflict of laws. In New Jersey v. Delaware (1) the Court dealt with a boundary dispute between two neighbouring states of the Union and was called upon to fix the boundary between them. The dividing line between the states of New Jersey and Delaware is first Delaware River and then Delaware Bay. The state of Delaware claimed that the boundary should follow the geographical median line, while New Jersey relied upon the thalweg principle.

The Court observed on this point that:

> "up to the time when New Jersey and Delaware became independent states, the title to the soil under the waters below the circle was still in the Crown of England. When independence was achieved, the precepts to be obeyed in the division of the waters were those of international law ......[which] today divides the river boundaries between States by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks ..... The underlying rationale of the doctrine of the Talweg is one of equality and justice." (2)

The Court could not, however, establish beyond any doubt the exact date at which the thalweg principle found admission into positive international law. While this principle was certainly "in the making" during the latter part of the 18th

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1) 291 U.S. (1934) p. 361 et seq.

2) Ibid. at pp. 378-380.

century, it did not achieve at that time supremacy among "the conflicting methods of division .... contending for mastery." (1) The application of the thalweg principle was nonetheless warranted in this case, in the Court's opinion, by the fact that:

> "In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give the boundary .... a practical location, or to establish a prescriptive right. In these circumstances, the capacity of the law to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the Talweg had only a germinal existence. The gap is not so great that adjudication may not fill it." (2)

This passage affords a good illustration of the rather widespread - but usually less pronounced - tendency to apply retroactively a new rule of customary rule, under the pretext that at the time to which it is being applied it was at least "taking shape". It should be noted, however, that in the given case the Court's inclination to apply a rule which it considered as just and reasonable was considerably facilitated by the concession made by Counsel for Delaware who

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1) Ibid, p. 383.

2) Ibid.

"made no point that the result is to be affected by difference of time." (1)

It may be also mentioned that in article III of the Agreement between Great Britain and the United States of Venezuela respecting the settlement by arbitration of the Venezuelan-British Guyana Boundary Dispute, the contracting parties stipulated that the arbitral tribunal "shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana ....." (2)

In the arbitral award of 3 October, 1899, the tribunal reproduced verbatim these terms of reference and stressed that it "investigated and ascertained the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of

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1) Ibid. p. 384.

2) 89 BFSP, pp. 57-65, at p. 59 (Italics added); it should be added, however, that the scope of this provision was somewhat restricted by the stipulation made in article IV.(a) of the same treaty where it was laid down that "adverse holding or prescription during a period of fifty years shall make a good title." (ibid. at p. 60).

British Guiana." (1)

The examples referred to above seem to indicate that, notwithstanding the doctrinal dearth of authority on this subject, the introduction of the rules of intertemporal law into the field of international law constitutes the well-recognized practice and flows from a genuine necessity to ensure a certain degree of stability for an existing state of things. Were the operation of these rules on the international plane called in question, this would almost certainly lead to the invalidation of the majority of the territorial titles on which the rights of States at present rest, as most of them rely on titles which are no longer valid in present day international law, though they were undoubtedly recognized as good titles at the time of their acquisition. At the same time the application of this principle is not intended to form an obstacle to the development of international

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1) 92 BFSP, pp. 160-162, at p. 161; the award is also reproduced in LaFontaine, _La Pasicrisie Internationale_, 1902, pp. 556-557. Further instances for the application of intertemporal law in State practice may be found in the express stipulation to this effect inserted in the Protocol signed at Washington on 28 May, 1884, by the United States and Haiti submitting for arbitration the _Dispute relating to Pelletier and Lazare_ (see Moore, _International Arbitrations_, 1898, vol. V, p. 4768) and in the decision rendered by Pope Leo XIII in 1885, in the _Caroline Islands_ case between Germany and Spain (see 76 BFSP, p. 293).

law and to its being brought in line with the prevailing and evolving concepts of a more refined legal system. Thus a balance has to be struck between the seemingly conflicting needs of stability and adaptability. In the view of Professor Gros, as expressed in his oral argument in the Minquiers and Ecrehos case, the distinction between the law applicable to the acquisition of a new right and that applicable to its maintenance - which has been gone into above - reconciles "les deux exigences fondamentales du droit: la sécurité et l'adaptation. La sécurité, parce qu'elle évite de rendre caducs de droits acquis valablement sous l'empire du système juridique ancien; l'adaptation, parce qu'elle exige que le titre ancien se conforme aux conditions du droit nouveau ....." (1)

The twofold aspect of the application of intertemporal law seems to meet both requirements. The first principle, namely, the principle that acts must be judged in the light of the law contemporaneous with their creation, is aimed at upholding the interests of stability and security in international relations; the second principle, i.e. the principle that rights validly acquired by the law in force at the time of their acquisition may lose their validity if not maintained

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1) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, Vol. II, p. 375.

in accordance with the changes brought about by the development of international law, is intended to meet the requirements of the adaptation of the law to the changing international scene. While it is essential to recognize the fundamental difference between these two aspects of intertemporal law, it is equally vital to realise that neither of the concomitant factors of intertemporal law can be invoked in isolation, disregarding the other. All the same, the first principle seems to have been generally accepted, while the second is still hotly contested. Nevertheless, in spite of the criticism levelled against recourse being made to the second principle - to which reference has been made above - it can be hardly doubted, in view of the judicial decisions referred to in this section, that this principle too has gained acceptance in the sphere of international law.

In order to achieve a reconciliation between these two aspects of intertemporal law, which are frequently present in territorial disputes, it is vital that a certain date be fixed which may serve as the starting point for the investigation of the rival claims and for a decision as to which of the competing claims is to prevail. The fixing of such a "critical date" is indeed decisive for the outcome of a dispute of this kind for it follows that acts performed after the "critical date" will be normally held as devoid of

any legal significance. This is why it is felt that the following sections of this chapter should be devoted to a more thorough analysis of the problems pertaining to the fixing of the "critical date" and to the method of assessment of the relative strength of competing claims.

III. The selection of the "critical date".

International disputes relating to territorial claims are frequently a matter for protracted negotiations and lengthy discussion and procrastination. Frequently such disputes will be dragged on for decades or even for centuries and their settlement will be reached long after the dispute first arose. Thus it is easy to understand that a tribunal confronted with a controversy of this kind will have to determine at what time the dispute must be presumed to have arisen. Such a decision is rendered necessary for two main reasons:

(a) by fixing the date at which the dispute is presumed to have begun the tribunal, in fact, determines what rules of law should govern the problems relating to the acquisition of the territorial title, in accordance with the rules of inter-temporal law, which were dealt with in the previous section.

(b) by fixing this date, the tribunal automatically excludes any subsequent act performed by either of the

litigant parties with a view to upsetting the status quo existing at the time of the outbreak of the dispute, and taking advantage of such improvements in its position.

Thus it is of the utmost importance in each of these territorial disputes to fix the date at which the dispute arose, or to use the specific term employed for this purpose: to fix the "critical date". The critical date has been rightly defined by one writer as "the date after which the acts or omissions cannot affect the legal situation." (1) It is an assumption of law that at a certain moment in the past the situation which gave rise to the dispute between two rival parties became, so to speak, "frozen". It is the situation which prevailed at that given moment which serves as the legal criterion and yardstick by which the merits of the conflicting parties' alleged rights are being measured. Any subsequent change or modification, as a result of the parties' acts or omissions, will be deemed irrelevant from the legal point of view and will be unable to improve, impair

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1) Johnson, The Minquiers and Ecrehos Case, 3 ICLQ, (1954) p. 189, at p. 208. The same writer defined in an article written in 1950 the critical date as "the date after which the actions of the parties cannot affect the legal situation" (see Johnson, in 27 BYIL (1950), p. 342, n.4). Another definition given by Roche is: "the date after which the actions of the parties may no longer affect the issue; the titles of the parties having to be determined according to the legal situation existing at that date." (see Roche, op.cit. at p. 83). As to other possible definitions see Fitzmaurice in 32 BYIL (1955-56), p. 20, n.2.

or alter in any way the rights of the parties.

Some international treaties contain express provisions fixing the date or event which is to govern the legal position in a certain case and which constitutes the "critical date" in the case in question.

This result of the "freezing" of a territorial situation was effected in the provisions of article IV of the 1959 Antarctic Treaty which stipulates that there shall be no "renunciation by any contracting Party of previously asserted rights or claims" to territorial sovereignty in the Antarctica and that "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 sovereignty.... or create any rights of sovereignty. No new claim ...... shall be asserted while the present Treaty is in force." (1)

While the notion of the "critical date" seems to have been always implicit in territorial disputes, the term itself appears to have originated comparatively recently, namely, in the award given by Judge Huber in the Island of Palmas

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1) Article IV of the Antarctic Treaty of 1 December, 1959, printed in Cmnd.913, Miscellaneous No. 21 (1959) and in 9 ICLQ (1960) p. 475. For the history of the different national claims to the Antarctic regions, and the various stages leading up to the conclusion of the treaty and its critical appraisal, as well as for the references to the relevant literature, see Hanessian, The Antarctic Treaty, 1959, 9 ICLQ (1960) p. 436 et seq.

case, where the distinguished arbitrator referred to the Treaty of Paris as to the "critical moment in this case" (1) and went on to say:

> "The question arises whether sovereignty ..... existed at the critical date, i.e. the moment of the conclusion and coming into force of the Treaty of Paris." (2)

Now, it is evident that the "critical date" cannot be arbitrarily chosen since, if this were allowed, it would be tantamount to deciding the case before going into its merits. The selection and fixing of the "critical date" being of primordial importance and entailing most serious legal consequences, this must accordingly be done in conformity with the accepted legal principles on this point.

In his oral argument before the International Court of Justice in the Minquiers and Ecrehos case Sir Gerald Fitzmaurice, Counsel for the United Kingdom, stressed the fact that "the whole point, the whole raison d'être of the critical date rule is, in effect, that time is deemed to stop at that date. Nothing that happens afterwards can operate to change the situation that then existed. Whatever that situation

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1) UNRIAA vol. II, p. 843; see also ibid. at p. 866.

2) Ibid. at p. 845; see also the Legal Status of Eastern Greenland case where the Court stated that "the date at which ..... Danish sovereignty must have existed in order to render the Norwegian occupation invalid, is the date at which the occupation took place, viz. July 10th, 1931." (PCIJ, Ser. A/B, No. 53, p. 45). The Court went on to say that "the critical date is July 10th, 1931." (Ibid.)

was, it is deemed in law still to exist; and the rights of the parties are governed by it." (1)

In an article published in 1956 Sir Gerald gave a list of possible criteria for determining the critical date. In his view the following are the main possibilities for the selection of the critical date:

> "(I) the date of the commencement of the dispute;
> (II) the date ... when the challenging or plaintiff State first makes a definite claim to the territory;
> (III) the date .... when the dispute 'crystallized' into a definite issue between the parties as to territorial sovereignty;
> (IV) the date when one of the parties .... takes active steps to initiate a procedure for the settlement of the dispute, such as negotiations, conciliation, mediation ... or other means falling short of arbitration or judicial settlement;
> (V) the date on which any of these procedures [as mentioned in (IV) above] is actually resorted to and employed;
> (VI) the date on which, all else failing, the matter is proposed to be or referred to arbitration or judicial settlement." (2)

Sir Gerald himself describes these rather speculative remarks as being tentative and breaking new ground, (3) and it is felt therefore that the principles underlying the rules, according to which the critical date is selected, can be best

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1) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. II, p. 64.

2) Fitzmaurice in 32 BYIL (1955-56) pp. 23-24.

3) Ibid. at p. 2.

ascertained by investigating some of the more important judicial decisions in which this question arose. Here again perhaps the most revealing decision is the arbitral award of Judge Huber in the Island of Palmas Arbitration. With his characteristic lucidity and clarity of style the eminent Swiss international lawyer and former President of the Permanent Court of International Justice set out to discuss this problem. He found that the critical date in that case was the year 1898, this being the date on which Spain transferred her rights over the Philippine archipelago to the United States. Basing himself on the well known maxim "nemo dare potest quod non habet", the arbitrator took the view that it was at this moment that the Treaty "focused" the dispute and formed the basis for the determination of the critical date. In the arbitrator's own words:

> "The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory." (1)

It is significant that Judge Huber fixed the critical date at 1898 and not, for instance, at 1648, the date of the conclusion of the Treaty of Münster, which, in the arbitrator's own words, was "the earliest treaty .... to define the relations between Spain and the Netherlands in the

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1) UNRIAA, vol. II, p.843.

regions in question." (1) Thus it can be readily seen that the critical date is not the date at which a dispute is "born", but rather the date at which it is "focused". It was only in 1898 that the issue originated whether the purported transfer of the title to the Island of Palmas from Spain to the United States under the Treaty of Paris was valid or not. The arbitrator quoted to this effect a letter written in 1900 by the United States Secretary of State to the Spanish Minister in Washington where this point was explicitly made in the following words:

> "This Government must .... hold that the only competent and equitable test of fact by which the title to a disputed cession .... may be determined is simply this: was it Spain's *to give*? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none." (2)

Judge Huber's insistence on the selection of 1898 as the critical date is explained by the fact that the dispute as to the sovereignty in that case turned on a distinct event, i.e. the coming into force of the Treaty of Paris. In other cases the determination of a territorial dispute may turn

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1) Ibid. at pp. 844-845; in 1648, though, there did not arise any dispute between the parties to the Treaty of Münster regarding the Island of Palmas. Seen in retrospect, however, that date may be regarded as the date of the "birth" of the dispute, giving rise to the *facts* which underlay the later dispute.

2) Ibid. at p. 842. (Italics added).

upon the validity or otherwise of a law or decree proclaiming sovereignty, such law or decree being promulgated by one of the parties to the dispute and being challenged by the other. In such cases the point in issue is the validity of the law or decree relied upon from the viewpoint of international law, and the critical date will accordingly be fixed as the date of the promulgation of such law or decree. In territorial disputes of this kind the selection of the critical date is more or less obvious, or, to use the term employed by Sir Gerald Fitzmaurice, we are dealing with "self-evident critical dates." (1)

This point was made abundantly clear in the Legal Status of Eastern Greenland case where the Permanent Court of International Justice had to pronounce on the validity, as against Denmark, of a Norwegian Royal Decree of 10 July, 1931, in which Norway had proclaimed her sovereignty over Eastern Greenland. The Court held that the Royal Decree was, in effect, the matter "which gave rise to the ..... dispute" (2) from which statement it followed that:

> "the date at which such Danish sovereignty must have existed in order to render the Norwegian occupation invalid is the date at which the occupation took place, viz. July 10th, 1931." (3)

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1) 22 BYIL (1955-56) p. 22.

2) PCIJ, Ser. A/B, N.53, p. 26.

3) Ibid. at p. 45.

Here again the Court did not select as the critical date the period at which the dispute was "born". The dispute between the two countries in all probability "began" as early as 1814, when the Union between them came to an end. There was also ample evidence that from 1921 onwards Norway openly challenged Denmark's rights over Eastern Greenland. Yet the Court selected July 1931 as the critical date because it was on that date that happened the concrete event which "focused" the dispute.(1)

Both in the Island of Palmas Arbitration and in the Legal Status of Eastern Greenland case the critical date was determined with reference to a treaty or proclamation which made it relatively easy to ascertain the precise moment at which the dispute arose. This task is, however, rendered less straightforward in those cases in which one cannot point at any instrument or other event of this kind which can "focus" the dispute and form the basis for the determination of the

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1) The selection of the critical date in this case has met with criticism by Roche on the ground that the Court should have fixed 1921 as the critical date in view of the fact that Norway's acts after that date were performed, in her own admission, for the purpose of improving her position during the forthcoming legal proceedings. Roche holds the view that the Court's decision was due largely to the fact that Denmark herself did not formulate her case before the Court in such a way as to make it depend on the position as it stood in 1921, thus precluding Norway from invoking any subsequent acts. He reaches the conclusion that "the critical date may depend on the will of one party so long as the other party does not object. If the other party does object, it falls to the Court to decide what shall be the critical date." (Roche, op.cit. at p. 95).

critical date. The difficulties attendant upon the fixing of the critical date in such cases are vividly illustrated by the pleadings of the parties on this point in the Minquiers and Ecrehos case. It will not be too bold to assert that this case virtually revolved around the determination of the critical date, it being apparently understood by both parties that if the events of the last hundred years were to be taken into account, then the United Kingdom title must prevail. This conclusion was the result of the fact that during the past century or so the manifestations of British authority over the two disputed islets were far more numerous than those of the French and it was therefore hardly surprising that, in the written arguments submitted on behalf of France, the critical date was set back as far as 1839, in the belief that the further this date could be put back, the stronger was the chance for the French case to succeed. The year 1839 was chosen by the French Government on the ground that in that same year a Fishery Convention was signed between the litigant parties whereby they defined and regulated the limits within which the general right of fishing was to be reserved thenceforth for the subjects of Great Britain and France, respectively. According to the provisions of article 3 of the said Convention, the Minquiers and Ecrehos formed part of an area within which common or joint fishery rights were

established.[1] It was contended on behalf of France that any acts performed subsequent to the conclusion of that treaty were irrelevant to the issues before the Court because the dispute in this case had arisen at the moment of the conclusion of the Convention and the situation which had existed at that date must be presumed to have prevailed ever since.[2]

This contention was refuted by the United Kingdom Reply for a variety of reasons, and it was argued, inter alia, that the Minquiers and Ecrehos had never come under article 3 of the 1839 Convention, because they had already been under British sovereignty at that time.[3] As against this arbitrary selection of a somewhat artificial critical date, the United Kingdom maintained throughout the proceedings that the real critical date in this case was the year 1950, the date on which the dispute "crystallized", i.e. was submitted by the parties to the jurisdiction of the Court. So far as can be established, this notion of "crystallization" as a criterion for the selection of the critical date was first introduced by the United Kingdom in this case and had never

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1) For the text of the Convention see Annex A 27 to the United Kingdom Memorial, ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. I, pp. 179-186. Article 3 may be found on p. 183 there.

2) Ibid, pp. 720-723.

3) Ibid, p. 447.

been resorted to before. According to Sir Gerald Fitzmaurice, Counsel for the United Kingdom in that case, who pleaded for the adoption of this test before the International Court of Justice, a dispute crystallizes into a concrete issue at the moment when

> "The Parties are no longer negotiating, or protesting, or attempting to persuade one another. They have taken up position and are standing on their respective rights and when that occurs, the claims of the Parties must obviously be adjudged according to the facts as they stand at that moment ...." (1)

The notion of crystallization was invoked again shortly afterwards in the United Kingdom applications in the Antarctica cases where it was asserted that the acts of the parties after 1926 in the case of the South Orkneys and after 1937 in the case of South Shetlands and Graham Land were of limited juridical relevance because "the dispute crystallized when Argentina first asserted her claims, namely, in or about 1926 in the case of the South Orkneys and in or about 1937 in the case of the other two territories; and according to well-established principles of law, it is at the date of crystallization that the rights of the Parties are to be adjudged."(2)

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1) Ibid. vol. II, p. 68.

2) ICJ, Antarctica cases, Pleadings, Oral Arguments, Documents, p. 32; see to the same effect ibid, p. 70 where the notion of "crystallization" was further resorted to in the application instituting proceedings against Chile. The date of the crystallization of the dispute with Chile was given as 1940.

Roche takes the view that this conception of the "crystallization" of an issue "bears a considerable resemblance to the situation which is often required by treaty, that the possibility of settlement by diplomatic negotiations should have been exhausted before the submission of a dispute to a judicial authority." (1)

The precise meaning of this notion has been described at some length by Sir Gerald in the course of his oral arguments in the _Minquiers and Ecrehos_ case and it appears well worth while to enlarge further on his thesis on this point. In his view, the basis for the determination of the critical date would be "the position existing on that date on which the differences of opinion that have arisen between the Parties have crystallized into a concrete issue giving rise to a formal dispute." (2) He suggested that the preliminary period preceding most disputes during which there are diplomatic exchanges, protests, or even negotiations, - a period the length of which varies according to circumstances - be not taken into account in the determination of the critical date because at that time the parties have not yet taken up any final position. In Sir Gerald's view:

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1) Roche, op.cit. pp. 96-97.

2) ICJ, _Minquiers and Ecrehos_ case, _Pleadings, Oral Arguments, Documents_, vol. II, p. 68.

> "in the ordinary course of events and assuming that once a concrete issue has arisen between two countries, they decide to settle it by international adjudication, the critical date would be the date on which they agreed to submit the dispute to a tribunal." (1)

Counsel for the United Kingdom was, however, at pains to point out that since the selection of the critical date serves an equitable purpose, namely, to ensure that the dispute be determined on the basis that seems most just and equitable, there may arise cases in which the critical date should be fixed at a date other than the date on which the dispute was submitted by the parties for adjudication. He therefore pointed out that one objective for the fixing of the critical date being to prevent one of the parties from unilaterally improving its position by means of taking some steps after the issue has been definitely joined, it would be contrary to the professed aims of doing justice to the real merits of each country's case to stick indiscriminately to the date of the submission of the dispute to adjudication as the test for the determination of the critical date. Such a course would be obviously unjust in cases where one of the parties at first evades a settlement, rejects the suggestion to go to arbitration, and then proceeds to take various steps to improve its position. If such a party eventually

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1) Ibid, pp. 68-69.

expresses its willingness to submit the dispute for a judicial settlement, it would be surely unfair to the other party, which had all along been willing to accept arbitration, to make the date of the eventual submission to a tribunal the critical date. Sir Gerald suggested that in such cases it would be more in consonance with the general notions of justice that the day on which arbitration was first proposed be fixed as the critical date.

While warning against putting the critical date too late, Sir Gerald had equal misgivings as regards putting it too early. He felt, rightly, it is believed, that such a course might unduly favour the party "which has put forward a claim in a general way but has not pursued it or has only pursued it in a desultory or intermittent way, without attempting to bring the matter to a head or to prosecute its claim by seeking international adjudication." (1) This would "place a premium on the making of paper claims which the country concerned need not then follow up or insist upon" (2) and it would thus enable such a State to "freeze" the legal position by the mere raising of a claim, in depriving any subsequent acts performed by the other party from any legal significance.

Sir Gerald's analysis of the problems relating to the

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1) Ibid, p. 69.

2) Ibid.

critical date represents, it is felt, the correct and proper approach to this delicate and at the same time decisive question for the acquisition of a territorial title in general and of an historic title in particular. This is why it was deemed appropriate to recapitulate his views on this subject at some length. It is certainly a matter for regret that the Court in its judgment showed some reluctance in expressing its views on this question. There is, however, little doubt that the Court rejected outright the French submission to regard the 1839 Convention as the critical date by pointing out that:

> "at the date of the Convention of 1839, no dispute as to the sovereignty over the Ecrehos and Minquiers groups had yet arisen. The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that question to the question of sovereignty over the Ecrehos and the Minquiers. In such circumstances there is no reason why the conclusion of that Convention should have any effect on the question of allowing or ruling out evidence relating to sovereignty." (1)

Following the same line of argument, Judge Levi Carneiro in his individual opinion pointed to the inherent contradiction of the French contention which tried on the one hand to fix the critical date in the year 1839 and at the same time did not fail to consider acts subsequent to 1839 and to invoke

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1) ICJ Reports, 1953, p. 59.

them in support of its case.[1]

Thus the Court clearly declined to associate itself with the French proposition without, however, stating in an unequivocal manner what it considered to be the critical date in this case. A closer perusal of the Court's judgment does, however, indicate that the Court, without expressly claiming to do so, regarded the years 1886 and 1888 as the critical dates as regards the Ecrehos and the Minquiers, respectively. This seems to emerge from that passage of the judgment in which the Court states that:

> "A dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when Fran e for the first time claimed sovereignty over the Ecrehos and Minquiers, respectively." (2)

The Court's judgment seems to have attached to the notion of "crystallization" a somewhat different meaning from that assigned to it by the United Kingdom. The Court in fact fixed the critical date at the time when the French Government made a definite claim to sovereignty in respect of each of the disputed islets. Thus the critical date appears to be the date of the origin of the dispute rather than its crystallization. By setting back the critical dates to the years 1886-1888 the Court at the same time declared that it

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1) Ibid. at p. 106.

2) Ibid. at p. 59.

was prepared to take account of various acts which had been performed after the critical dates, explaining this decision by the "special circumstances of the case". In the Court's own words:

> ".... In view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned. In many respects activity in regard to these groups had developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and <u>in a similar manner</u>. In such circumstances there would be no justification for ruling out all events which during this continued development occurred after the years 1886 and 1888 respectively." (1)

This conclusion may strike one at first sight as rather odd because, as will be remembered, the very purpose of the critical date is to <u>exclude</u> any subsequent fixing of the critical date is to exclude any subsequent activities from being taken into account. (2) The Court

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1) Ibid. at pp. 59-60. (Italics added).

2) In the United Kingdom application against Argentina in the *Antarctica* cases this point was explicitly made when it was alleged that all acts performed by the Argentine Government subsequent to what the United Kingdom regarded as the dates of crystallization in these cases "were clearly undertaken, not as a genuine manifestation of an existing title, but with a view to trying to create one and in order to improve Argentina's legal position. They are not, therefore, to be taken into consideration." (*Antarctica* cases, *Pleadings, Oral Arguments, Documents*, p. 32); as regards various acts performed by Chile, see to the same effect, ibid. at p.70.

in this case, after determining the critical dates as being in 1886 and 1888, did in fact refer to acts and events which occurred as recently as 1950.(1) True, the Court left no doubt that the acts following the commencement of the dispute in 1886 and 1888 were not regarded as constituting further stages in the emergence of the critical date, prior to its coming into being, but rather as acts subsequent to its coming into existence. Still, the passage of the judgment just quoted does seem to contradict the definition of the critical date given in this section,(2) where it was asserted that the function of the critical date was to "freeze" the legal situation as it existed on the critical date and to exclude from the scope of legal consideration any events which occurred after that moment. This apparent contradiction resolves itself when one bears in mind that, although evidence of acts occurring after the critical date cannot be adduced directly in proof of a title, it may at the same time be admissible indirectly because of the light it throws on events

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1) See e.g. ibid. at p. 65, where the Court relies on inquests held in Jersey on corpses found at Ecrehos in 1948 and on rating schedules of 1950 relating to Ecrehos kept by the Jersey authorities. As to the Minquiers, the Court invoked various works and constructions carried out by the Jersey authorities as late as 1933. (Ibid. at p. 69).

2) See p. 394, n. 1 above.

occurring before the critical date or on the position as it stood at that date. Thus the function of these subsequent acts is not to supply evidence required for the proof of a title, but rather to serve as a means of interpreting a title or situation as it existed on the critical date. As was pointed out by Sir Gerald Fitzmaurice in the course of his oral argument in the Minquiers and Ecrehos case, the principle involved on this point is analogous to the "principle of subsequent practice" with regard to the interpretation of treaties." "Just as the subsequent practice of parties to a treaty in relation to it cannot alter the meaning of the treaty, but may yet be evidence of what that meaning is or what the parties had in mind in concluding it, so equally events occurring after the critical date in a dispute about territory cannot operate to *alter* the position as it stood at that date, but may nevertheless be evidence of, and throw light on, what the position was." (1)

This, in fact, was the line adopted by Judge Huber in the Island of Palmas Arbitration. As will be recalled, the

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1) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. II, p. 94 (Italics in original); for a more detailed analysis of the "principle of subsequent practice" and for further authorities in support of the admissibility of such practice as a principle of treaty interpretation, see Fitzmaurice, in 28 BYIL (1951), p. 9 and pp. 20-22.

arbitrator selected the year 1898 as the critical date in that case; this, however, did not prevent him from referring to a subsequent visit of the American General Leonard Wood to the island in 1906, which he described as "the first entry into contact by the American authorities with the island."(1) The arbitrator regarded this event as the "origin of the dispute"(2) between the United States and the Netherlands, as distinct from the "critical moment" which he fixed as being the year 1898. The term "origin of the dispute" is warranted by the fact that it was this visit which sparked off the legal controversy between the parties, leading ultimately to the conclusion of an arbitration agreement in 1925.

It appears therefore that the "critical date" and the "origin of the dispute" are not identical and interchangeable terms. What is more-contrary to what may perhaps reasonably be assumed, the "origin of the dispute" may on occasions be later than the "critical date". Judge Huber made it, however, quite plain that the events which took place between the critical moment and the origin of the dispute "cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the

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1) UNRIAA, vol. II, p. 836.

2) Ibid.

Philippines by Spain took place. They are, however, indirectly of certain interest, owing to the light they might throw on the period immediately preceding." (1) The arbitrator illustrates this by pointing out that "there is no essential difference between the relations between the Dutch authorities and the Island of Palmas (or Miangas) before and after the Treaty of Paris. There cannot therefore be any question of ruling out the events of the period 1899-1906 as possibly being influenced by the existence of the said Treaty." (2)

The International Court of Justice appears to have followed suit on this point in the Minquiers and Ecrehos case when it ruled that acts subsequent to the critical date might be taken account of, provided these acts were not performed with a view to improving the legal position of one of the parties to the detriment of the other and on the condition that they merely constituted a continuation of an already accepted practice carried out in a similar manner as before.(3)

It is believed that the soundness of this approach is well borne out by the realities of international life, because

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1) Ibid. at p. 866.

2) Ibid.

3) ICJ Reports, 1953, pp. 59-60.

normally sovereignty over territory is not something that springs up overnight. It is a lengthy process which is usually going on constantly for some time. If the critical date is fixed in a given case and it is also established that for a number of years afterwards one of the contestants has been exercising governmental authority over the disputed territory, displaying the normal signs of effective and regular State control, then this stability and regularity of State control will in itself strongly militate in favour of the presumption that the State now in effective control was also in control for some time before, including, in all likelihood, the critical date itself. (1)

It is, however, worth noting that under no circumstances will it be permissible to invoke in support of a claim of a

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1) The foregoing statement should not be taken as an endorsement of a principle which would found a State's sovereignty on a purely abstract presumption, raised by the fact that the territory in question was under the authority of that State at two different dates, from which it would follow that, in the absence of any evidence to the contrary this State must be presumed to have been in possession of that territory in the intervening period also. The adoption of such a principle was in fact emphatically rejected by Judge Huber in the Island of Palmas Award when he stated that "the admission of the existence of sovereignty [at two given periods].... would not lead .... to the conclusion that, unless the contrary is proved, there is a presumption for the sovereignty in the meantime .... no presumptions of this kind are to be applied in international arbitrations." (UNRIAA, vol.II, p. 864). See also to the same effect the judgment rendered in the Minquiers and Ecrehos case, ICJ Reports, 1953, p. 55.

territorial title acts which have taken place after the dispute has been narrowed into a concrete issue. In most cases this will mean that all acts performed by the parties, or by either of them, subsequent to the conclusion of an agreement to submit the outstanding issues to a judicial settlement, will be excluded by the tribunal called upon to settle such a dispute from among the acts to be taken into account in determining the rights of the parties. The "origin of the dispute" will not always coincide with the conclusion of the treaty for the judicial settlement of the dispute. It signifies rather the first in a series of events which ultimately result in the submission of the dispute before a judicial tribunal.

This rule is founded on the assumption that it is the duty of the parties to preserve a _status quo_ after the submission of their dispute for judicial decision and that any action taken by them afterwards must be assumed as being aimed at upsetting the balance existing between them at the time of the conclusion of the agreement. This rule was invoked by Judge Huber in the _Island of Palmas_ case when, referring to acts which had occurred after the "origin of the dispute", he said:

> "As regards the 20th century it is to be observed that events subsequent to 1906 must in any case be ruled out in accordance both with the general principles of arbitral procedure between States

> "and with the understanding arrived at between the Parties ......" (1)

Here the arbitrator fixed as the "final date" the year 1906 and not 1925 - in which year the arbitration treaty was concluded - because it was the events of this year - notably the visit of General Wood in Palmas - that set in train the chain of events which led ultimately to the conclusion of the arbitration agreement some 19 years later.

Similarly, in the Minquiers and Ecrehos case the Court, though fixing the years 1836 and 1888 as the critical dates, was prepared at the same time to take into account events up to the conclusion in 1950 of the Special Agreement between the parties.

In no case, however, will acts performed after the reference of a dispute to arbitration or to judicial settlement be taken cognizance of in appraising the rights of the parties to the dispute. This principle was perhaps most succintly enunciated by the Permanent Court of International Justice in the case concerning the Legal Status of the South-Eastern Territory of Greenland. (2) There the Court dealt with a territorial dispute that had arisen between Norway and

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1) UNRIAA, vol. II, p. 866.

2) Order of 3 August, 1932, PCIJ, Series A/B, No.48, p. 13.

Denmark. Norway applied to the Court to order interim measures whereby Denmark would be instructed to abstain in the disputed territory from any coercive measures directed against Norwegian nationals. (1) The Norwegian request was motivated, amongst other things, by the fear that certain acts performed by the Danes after the institution of the Court proceedings might affect the rights of the Parties.

The Court, however, while recognizing that "the object of the measures of interim protection .... is to preserve the respective rights of the Parties pending the decision of the Court, in so far ..... as the damage threatening these rights would be irreparable in fact or in law", (2) dismissed the Norwegian request because, after the institution of proceedings:

> "no act on the part of the ..... [Governments of Denmark and Norway] in the territory in question can have any effect whatever as regards the legal situation which the Court is called upon to define." (3)

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1) Ibid, p. 14.

2) Ibid, p. 20.

3) Ibid, p. 23.

IV. The relative strength of competing claims.

The selection of the critical date in any given dispute - whatever this date may be - does of course not mean that the situation as it exists at that particular moment will in itself determine the rights of the parties, regardless of what happened before. The typical territorial dispute will have been normally in existence for a long period at the time when the critical date emerges. During this period both contestants may have exercised certain governmental functions in the disputed territory and may have manifested in one way or another their willingness to lay a valid territorial claim to it. This is the normal state of things in most cases where a title to land territory is disputed and is not altogether unlikely to be the case even when the dispute revolves around the acquisition of a maritime historic title. (1) In disputes of this kind, as has been pointed out elsewhere, the issue is not whether the territory in question is res nullius or in the possession of one of the parties to the conflict; the real issue is which of the parties has acquired sovereignty over the disputed territory. The party claiming

1) See e.g. the Grisbadarna Arbitration where both Sweden and Norway claimed to have acquired a title to the disputed banks by virtue, inter alia, of their alleged exercise of authority over them.

sovereignty in such disputes will not base it on a title by occupation of a formerly ownerless territory; it will invoke a title founded either on adverse holding or on a long-standing (so-called "immemorial") possession, the origins of which it is impossible to trace.

International tribunals faced with such a type of territorial dispute will approach it on the assumption that the issue may turn not so much on the intrinsic value of the acts or claims of the rival parties, as on their relative worth when looked upon as being in competition with each other. In theory a situation can be conceived in which neither of the contestants has put forward a sufficiently strong and well-founded claim based on abstract rights; it will then fall to a tribunal faced with such competing claims to establish, to quote Sir Gerald Fitzmaurice, that "these grounds are _less_ insufficient in the one case than in the other, and therefore can afford a basis for a finding of sovereignty." (1) It could equally happen that both parties put forward claims which, if taken separately and in isolation, would perhaps suffice to give each of them a valid title, but, when confronted with each other, the tribunal called upon to determine the issue will have to decide which of the contestants has made out a

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1) 32 BYIL (1955-56) p. 35 (Italics added).

better or superior title.

The concept, according to which the tribunal will consider "the general weight of the claim" of each party rather than the situation prevailing at the critical date alone, makes it necessary to view each country's claim as a whole. It would clearly be contrary to this "weight of the claim" concept if the claims were to be examined stage by stage, drawing comparisons of the strength of the competing parties' claims at successive periods. Accordingly, Judge Huber in the Island of Palmas case, in assessing the respective rights and claims of the United States and of the Netherlands, did not go back to the earliest date mentioned in that case (i.e. the period of the Thirty Years War). Nor did he compare the titles of the competing parties at that date or at any successive moment. He declined likewise to adopt the critical date as the starting point for his examination from which he would go backwards comparing the titles of the contestants at various previous dates. In neither of these ways would a broad legal comparison of the two competing titles have been feasible. Instead, Judge Huber followed a method which considered each of the two competing titles as a whole and as an entity. This method was described by Sir Lionel Heald in his oral argument in the Minquiers and Ecrehos case in the following words:

> "Instead of working purely chronologically, either forwards or backwards, [Judge Huber] studied and analyzed first the one title by itself, and the other by itself, then the first again, comparing the two titles not in terms of the moment, but in respect of their legal weight, taken as a whole over the whole period." (1)

There is little doubt that Sir Lionel did in fact correctly interpret the general tenor of this award which was summarized by the arbitrator himself as follows:

> "The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative." (2)

The arbitrator therefore concluded:

> "The Netherlands title of sovereignty acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700 .... holds good." (3)

Roche makes the point that Judge Huber may have felt all the more entitled to use the "relative strength" method of assessment because he took the view that, due to the dearth of specific evidence relating to the Island of Palmas, the

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1) ICJ, _Minquiers and Ecrehos_ case, _Pleadings, Oral Arguments, Documents_, vol. II, p. 49.

2) UNRIAA, vol. II, p. 868.

3) Ibid, p. 869.

parties must have foreseen such an approach to this problem.[1] This statement is in fact borne out by the following passage of the award:

> "The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the Parties ..... because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty." (2)

The same idea was conveyed perhaps even more clearly by the Permanent Court of International Justice in the Legal Status of Eastern Greenland case, where the Court commented on the problem of the relative strength of competing territorial claims in the following words:

> "Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal there have been two competing claims to sovereignty and the tribunal has had to decide which of the two is the stronger." (3)

Thus, in this case too, the Permanent Court of International Justice seems to have upheld the view that a tribunal faced

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1) Roche, op.cit. p. 67.

2) UNRIAA, vol. II, p. 869.

3) PCIJ, Series A/B, N.53, p. 46.

with a territorial dispute based on two competing claims will examine these titles as a whole and not piecemeal, by comparing them over the whole material period. (1)

In the _Minquiers and Ecrehos_ case, the United Kingdom relied heavily on this concept of the relative strength of competing claims and it was argued on her behalf that "it would be unsound to embark on any historical comparison of the strength of the two countries' claims at successive periods of time." (2) Counsel for the United Kingdom suggested that "the right method is to take each country's claim as a whole and as it stands now and then to decide which is the weightier." (3)

The Court in its judgment appears to have resorted to the method laid down by Judge Huber in the _Island of Palmas_ case and followed in the _Legal Status of Eastern Greenland_ case, thus upholding the United Kingdom contentions on this

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1) See, however, Roche, who asserts that this case "indicates a tendency to favour the 'period to period method'". (Roche, op.cit. at p. 66).

2) ICJ, _Minquiers and Ecrehos_ case, _Pleadings, Oral Arguments, Documents_, vol. II, p. 76.

3) Ibid, p. 55; Wade, himself one of the United Kingdom Counsel in that case, expressed the same idea when he maintained that "in deciding between two competing claims to territory, each country's claim and grounds of claim should be considered as a whole, and the decision should be in favour of the country whose claim is the weightier." (ibid. at p. 96).

point. It examined separately the grounds of title alleged by each of the parties in respect of each of the disputed islets and then compared the relative weight of the competing claims. (1) With reference to the Ecrehos, the Court concluded:

> "The Court being now called upon to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos in the light of the facts considered above, finds that ...... the sovereignty over the Ecrehos belongs to the United Kingdom." (2)

With reference to the Minquiers the Court did not pronounce itself in so many words; it is, however, clear from the perusal of those pages of the judgment devoted to the analysis of the evidence produced by the parties concerning the Minquiers that it followed precisely the same method in this case also. (3)

Since the strength and weight of a territorial claim of this type is to be assessed in the light of the strength of

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1) Prefacing its analysis of the rival claims to the Ecrehos, the Court said: "The Court will now consider the claims of both parties to sovereignty over the Ecrehos and begin with the evidence produced by the United Kingdom Government." (See ICJ Reports, 1953, p. 60). This same phrasing occurs also literally as regards the Minquiers (see ibid. p. 67).

2) Ibid. at p. 67.

3) Ibid. pp. 67-72.

the competing claim, it is only too obvious that the objective is not to ascertain whether one of the contestants has acquired an absolute title, but rather which party has acquired a superior title. The essential issue in this kind of case "is not so much 'what has each party done' but 'which has done the most'". (1) It clearly follows that acts or omissions which would be regarded as a sufficient proof of title in the absence of a rival claim will have to be considered in a different light altogether once there is a competing claim in existence. To quote Sir Gerald Fitzmaurice:

> "acts that will be sufficient, or conversely, neglects that will be immaterial, in the face of a low degree of counter-activity, will not be so if that counter-activity is high." (2)

This statement has, in fact, far-reaching consequences inasmuch as the degree of continuity of possession required for the establishment of a valid title will turn to a very large extent on the existence or otherwise of a competing territorial claim. (3)

On this point, again, some guidance may be sought in some

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1) ICJ, *Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents*, vol. II, p. 57. (Oral Argument of Sir Lionel Heald)

2) 32 BYIL (1955-56) p. 64.

3) For a more detailed discussion of the notion of "continuity" with reference to the acquisition of an historic title, see chapter 4, section II.B, above.

of the major decisions rendered in recent decades by international tribunals called upon to pronounce in territorial disputes. The general principle underlying the considerations of international tribunals in such cases appears to have been formulated by the Permanent Court of International Justice in the Legal Status of Eastern Greenland case, where the Court observed:

> "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 very little in the way of 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 territories." (1)

The Court had obviously in the back of its mind the award rendered shortly before in the Clipperton Island case. There, as will be recalled, France had displayed no governmental function with regard to the disputed territory for about forty years, since first taking possession of the island in 1858. In 1897 Mexico raised a claim to the island. But, since no other State claimed or maintained authority over the island in the intervening period, France's original act of taking possession was considered as still valid in international law. King Victor Emmanuel III, the sole arbitrator in that case, took the view that in "les cas ordinaires" the taking of possession

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1) PCIJ, Series A/B, No. 53, p. 53.

itself - indicating <u>animus occupandi</u> must be followed up by "une organisation capable de faire respecter ses droits." (1) He stressed, however, that:

> "Il peut y avoir aussi des cas où il n'est pas nécessaire de recourir à ce moyen. C'est ainsi que, si un territoire, par le fait qu'il était complètement inhabité <u>est dès le premier moment où l'Etat occupant y fait son apparition, à la disposition absolue et incontestée de cet Etat</u>, la prise de possession doit être considérée à partir de ce moment, comme accomplie et l'occupation a achevée par elle même." (2)

The italicized portion of the above quoted passage seems to warrant the conclusion reached by Fitzmaurice that "any subsequent intervening manifestation of sovereignty by another State - unless immediately reacted against (as France reacted against Mexico's intervention) - would have been detrimental to the French claim unless it had been offset by some concrete activity on the part of France over and above her initial <u>prise de possession</u>." (3) According to Waldock there is, however, little doubt that the inactivity of France "would surely have been fatal to her claim in the face of an intervening exercise of sovereignty by another

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1) UNRIAA vol. II, p. 1107, at p. 1110.

2) Ibid. (Italics added).

3) 32 BYIL (1955-56) pp. 65-66. (Italics in original).

State." (1)

The Legal Status of Eastern Greenland case presented some analogous features and the Court did not miss the opportunity to state that:

> "up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty." (2)

It is in the light of this finding that one should read the Court's statement that "in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights." (3) This statement of the general rule is, however, subject to the all-important qualification: "provided that the other State could not make out a superior claim." (4)

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1) Waldock, 25 BYIL (1948) p. 325; Nevertheless, this appears to be one of those instances in which the "period to period" method was employed. This may be explained by the fact that "here the facts were comparatively simple," (Roche, op.cit. at p. 65), and owing to the brevity of the period relevant to the dispute which was spread over less than 40 years. Thus the arbitrator found it convenient to consider the relative merits of the parties' cases in 1858, when France first claimed the island, and then in 1897, when Mexico first reacted to the French assertion of sovereignty. (For a more detailed analysis of the implications of the Clipperton Island case on this point see Roche, op.cit. pp. 65-66).

2) PCIJ, Series A/B, No. 53, p. 46.

3) Ibid.

4) Ibid.

In this connection it is worthwhile considering the Court's approach to the problem whether the rights of Denmark could have been maintained even during certain periods when there was no shadow of Danish authority over Greenland. It appears pertinent to interpose at this juncture that some time after 1380 - this being the date at which the Danish and Norwegian Crowns were joined - the Norse settlements which had existed in Greenland before, disappeared and

> "during the first two centuries or so after the settlements perished, there seems to have been no intercourse with Greenland and knowledge of it diminished; but the tradition of the King's rights lived on .... [and] the King considered that in his dealings with Greenland he was dealing with a country with respect to which he had a special position superior to that of any Power." (1)

This conviction of the King in itself would of course not have been sufficient to preserve any title for Denmark and the Court was the first to recognise this fact by saying:

> "That the King's claims amounted merely to pretensions is clear, for he had no permanent contact with the country, he was exercising no authority there." (2)

The conclusion that this absence of exercise of authority on the part of Denmark did not prove fatal to her rights is warranted solely by the fact that:

> "The claims [of Denmark] .... were not disputed. No other Power was putting forward any claim to

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1) Ibid. at p. 47.

2) Ibid. at p. 48.

"territorial sovereignty in Greenland and _in the absence of any competing claim_ the King's pretensions to be the sovereign of Greenland subsisted." (1)

It seems quite clear that the Court would have found that the original title of Denmark had been lost by the inactivity which had lasted for about two centuries, were it not for the absence of a competing claim actively maintained at the time. Commenting on the Court's judgment, Waldock makes the point that the Court "did not dispense altogether with state activity; it only recognized that state activity may be slight when the territory is uninhabited and _when there is no competing state activity_." (2) It is therefore hardly surprising that in his argument in the _Minquiers and Ecrehos_ case, Counsel for the United Kingdom asserted that the State activities referred to by France as indicating the display of authority on her part over the disputed islets might have perhaps sufficed in the absence of a competing claim and of competing State activities, but could not be regarded as sufficient for the upkeep of a title in the face of such rival claims and activities. Citing in his support the _Legal Status of Eastern Greenland_ case, Counsel for the United Kingdom maintained:

"It is just conceivable that, supposing France to have had an original title to the Minquiers and Ecrehos, this might have simply continued

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1) Ibid. (Italics added).

2) Waldock, loc.cit. at p. 325 (Italics in original).

> "even without any concrete display of State authority, *provided France had been alone in the field ..... But with an actively competing claim in the field*, over the whole period, any *such original rights were bound to suffer extinction*, unless supported by effective possession and control and by the active exercise of State authority." (1)

The Court in its judgment seems to have approved of this approach, for, after having enumerated the various activities over the islets performed by the contesting parties, it concluded, with reference to the Minquiers that:

> "the Court does not find that the facts invoked by the French Government are sufficient to show that France has a valid title to the Minquiers." (2)

It may be safely assumed that this conclusion was warranted to a very large extent by the superior manifestation of British authority over the Minquiers, and the French claim would have been probably upheld in the absence of such competing activities.

V. The burden of proving an historic title.

The question of the burden of proof is, of course, a general problem of law. At first sight it might appear that this procedural question has no real bearing on the eventual

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1) ICJ, *Minquiers and Ecrehos* case, *Pleadings, Oral Arguments, Documents*, vol. II, p. 57. (Italics added).

2) ICJ Reports, 1953, p. 71.

outcome of a legal dispute and is little more than indulging in legalistic niceties and minutiae. Such a view, may, however, prove frequently both deceptive and illusionary. The annals of legal history provide ample illustration of cases in which the ultimate decision was a direct result of the rules governing the evidential procedure and parties are known to have lost their cases solely because they have not succeeded in discharging the burden of proof resting on them. It may therefore be readily seen that the questions attendant on the onus of proof are of direct relevance in the establishment of an historic title.

In the sphere of domestic law the problems pertaining to the onus of proof are not fraught with particular difficulties. In civil law this duty is normally incumbent on the plaintiff. _Actori incumbit probatio._ Similarly, in criminal proceedings the burden of proof is laid on the shoulders of the prosecution.

In exceptional circumstances - explicitly enumerated in the law itself - the onus of proof may rest on the other side. This usually happens in those cases where the law infers certain presumptions as being the logical outcome of given situations and once the claimant has invoked such a presumption in his favour, the burden of proof shifts to the rival side. Likewise, certain legal systems establish such

legal presumptions in the favour of the applicant whose claim is based on a negative fact, the proof of which is incompar - ably more difficult than that of a positive allegation.

Apart from these relatively few departures, however, it may be taken as sound law that the burden of proof rests on the shoulders of the party which has set the wheels of the legal machinery in motion. It then becomes the duty of this party to make out a <u>prima facie</u> case, proving all those facts which are relevant and material for the success of its claims. Then, and only then, will the burden of proof shift to the other side, which in turn, if willing to refute and thwart the charges levelled against it, will be called upon to prove all the facts on which its alleged case rests.

In international law there do not appear to exist elaborate rules as to the burden of proof. The reason for this obvious drawback is thought to be the fact that "the parties before international tribunals, and also international judges, often come from states whose municipal law on the subject varies considerably." (1) Another reason given is that in many cases the parties to international disputes have the same standing and there is neither plaintiff nor defendant. (2)

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1) Roche, op.cit. p. 129.

2) Ibid.

International law is no doubt influenced on this point by the fact that a fair proportion of cases is started by <u>compromis</u>. If more use were made of the optional clause procedure, the position might be perhaps different.

As far as the problem of the onus of proof is concerned, international law follows, broadly speaking, the same rules as domestic law. It is incumbent on each party to prove the facts alleged by it, and to bring forth evidence in support of its legal arguments. Thus, it is first for the applicant State (if there is such) to prove the facts on which its action relies and to establish a <u>prima facie</u> case; the opposing State will then proceed to prove those facts which, in its view, defeat the applicant State's case.

As has been stressed before, the process of evidence normally involves merely the proof of facts. It is admitted that, as on the national legal level, international law does not require the parties to supply evidence as to the state of law and as to the contents of rules of law applicable in each given case; (1) international tribunals are presumed to have judicial notice of the general rules of international law. The age-old maxim "<u>jura novit curia</u>" finds its application in

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1) This rule, though, has its exceptions on the national level, where, as is well known, foreign law has to be proved with the aid of expert witnesses and is regarded as a question of fact.

the field of international law also. This statement, however, must be read *cum grano salis*. It is, as has been stated before, the *general* rules of international law that are within the knowledge of an international tribunal. "There is no burden of proof" said Sir Eric Beckett in the course of his oral arguments in the *Fisheries* case, "so far as the general rules of international law are concerned and ..... the maxim *jura novit curia* applies to everything that is part of the general rules of international law." (1) Historic titles do, however, not constitute the *rule*; they are, as has been submitted in a previous chapter, a deviation and departure from the general rules of customary international law and, being basically founded on adverse holding, they find their legal justification in the fact that the State or States faced with such an exceptional claim have acquiesced in a situation which is contrary to, and derogatory of, the normally applicable rules of international law. "It is where a State relies upon something special to itself, such as a prescriptive or historic title or treaty right, that the burden of proof arises." (2)

Having reached this stage, it will be more easily under-

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1) ICJ, *Fisheries* case, *Pleadings, Oral Arguments, Documents*, vol. IV, p. 33 (Italics in original).

2) Ibid.

stood why the parties to the Fisheries case should have devoted so much space and energy to what at first sight may appear as a futile academic discussion, namely, the problem whether the regime of historic waters was part of the general international maritime regime, as was contended on behalf of Norway, or whether, as was asserted by the United Kingdom, "historic waters" formed an exception because it was their function to accord to a body of water a legal status which would not have normally accrued to it under the applicable rules of international law. This seemingly superfluous discussion between the parties was indeed only a preliminary "jockeying for position" - to use the words of Waldock in his oral reply in the Fisheries case,[1] for what was really involved in this controversy was the question: does the United Kingdom have to prove that Norway has not acquired any exceptional rights beyond her marginal belt of territorial waters, as measured according to the commonly accepted and employed methods of delimitation, or is it incumbent on Norway to prove that, owing to some exceptional circumstances, she has acquired an exceptional right of delimiting her territorial waters by resorting to the "Norwegian method" of delimitation which entails a considerable increase in the width of her territorial

1) Ibid. at p. 394.

waters.

It is submitted that, owing to the exceptional character of an historic claim and its deviation from the general rules of customary law, the burden of proof in such cases falls on the State which claims such a title in its favour to prove all those facts which, in its opinion, support the exceptional claim, irrespective of whether the legal proceedings had been instituted by the party alleging such a title or by a party denying the acquisition of it by its opponent. A State raising a claim to rights and titles which would not normally accrue to it under international law must obviously be prepared to prove that it had in fact acquired such rights or titles. Such a course of action will undoubtedly better meet the requirements of both reason and justice than a demand postu - lating that it is on the State relying on the normal rules to justify its reliance on them. The acceptance of the contention, according to which the burden of proof invariably lies on the applicant, would in fact create a serious anomaly in that the application of the general rules of international law would depend on the accident as to whether the State relying on these rules happens to be the applicant or whether the action was filed by the State which claims exemption from them. "The decision of the Court", asserted Sir Eric Beckett in his opening statement in the Fisheries case, "in a case which turns

on the general rules of international law and which is inevitably a precedent of the gravest importance for the whole world cannot turn on the accident whether the United Kingdom happens to have brought the case as plaintiff or whether Norway has ..... The Court's conclusions on the general rules of international law will not depend in any way on whether Norway or the United Kingdom is the applicant State." (1)

Norway, in her written Rejoinder, had not basically challenged the correctness of this proposition, recognising in principle that "celui qui invoque un fait ou un droit exceptionnel a l'obligation de l'établir sous peine de voir sa prétention écartée." (2) At the same time she maintained that:

> "quand il s'agit d'une règle coutumière faisant partie du droit international commun, on peut raisonnablement soutenir que ... les éléments d'appréciation sur lesquels la Cour appuie sa conviction ne sont plus nécessairement limités à ceux qui ont été produits devant elle par la partie chargée du fardeau de preuve." (3)

Norway attempted, however, to escape the logical conclusions of these apparently correct statements by asserting that her alleged historic right to apply the Norwegian method

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1) Ibid. vol. IV, pp. 33-34.

2) Ibid. vol. III, p. 285.

3) Ibid.

of delimitation by straight baselines connecting the outermost points of the "*skjaergaard*" did not constitute an exception, since the generally applied rule of following the physical line of the coast has not achieved the degree of a general rule of customary international law. The Norwegian method, Norway maintained, was the original method of delimitation recognized by maritime international law and other methods of delimitation - and in particular the coast-line method advocated by the United Kingdom and generally applied by the littoral States of the world - being comparative "late-comers" on the stage of international law - could not be regarded as ranking higher in the hierarchy of the binding rules of international law. Norway also charged the United Kingdom with misunderstanding the true nature and purpose of the rules governing the legal regime of the seas and the delimitation of the maritime territorial domain of the littoral State. In Norway's opinion "ces règles en effet n'ont pas pour objet *d'attribuer* à l'Etat côtier les compétences qu'il exerce sur la mer voisine de ses côtes, de donner un *fondement juridique* à sa souveraineté. Elles ont pour objet de limiter et de *restreindre* le champ de cette

souveraineté." (1) Thus, in the opinion of Norway, it is not the national pretensions of the various littoral States that encroach upon the principle of the freedom of the high seas, but it is rather the principle of the freedom of the high seas that encroaches on the original rights of the littoral States to be regarded as the sovereigns over wide portions of the sea areas adjacent to their land territories. (2)

It would appear, however, that this concept of the nature of the maritime historic title and its "incorporation" into the general international legal practice, as being in conformity with the normal rules of law and not a departure from them, is borne out neither by doctrine nor by practice, both of which seem to have upheld the traditional view that the role of an historic title is to validate an intrinsically invalid claim and not merely to confirm an already existing title. It necessarily follows that the historic claim being regarded as

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1) Ibid. vol.III, p.287 (Italics in original); In another passage of the Counter-Memorial Norway maintained that the sea areas landwards to the Norwegian-drawn baselines "ni juridiquement ni historiquement ...n'ont jamais fait partie de la mer libre. Elles ont toujours été norvégiennes et ne représentent même que le résidu d'un domaine plus vaste que s'est contracté au profit de la communauté des Etats. (Ibid. vol. III, p. 442).

2) See to this effect the Norwegian Counter-Memorial where it is asserted that "historiquement ... ce n'est pas généralement la souveraineté de l'Etat qui s'est étendue au détriment de la haute mer, mais bien la haute mer qui s'est développée en absorbant des espaces soumis jusque-là à l'autorité de l'Etat." (ibid. pp. 444-445).

an exception to, and derogation of, the general rule - sanctioned only by the acquiescence of the State or States adversely affected by the new practice or situation - the burden of proof rests on the State claiming for itself such an exceptional title, irrespective of whether it happens to be the plaintiff or not. "En ce qui concerne le fardeau de preuve" says Gidel discussing the onus of proof attendant on the proof of a maritime historic title, "il pèse sur l'Etat qui prétend attribuer à des espaces maritimes proches de ses côtes le caractère qu'ils n'auraient pas normalement, d'eaux intérieures. C'est l'Etat riverain qui est le demandeur dans cette sorte de procès. Ses prétentions tendent à un empiètement sur la haute mer; le principe de la liberté de la haute mer, qui demeure la base essentielle de tout le droit international public maritime, ne permet pas de faire peser le fardeau de la preuve sur les Etats au détriment desquels la haute mer sera réduite par l'attribution de certaines eaux en propre à l'Etat qui les réclame comme telles." (1)

Similarly, Colombos maintains that the rules fixing the normal breadth of territorial waters in bays are subject to the exception that:

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1) Gidel, op.cit. vol. III, p. 632.

"on historical or prescriptive grounds .... the territorial State is entitled to claim a wider belt of marginal waters, provided that *it can show* affirmatively that such a claim *has been accepted*, expressly or tacitly, by the great majority of other nations." (1)

Both Gidel and Colombos merely follow in this respect the principles which seem to emerge from Basis of Dis - cussions No. 8 drafted by the Preparatory Committee of the 1930 Hague Codification Conference. The Preparatory Committee, appointed under a resolution adopted by the Council of the League of Nations on 28 September, 1928, had at an earlier stage of its deliberations examined the replies of the Governments to its request for information on questions relating to the agenda of the proposed conference. Basis of Discussions No. 8 prepared by this Committee reads as follows:

"The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State; *the onus of proving such usage is upon the coastal State.*" (2)

True, the Hague Codification Conference proved abortive and its deliberations came to nought; it is, however, worth

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1) Op.cit. pp. 154-155 (Italics added).

2) Series of L.o.N.P. (1929) vol.II, p. 45.(Italics added).

noting that, although Basis of Discussions No. 8 underwent some criticism in the Second Committee of the Conference, it was not seriously questioned by anybody that the burden of proof as regards the establishment of a special claim rested on the coastal State. Moreover, it may be added that the only Government which in its reply to the request of the Preparatory Committee expressly referred to the question of the burden of proof was the Government of Germany which stated that:

> "as regards historic bays, it would seem right in principle *to require the coastal State making such a claim* in respect of bays exceeding six nautical miles in width *to prove* that the bay has acquired the status of 'inland waters' of the coastal State through long usage generally recognized by other States." (1)

As has been stated before, the question of the burden of proof of an historical title was canvassed at great length in the *Fisheries* case. It is therefore a matter for sincere regret that once more the Court did not make full use of the opportunity to pronounce unambiguously on an important question of law which had been raised before it. It is perhaps true to say that the Court might have deemed it superfluous to go into this problem, since it did not consider Norway's alleged rights over certain maritime

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1) Ibid, p. 111. (Italics added).

areas as being of an "historic" character properly so-called. The Court seems to have rejected the United Kingdom contention, according to which Norwegian sovereignty over the waters in dispute would constitute an exception, historic title justifying situations which would otherwise be in conflict with international law. The Court held that, as regards bays "the ten-mile rule has not acquired the authority of a general rule of international law" (1) and that consequently any deviation from this alleged rule did not constitute an exception. Similarly, the Court rejected the United Kingdom claim that baselines drawn between various points must be limited to a maximum length of ten miles, pointing out that no such rule existed in international law and that the Norwegian method did not form an exception to such an alleged rule but rather "the application of general international law to a specific case." (2)

It is therefore submitted with some diffidence that the majority judgment of the Court did not find in favour of Norway on "historic" grounds in the meaning which this term has generally acquired in doctrine and practice. Support to this view is lent by the fact that Judge Hackworth, while concurring in the operative part of the majority judgment,

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1) ICJ Reports, 1951, p. 131.

2) Ibid.

dissociated himself from its motives, emphasizing that he did so for the reason that "he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water." (1)

Those of the judges, however, who dealt with the problem of the acquisition of an historic title, namely, Judges Hsu-Mo, McNair and Read, stressed the need for the claimant State to prove its alleged historic title. Thus, Judge McNair quoted with approval Lord Stowell in the Twee Gebroeders case where it had been stated that the general presumption was against the existence of such rights and that an historic title "is a matter to be established on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence." (2)

Judge Read expressly voiced the opinion that, as regards the acquisition of any "historic rights" by Norway, "the burden of proof is upon Norway to prove[the relevant facts](3)

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1) Ibid. at p. 141.

2) (1801) 3 Christopher Robinson's Admiralty Report, p. 336, at p. 339; this case is cited in ICJ Reports, 1951, pp. 183-184.

3) ICJ Reports, 1951, p. 194.

and after a searching analysis of the history of the case he reached the conclusion that "it has not been proved that the Norwegian System was made known to the world in time, and in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had constructive knowledge." (1)

Judge Hsu-Mo, likewise, in his separate opinion appears to have required from Norway to prove her alleged historic title and it is because Norway did not put forward legally sound evidence in support of her historic claims, that Judge Hsu-Mo dismissed the Norwegian historic claims as regards the Svaerholthavet and Lopphavet. (2)

An important contribution to international law on this subject was, however, made in the judgment delivered by the International Court of Justice in the Minquiers and Ecrehos case. There France claimed an original title to the disputed islets, alleging that it was the United Kingdom's turn to prove that Britain had acquired a good title, displacing the French one. This contention was explained on the ground that "en cas de doute le droit doit être présumé en faveur de la République française qui a succédé à la souveraineté

1) Ibid. at p. 205.

2) Ibid. at p. 157.

des anciens rois de France." (1)

To this contention the United Kingdom replied that even if France had proved her ancient title - and on this point also the United Kingdom entertained doubts - it would not suffice for France to rely on such an ancient title, without adducing positive proof of a good and valid title. The United Kingdom cited in support of her argument Judge Huber's Award in the Island of Palmas case, where it had been laid down that there was no presumption of a continuity of territorial titles. (2)

The Court appears to have endorsed the United Kingdom assertion on this point, holding that:

> "Such an alleged original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another valid title according to the law of the time of replacement. It is for the French Government to establish that it was so replaced." (3)

Thus the matter may be summed up by saying that, owing to the exceptional nature of the historic claim itself and as a direct consequence of the departure from the general

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1) ICJ, Minquiers and Ecrehos case, Pleadings, Oral Arguments, Documents, vol. I, p. 383.

2) Ibid. vol. II, p. 53-54.

3) ICJ Reports, 1952, p. 56. (Italics added).

rules of international law inherent in the acceptance of such a claim, the general rules governing the onus of proof undergo also some modification. Contrary to the maxim "actori incumbit probatio", according to which the onus of proof will always fall on the applicant who will be expected to furnish the necessary evidence to make out a *prima facie* case, the onus of proving an historic claim will invariably fall on the State relying on such a claim and invoking an historic title in its support, irrespective of whether or not the legal proceedings in such a case were instituted by the claimant State.

VI. Strict geographical interpretation of an historic title.

Since an historic title is acquired as a result of an encroachment upon the rights previously acquired by another State or the community of States and develops through a process of adverse holding, it necessarily follows that any claim of this kind must be given the strictest possible geographical interpretation. If historic titles are exceptions to the general rules of customary international law - as it is submitted they are - then it is only reasonable to restrict the scope of such exceptions to the bare minimum justified by the clearest evidence. Such a restrictive interpretation as regards the extent of the area acquired by

means of an historic title is indeed imperative, because it constitutes one of the most vital safeguards for the proper manipulation of the device of acquiescence. MacGibbon formulates this idea in the following words:

> "The purpose of insisting on circumspection in inferring the consent of a State from its inaction is to ensure that such acquiescence corresponds accurately with the implied intention of the acquiescing State, and to limit the benefits of acquiescence to claims which have been formulated in such a way that the acquiescing State has or ought to have knowledge of them." (1)

Thus, in the arbitration between Great Britain and Venezuela respecting the Venezuelan-British Guyana Boundary Dispute, the United Kingdom maintained that the potential capacity of a State's expansion should be taken into account only in cases of acquiring titles by occupation (i.e. taking possession of res nullius), while in cases involving adverse possession and the infringement of the rights of a previous possessor, the rights of the newcomer should be interpreted strictly and should apply only to the territory effectively held by it. (2) (Venezuela, in turn, contended that when a territory is vacant, the entrant State may enter it as for the whole territory, but when the entry is adverse,

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1) MacGibbon, in 31 BYIL (1954), p. 169.

2) See British-Venezuelan Boundary Dispute, The British Case, 1898, pp. 149-150.

only the territory effectively held will be acquired thereby.)[1]

It was on similar grounds that the minority judges in the _Fisheries_ case rejected some of the Norwegian claims. Judge Hsu-Mo, discussing in his separate opinion the Norwegian claim for the acquisition of an historic title to the Lopphavet and Svaerholthavet pointed out that:

> "...... the Rescripts on which [Norway] has relied contain one fatal defect: the lack of precision. For they fail to show any precise and well-defined areas of water, in which prohibition [of fishing by foreigners] was intended to apply and was actually enforced. And _precision is vital to any prescriptive claim to areas of water which might otherwise be high seas._" (2)

Judge Sir Arnold (now Lord) McNair in his dissenting opinion refuted the Norwegian contention according to which the lack of protest on the part of Great Britain against the Norwegian Decrees of 1869 and 1889 ought to have been considered as her consent of the "Norwegian method" of delimitation in general. Judge McNair held that acquiescence might have been imputed to Great Britain solely as regards the localities which were explicitly covered by these Decrees and that Britain could not have been expected to have acquiesced in any claim going beyond these territories.

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1) See _British-Venezuelan Boundary Dispute_, The Venezuelan case, 1893, p. 228.

2) ICJ Reports, 1951, p. 157.

In Judge McNair's own words:

> "The question .... arises whether the two Decrees of 1869 and 1889 affecting a total length of maritime frontier of about 83 miles and connecting islands but not headlands of the mainland, ought to have been regarded by foreign States when they became aware of them, or ought but for default on their part to have become aware, as notice that Norway had adopted a peculiar _system_ of delimiting her maritime territory, which, in course of time would be described as having been from the outset of universal application throughout the whole coastline amounting .... to about 3400 kilometres (about 1830 sea-miles) or whether these Decrees could properly be regarded as regulating a purely local and primarily domestic situation. I do not see how these two Decrees can be said to have notified to the United Kingdom the existence of straight base-lines applicable to the whole coast." (1)

And Judge Read followed suit by saying:

> "........ I am unable to conclude that the British Government, or, indeed, any other foreign government, except France, had any reason to believe that a Norwegian System had come into being in 1869-1889 or that these Decrees were anything more than local ad-hoc measures." (2)

It is a matter for regret that, in contradistinction to the unequivocal and sound legal approach of the minority judges, the majority of the Court seems to have obscured this issue by contenting itself with the rather ambiguous statement that:

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1) ICJ Reports, 1951, p. 171 (Italics in original).

2) Ibid, p. 200.

> ".... the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for the explanations by the French Government. Nor knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 relating to the delimitation of Romsdal and Nordmöre which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice." (1)

The matter may be concluded by saying that when a title to territory is based on adverse possession, more stringent and less liberal criteria will be applied as to the extent of the area covered by such possession than would be the case with a claim founded on occupation.

(italics in original)

1) Ibid, p. 139; for a critical evaluation of the majority conclusion on this point see Fitzmaurice in 30 BYIL (1953) pp. 33-39.

CHAPTER 6.

JURIDICAL ASPECTS SPECIFICALLY RELATED TO THE FORMATION OF A MARITIME HISTORIC TITLE.

I. General.

The present chapter deals with those aspects of the acquisition of an historic title which relate specifically to the acquisition of historic rights over maritime areas. The inclusion in this study of a chapter devoted solely to the problems attendant on the establishment of maritime historic rights seems to be warranted for several reasons.

Firstly, since the high seas cannot be appropriated by any single State and all member-States of the international community enjoy over them equal rights, a maritime historic title has to be acquired at the expense of the entire community of States, whereas an historic title to land territory is acquired at the expense of only one other State.

Secondly, the doctrine of historic titles in general evolved, in fact, from the theory of historic bays and thus has its roots in the sphere of the law of the sea.

Thirdly - and this is merely a logical consequence of the reason just mentioned - the majority of writers dealing with historic titles have been preoccupied in the past with

the problem as it posed itself with regard to maritime areas.

Fourthly, and lastly, in contradistinction to historic titles to land territories, historic claims falling short of full sovereignty feature prominently in the sphere of maritime historic rights and constitute a fair proportion of these claims. This preeminence of non-exclusive historic rights in the field of the law of the sea also merits special attention.

Thus the present chapter will be devoted to an examination of the impact of the principle of the freedom of the high seas on the formation of a maritime historic title, to problems relating to "international acquiescence", to a brief study of the specific manifestations of State authority over maritime areas, to an analysis of the various aspects of the doctrine of historic waters in general and historic bays in particular and to a discussion of the juridical status of historic waters.

A special section then deals with problems pertaining to the acquisition of non-exclusive historic rights, with special reference to traditional rights of fishing (sometimes referred to also as "historic rights in reverse").

Finally, there follow two sections in which the relevance of the theory of historic titles with regard to the continental shelf and sedentary fisheries, respectively, is

more closely examined.

There has been ample reference in previous chapters to judicial decisions and State practice regarding maritime historic claims, inasmuch as they were indicative of legal aspects common to all historic titles, whether claimed over land territories or maritime areas. The purpose of the present chapter, however, is to concentrate merely on those aspects of the formation of an historic title which affect the acquisition of such a title to maritime areas.

II. The impact of the principle of the freedom of the high seas on the formation of maritime historic rights.

"Le principe de la liberté de la haute mer .... demeure la base essentielle de tout le droit international public maritime." (1) These words of Gidel, undisputably one of the foremost contemporary authorities on the international law of the sea, clearly state the principle on which the whole edifice of modern maritime international law rests.

An historical analysis of the evolution of this commonly accepted principle of our days would clearly go beyond the scope of this chapter. Suffice it to say here that the

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1) Gidel, op.cit. vol. III, p. 632.

emergence of this rule went by no means unchallenged and that the concept of "*mare liberum*", as propounded and put forward by Grotius, met with the doctrinal opposition of Selden, who was a supporter of the theory of "*mare clausum*". There is good reason to believe that the respective attitudes taken up by these two scholars, and later by their disciples and followers, were largely influenced by the national pretensions and other vested interests of their countries. Whatever the reason for their divergence of opinion as to the precise legal status of the high seas, it is an undeniable fact that since the days of Grotius, the principle of the freedom of the high seas gradually found an ever wider currency and that after this gradual evolution, it gained the upper hand towards the beginning of the nineteenth century when it crystallised into a universally accepted principle of international law.(1)

To refer to the open sea as an area which is "free" to all is by no means to suggest that the sea is *territorium nullius*. Indeed, such a construction might lead to the inevitable conclusion that the seas are open to appropriation by the first occupant, just as any *terra nullius* is open to

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1) For a more extensive historical survey of the evolution of this cardinal principle of modern maritime international law see Gidel, op.cit. vol. I, at pp. 123-212.

occupation. Such a course would, no doubt, bring about the very situation which was meant to be avoided by the invocation of the principle of the freedom of the high seas, namely, the raising of national pretensions over certain bodies of water beyond the limits recognized in international law. It would thus defeat the very purpose for which the doctrine of "mare liberum" was introduced into international law.

In fairness to those who regard the high seas as res nullius, it should be added, however, that they interpret the meaning of this term, when related to maritime areas, in an entirely different manner. According to Gidel, they employ this term to indicate their view that:

> "la haute mer est un espace qui ne relève actuellement comme tel, qui ne peut pas relever comme tel, de l'ordre juridique de la communauté des Etats. Pour exprimer [cette] proposition, on dit: la haute mer est res nullius." (1)

This expression, however, is most likely to mislead the student for the reasons given above. Its choice must therefore be regarded as highly unfortunate, because, as Gidel points out, the idea which is meant to be conveyed is the very opposite to that which is normally attached to the term

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1) Ibid. p. 213. (Italics in original).

"res nullius". What is really intended to be expressed by resorting to this term is the fact that the sea cannot be occupied by anyone. Thus this concept seems to be better covered by the expression "res quae nullius domini esse potest". (1)

Thus, in order to avoid confusion arising from the use of a somewhat misleading terminology, it would appear that the terms "res communis" or "res extra commercium" are better suited to give a precise notion of what is meant by the freedom of the high seas. "Res communis" implies that the high seas have to be looked upon as a property over which the whole of the community of nations has joint ownership. (2) The supporters of the theory of "res extra commercium" wish to indicate that the seas are to be regarded as a property which is not subject to the normal processes of property transfer and which consequently cannot be acquired by any of the members constituting the family of

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1) Ibid, p. 214; by contrast, "res nullius" is defined in Roman law as "res nullius cedit primo occupanti."

2) For a critical analysis of this concept see Gidel, op. cit. vol. I, p. 215.

nations.[1]

But whatever course one is tempted to adopt, the question of proper terminology - however important in itself - is only of secondary significance in this respect, because the results flowing from the recognition of the principle of the freedom of the high seas are well understood. The principle implies, to use again the words of Gidel, that:

> "L'idée qui domine le droit de la mer est la liberté de l'utilisation licite et normale des espaces maritimes; toute restriction inutile à cette liberté doit être évitée." (2)

It follows that there is, as it were, a presumption of law that the waters of the sea are free and that any pretensions of sovereignty over a certain body of water, going

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1) Thus says Grotius: "The sea is included among those things which are not articles of commerce, that is to say, the things that cannot become part of anyone's private domain. Hence it follows .... that no part of the sea may be regarded as pertaining to the domain of a given nation."(Grotius, De Jure Praedae Commentarius, Scott's ed., 1950, p. 236). Similarly, Oppenheim maintains that "the term 'freedom of the open sea' indicates the rule of the Law of Nations that the open sea is not, and never can be, under the sovereignty of any State whatever ... Since ... the open sea can never be under the sovereignty of any State, no State has a right to acquire parts of the open sea through occupation." (Oppenheim, op.cit. vol. I, p. 589); see also Schwarzenberger in 87 Hague Recueil, (1955), vol. I, p. 367.

2) Gidel, op.cit. vol. III, p. 674; as to the various connotations given to this principle in the past, see Gidel,op. cit. vol. I, pp. 125-126.

beyond what is admittedly the maritime appurtenance of the littoral State, constitute an exception to this rule which has to be justified by a special rule recognized in international law.

It is as well to stress this point from the outset because in recent years the attempt has been made to conceive a different interpretation of this cardinal and fundamental principle of maritime international law. As will be recalled, in the Fisheries case Norway challenged the idea of the supremacy of the principle of the freedom of the seas, maintaining that this principle was only one among many notions the application of which was vital for the enforcement of modern maritime international law. It was contended on behalf of Norway that the principle never achieved the degree of a basic principle of the international law of the sea. The triumph of this rule was confined, in Norway's view, solely to those areas of water which had not been submitted before to the exclusive authority of any State. The principle, however - so ran the Norwegian argument - could not be resorted to for the purpose of narrowing and restricting national pretensions, however unreasonable they may seem in the light of modern international law. In Norway's view, the two conflicting and rival concepts of the freedom of the high seas and the national pretensions of the coastal State over wide portions of the sea adjacent to its territory are

on the same legal footing and "on commettrait une erreur si l'on prétendait établir entre elles une sorte de hiérarchie." (1) Norway also vigorously denied the concept put forward in the United Kingdom Memorial, according to which there was a presumption of law that waters of the sea were free and that any claim to sovereignty over a given area of water had to be justified as an exception recognized in international law. In the United Kingdom Memorial it had been submitted that "a presumption of law arises that any given area of sea which is not within the inland or territorial waters of a State under the general rules of international law, forms part of the high seas." (2) Norway took strong exception to this view, arguing that "ce n'est pas la souveraineté de l'Etat qui a empiété sur la haute mer. C'est la mer libre qui a refoulé la souveraineté de l'Etat." (3)

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. I, p. 344.

2) Ibid, p. 95.

3) Ibid. p. 345; This statement does to some extent deviate from the Norwegian contention that "il est .... inexacte d'interpréter la situation juridique présente comme impliquant une subordination du principe de souveraineté (valable pour la mer territoriale) au principe de non-souveraineté (valable pour la haute mer) .... Les deux principes sont juridiquement egaux. C'est leur conciliation - et non la subordination de l'un à l'autre - qui donne la clef du droit international moderne de la mer." (ibid. vol. III, p. 265; Italics in original).

This seemingly meaningless legalistic quibble has, as will be readily admitted, far-reaching legal implications which have been alluded to already in the chapter dealing with the problems of evidence pertaining to the establishment of a maritime historic title. There is, however, little doubt, that the Norwegian concept, though it may be historically correct as far as the emergence of the rule of the freedom of the high seas is concerned, runs counter to the generally accepted view on this point as upheld by doctrine and practice alike. Thus says Calvo:

> "Au fond ..... toutes les questions que nous avons discutées plus haut se rattachent directement ou aboutissent forcément à un seul et même principe fondamental, celui de la liberté des mers." (1)

The principle of the freedom of the high seas was also given expression by Phillimore in the following words:

> "The reason of the thing, the preponderance of authority and the practice of nations have decided, that the main ocean, inasmuch as it is the necessary highway of all nations and is from its nature ... incapable of being

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1) Calvo, Le Droit International Théorique et Pratique, 5th edition, 1896, vol. I, section 384; see also Gidel, op. cit. vol. III, p. 674; see also Schwarzenberger in 87 Hague Recueil (1955) vol. I, pp. 358-371 where the author elevates this principle to the rank of one of the seven fundamental principles of international law.

"continuously possessed, cannot be the property of any one State." (1)

In the well-known Lotus case the principle of the freedom of the high seas was defined as "the absence of any territorial sovereignty upon the high seas." (2) More recently, Judge Read, in his dissenting opinion in the Fisheries case, made a forceful statement in support of this overriding principle of modern maritime international law when he maintained:

"No question of res nullius or annexation arises in the case of the sea. All nations enjoy all rights and all privileges in and over all of the sea beyond the limit of territorial waters. It follows that the power of a coastal State to mark out its maritime domain cannot be used so as to encroach on the high seas and impair these rights and privileges. Its power is limited to the marking out of areas already subject to its sovereignty." (3)

It was because of this clash of the Norwegian claims with the principle of the freedom of the high seas that Judge Read considered the "Norwegian system" to be contrary

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1) Phillimore, op.cit. vol. I, section 172; Perels sums up the matter by saying that "rights of property or sovereignty over the sea neither exist nor can they be acquired." (In the original German: Ein Eigentums-, oder Hoheitsrecht am Meere existiert weder, noch kann ein solches erworben werden." [Perels, Das Internationale Öffentliche Seerecht, 1903, p. 16]).

2) PCIJ, Series A, No. 10, p. 25.

3) ICJ Reports, 1951, p. 190.(Italics in original).

to international law, an idea which was also reflected in the following words of Judge Sir Arnold (now Lord) McNair:

> "I consider that the delimitation of territorial waters made by the Norwegian Decree of 1935 [marking out the straight baselines applied by Norway] is in conflict with international law and that its effect will be to injure the principle of the freedom of the high seas and to encourage further encroachments upon the high seas by coastal States." (1)

Most recently this principle was once more reaffirmed by the 1958 Geneva Conference on the Law of the Sea. Article 2 of the Convention on the High Seas proclaims, inter alia, that "the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." (2) Here the idea of the high seas being incapable of appropriation is clearly enunciated.

It has been deemed fit to dwell at some length on this fundamental principle of maritime international law, not for its own sake and without any pretension to exhaust the topic, (3) but because it was felt that by stressing and reiterating this basic principle the problem of the so-called "maritime historic rights" might be seen in its true perspective.

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1) Ibid. at p. 185.

2) Cmnd. 584 (1959) p. 27.

3) Gidel, in his monumental work on the law of the sea, devotes to this question about 90 pages. (see p. 457, n.1 above).

Maritime historic rights or "historic waters" - as they are frequently called - are, to employ the definition given by the International Court of Justice in the Fisheries case, "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title." (1) In other words, historic waters are waters which would have been normally regarded as forming part of the high seas, were it not for some exceptional reasons, owing to which they are accorded an exceptional status. If the existence of such exceptional and unusual circumstances can be proved, the claimant State will be entitled to the recognition of certain rights which go beyond the normally accepted maritime rights of littoral States.

As will be seen below, such exceptional claims may amount either to claims of full sovereignty and exclusive rights over the "historic waters", and to a right to treat them as if they formed part of the claimant State's internal waters or territorial waters, or to more limited claims relating to the exercise of certain rights over the waters in question, such as the right of fishing, without at the same time involving a claim of full and unlimited sovereignty. Both forms of these rights may be justly termed "historic

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1) ICJ Reports, 1951, p. 130.

rights". It would appear, however, that only the first kind of historic rights relates to "historic waters" properly so-called, whereas the second deals with what may be termed "non-exclusive historic rights", in the sense that they do not imply a claim of full sovereignty.

Both forms of maritime historic rights will be dealt with under separate headings further below. However, it cannot be overemphasized that both categories of maritime historic rights - in other words, all maritime historic rights - share one all-important and never-to-be-forgotten attribute. This is that they are established at the expense, and to the detriment, of the community of nations as a whole. They do not therefore affect solely the rights of one State or another, but are intended to encroach upon the rights which would normally accrue to the entire international community. In this respect maritime historic titles differ sharply from historic titles to land territories, which, as will be recalled, usually affect only two States, namely, the claimant State and the State which considers itself affected by such a claim. It is this fundamental divergence of maritime historic rights, as compared with "ordinary" historic rights, that seems to justify the insertion of a special chapter devoted entirely to the legal aspects attendant upon the creation and upkeep of maritime historic rights.

Moreover, as has been stated elsewhere, although the basic principles relating to terrestrial and maritime historic rights are identical, it remains true that, in the majority of instances in which historic claims are put forward by different States, the areas involved are various bodies of _water_ and not land territories. Thus it is hardly astonishing that the problems of historic rights have been expounded mainly by writers who have devoted more than cursory attention to the international law of the sea. It is primarily they who deserve credit for having introduced some measure of clarity and lucidity into this confused field of international law.

The distinctive legal status of the high seas and the fact that they form the common and inalienable property of the international community, and not of a single State or even a group of States, lies at the root of the particular process through which maritime historic rights are created. In fact, this exceptional status of the high seas affects the acquisition of maritime historic rights in at least three ways:

(a) The legal basis of historic rights in general, is, as will be recalled, the concept of acquiescence, which means that the State whose rights have been encroached upon, or are likely to be infringed, by an historic claim has, by its conduct, acquiesced in such an exceptional claim. As long

as the historic claims are put forward in respect of land areas, the controversy will normally affect only two States, notably, the claimant State and the State affected by such a claim. As regards maritime historic rights, however, the claimant State will find itself faced with the international community at large whose rights are inevitably subject to restriction, if the maritime historic claim of a particular State is to prevail. The importance of this distinction is obvious. Since the purported maritime historic rights infringe the rights of the international community, the exceptional claim may be sanctioned only through _international acquiescence_, i.e. acquiescence given not by a single State, but rather acquiescence of such a representative body of States as may be regarded as truly reflecting international recognition of an otherwise illegal situation. This aspect of the acquisition of maritime historic titles will be further enlarged upon in the next section.

(b) In view of the fact that sovereignty over maritime territories is exercised by States in a manner which differs considerably from the manifestations of authority over land areas, it necessarily follows that the requirements for the formation of a maritime historic right (that is to say, the manifestations of State authority from which a presumption of acquiescence may be inferred) should also differ to some

extent from thoseusually enumerated when dealing with the establishment of historic rights over land areas. The notions of effectiveness, continuity, notoriety, possession à titre de souverain, etc., when applied to maritime territorial situations, assume a meaning which is somewhat different from that normally attached to these notions. This aspect of the problem will also be dealt with further in the section in which the various manifestations of sovereignty over maritime areas are investigated. (See section IV below).

(c) The fact that the high seas form the joint property of international society and are thus not open to acquisition by a single State, as would be the case with an ownerless piece of land territory, has another far-reaching consequence. This is that maritime historic rights can never be acquired merely by means of occupation of a hitherto ownerless territory. Rather the claim to a maritime historic title must be based on the adverse holding by the claimant. In other words, the claimant State must be able to assert successfully that it built up this title by depriving the community of States of a right which had formerly belonged to it.

Thus, in this last respect also, the acquisition of a maritime historic title differs from the establishment of an historic title over land territory. The latter, as will be

recalled, may be acquired in different ways among which there is the so-called "immemorial possession" which, in effect, means that, as the origins of the claimant State's pretensions to the territory in question cannot be traced, the situation prevailing at present is deemed to have always existed and is therefore presumed to be in conformity with legal requirements. Such a presumption may be raised as regards territorial situations which have prevailed for a very considerable period. The modern international law of the sea, however, took its final shape only at the beginning of the nineteenth century, and it would appear that maritime historic claims put forward by different States can be recognized today only if the claimant State is in a position to prove that it asserted its authority over the allegedly historic waters since the emergence of the relevant rules of the modern international law of the sea and with the acquiescence of the international community. It may be safely maintained that a claim resting solely on extensive medieval pretensions, which may have been valid as long as a different legal regime prevailed over the high seas, will not be deemed as sufficient to uphold maritime historic claims valid according to the law in force at present. At the time when the new international law of the sea took its final shape with the undisputed triumph of the "mare liberum" doctrine, each State was deemed

to have been under the obligation, as it were, to reacquire its rights beyond those parts of the maritime territory which were conceded by the new regime to form the marginal belt of the coastal State. Such a "reacquisition" of rights could be made only at the expense of the international community at large.

These distinctive features of the maritime historic claim do, in fact, considerably increase the already grave legal problems surrounding the acquisition of an historic title in general.

The following sections are intended to throw some light on the questions related to acquiescence - with regard to the acquisition of a maritime historic title - and to the manifestations of authority from which such acquiescence may be inferred.

III. What is international acquiescence?

In contradistinction to the "ordinary" historic claim, where the acquiescence of the single State affected by the raising of such a claim will suffice to validate an intrinsically invalid title, a maritime historic claim will be sanctioned only through the acquiescence of the international community. Since a maritime historic claim is likely to affect the entire community of States, it will be open to

each of the member States making up the international community to lodge a protest against such an extensive claim and take whatever measures it sees fit to prevent such a title from maturing. (With respect to land territories the right to protest against, and to oppose the building up of, an historic title accrues, as will be recalled, only to the States directly affected by such a claim.)

In examining the problem whether the international community may be presumed to have acquiesced in the establishment of some historic claim raised by a given State in respect of a given body of water, one faces again the question of the "generality of practice", which has been dealt with in chapter 2 above. (1) As was pointed out there, where different authorities were cited, this general problem of customary international law cannot be solved in a clear-cut manner. In the opinion of Sørensen, what is required is not a unanimity of practice, but a practice followed by the great majority of nations. (2) This rather vague formulation of the requirements necessary for the establishment of a new customary rule of international law does, however, bring out clearly one fundamental point, namely, that "generality of practice" should not be confounded with

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1) See Chapter 2, section II, above.

2) Sørensen, op.cit. p. 102.

"universality of practice". The adoption of such a stringent and rigid criterion for the emergence of new rules of customary international law would, no doubt, paralyse the progress of international law and render its development virtually impossible. One tends to lend wholehearted support to Kunz when he maintains that the practice in question "must be 'general', not universal". (1) At the same time, however, he is at pains to point out that, by dispensing with the requirement for a unanimous and universal acceptance of the new rule by the international community, the door has by no means been thrown open to the adoption of a "majority" test. To quote again from Kunz:

> "A mere majority of States is not enough. The practice must have been applied by the overwhelming majority of states which hitherto had an opportunity of applying it." (2)

Thus Kunz enunciates an important principle, namely, that it is not a mere "arithmetical majority" of States that is required for the creation of a new customary rule, but rather what may be perhaps best termed a "functional majority" of the States affected or likely to be affected by the emergence of the new rule. Such a "functional majority" may sometimes involve a great number of States. On other occasions, however, it may well happen that the number of

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1) Kunz, loc.cit. p. 666.

2) Ibid.

States directly affected by the creation of a new rule may be extremely small.

The application of the "functional majority" test may be of considerable help in the sphere of maritime historic rights. As has been rightly pointed out by Gidel, the acts or omissions of various States cannot be always put on the same level. (1) For instance, the presumed acquiescence of Afghanistan (which is a land-locked country anyway) in a practice which has allegedly sprung up off the coast of Denmark can hardly be equated with the acquiescence given to the same practice by Sweden which, being one of Denmark's neighbours and a maritime Power herself, is likely to be affected in a much more direct and acute manner by the emergence of such a practice.

It is not proposed here to lay down a rule which would confirm, by examining the number or the identity of the States which have given their assent to the establishment of a purported maritime historic right, - whether or not a new and exceptional maritime historic right has come into existence. Nor would the laying down of such a rule appear to be feasible or practicable. One cannot lose sight of the fact that the number of the member States of the international community undergoes constant and rapid changes, which is one

1) Gidel, op.cit. vol. III, p. 634.

more reason for denying any resort to such a mechanical device as the adoption of the "arithmetical majority" test. This surely is not a heartening conclusion for the academic lawyer who would undoubtedly welcome a fixed and easily ascertainable rule of law. The chaotic conditions which still characterize international relations, do, however, not permit of the adoption of such rules. International law, being unable to lose touch with international realities, must, in the course of shaping its norms, take due account of frequently harsh facts. It certainly cannot overlook the present-day structure of the international society, which - in respect of the creation of maritime historic rights - has the consequence that, in any given case in which a claim to maritime historic rights is raised, it will be necessary to investigate whether the new and exceptional practice has been applied by "the overwhelming majority of states which hitherto had an opportunity of applying it." (1) The test applied is not a quantitative, but rather a qualitative, one. This argument was expressly referred to in the United Kingdom pleadings in the Fisheries case when, for instance, it was contended in the Reply that "the Court's freedom to appreciate all the circumstances alleged to establish a customary rule also extends to appreciating the relative significance of

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1) See p. 474, note 2 above.

the quantity of its acceptance as law by other States." (1)

Closely related to the question of the number of States which must acquiesce in the creation of a maritime historic title is the problem of protest against a practice derogatory of the normal rules of law. In other words: how many States ought to protest to prevent such a title from maturing? And can the protestsof the protesting States be all put on the same level,irrespective of their status among the maritime Powers of the world and regardless of their interests in the area in question?

It may be safely assumed that a protest emanating from a single State will not prevent indefinitely a new - and in itself unlawful - practice from coming into existence, provided such a practice, otherwise derogatory of the commonly accepted rules of international law, has met with the assent of the international community. It is, however, impossible to state how many States are supposed to protest in order to show that an allegedly new rule of law is no rule at all. The impossibility of laying down a rule on this point either was clearly recognized by various writers of international law. Thus Gidel maintains that:

> "il paraît impossible d'exiger ni que la reconnaissance .... soit rigoureusement 'universelle' ni qu'elle soit expresse.

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1) ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. II, p. 427.

> "Une seule contestation émanant d'un seul Etat ne saurait infirmer un usage; les contestations ne peuvent, d'autre part, être placées toutes sur le même plan, sans distinction de leur nature, de la situation géographique ou autre de l'Etat dont elles émanent." (1)

It appears that one cannot go beyond vague statements like the one just quoted. This becomes clear also when one reads a similar statement made by Johnson on this point, where he asserts that:

> "it is not possible to lay down a general rule stating how many States must protest and how strongly they must protest in order to prevent the growth of a prescriptive claim over areas of the high seas, but at least the governing principle is clear - there must be 'a general recognition of it by the maritime Powers of the world." (2)

This writer too did not find it possible to specify more precisely what is meant by the presumably intentionally vague phrase "the general recognition ...... by the maritime Powers of the world". One may, however, assume that the rules normally applicable to the growth of any new customary rule of international law will also apply to the growth of maritime historic rights. If the standards set by international law fall short of those to which one has become accustomed in municipal law, this is surely a sad reflection on the standard reached by international law at the present time. But a

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1) Gidel, op.cit. vol. III, p. 634.

2) Johnson, 27 BYIL (1950), p. 351.

denial of the practicability of these rules, when applied to the regime of historic waters, on account of these obvious shortcomings, would be no more justified than a refusal to recognize the need to apply any norms of customary international law, owing to the undisputable deficiencies which at present beset the machinery of customary international law.[1]

Finally, it should be pointed out that, as is the case with historic titles in general, with regard to the establishment of maritime historic titles also, the time factor is of no direct legal relevance. It is, however, through the passage of time that a presumption of acquiescence is inferred and it is with the further efflux of time that such a presumption is strengthened. But - and this point too cannot be overemphasized - it is not the passage of time that sets the seal of legal validity on an otherwise invalid claim. The time factor is relevant here - as in any other historic claim - precisely to the extent that an inference of acquiescence may be drawn from it.

IV. Manifestations of State authority over maritime areas.

The requirements which have been enumerated above as

1) For a more detailed discussion of the impact of a single State's protest on the prevention of the formation of an historic title, see chapter 4, section III.D.(5) above.

prerequisites for the establishment of an historic title in general [1] undergo some modifications, when applied to maritime historic titles, in order to adapt them to the peculiar character of the maritime domain of a State and to the manner in which State authority is being exercised over such territories. It will be readily understood that such notions as "effectiveness", "continuity", "notoriety" etc. assume with regard to maritime areas a meaning different from that normally attached to them when referring to land territories. As will be recalled, the prerequisite for raising a presumption of acquiescence in a given territorial situation is the effective display of authority by the State claiming for itself the benefits of such a situation, in a manner appropriate to the nature of the territory in question. Now, "effectiveness" assumes various forms under various circumstances. What may be regarded as "effective" when referring to a remote and isolated district, may be considered as "ineffective" when applied to a densely populated area. Similarly, measures which might prove insufficient as proof of manifestations of State authority over terrestrial areas, might be considered as meeting the requirements of "effectiveness" with regard to maritime territory, where no "effective"

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1) See chapter 4 above.

control, in the usual sense, can be exercised.

Here again, no rules can be laid down as to what may be regarded as "effective", "continuous", "notorious", etc. in maritime territorial situations. The ultimate decision in such cases will invariably rest with the tribunal called upon to pronounce in a legal controversy in which a maritime historic right is claimed. The tribunal, in turn, will decide the case having regard to the peculiar circumstances and facts of that case. Any recourse to preconceived and abstract notions of law will be of no avail.

It is certainly not a matter of pure coincidence that the theories of the "effectiveness" of territorial situations and of the freedom of the high seas crystallized contemporaneously, both being the products of the earlier part of the nineteenth century. Once the notion of "effective control" was insisted upon as the main - if not sole - criterion for the recog - nition of the sovereign rights of a State over a given area, it became virtually impossible to support the national pretensions to wide portions of the high seas over which the exercise of national sovereignty was inconceivable to all intents and purposes. So the notion of "effectiveness" is one more factor which militates in favour of limiting national pretensions over maritime territories, thus restricting them to those areas which - owing to peculiar and unusual

circumstances, arising mainly from an unusual geographical configuration and a consequent close link with the coastal State's land domain - may be properly regarded as having come under the effective control of the claimant State. Thus it is not surprising that the theory of "historic waters" has been applied mainly with regard to certain bays over which the littoral States do, in actual fact, exercise much the same functions as any State does in its internal waters. Moreover, the theory of "historic waters" in general is in fact only a later doctrinal extension of the concept of "historic bays", as will be shown in the next section. It is therefore mostly through cases relating to bays, claimed on historic grounds as belonging to the coastal State's maritime domain that the various possible manifestations of authority over maritime areas can be ascertained.

Both municipal and international case law afford an opportunity to establish on what grounds historic claims to various bays have been recognized in the past. As will be presently shown, the considerations relied upon by the parties to disputes affecting the legal status of certain bays as justifying the incorporation of such bays in the national domain of the claimant State form a mixture of geographical, economical, strategical and historical elements. The common feature of all these claims seems to be the belief that a special relationship exists between the water area concerned

and the land territory enclosing it. According to this concept, the maritime area is a dependency of the land territory, being controlled and dominated by it, and the coastal State exercises over it much the same authority and acts of sovereignty as it does or would do over its internal waters (like lakes and rivers). The legality of such an historic claim is to be measured, in the words of Jessup, "not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign powers." (1)

In its award rendered in the North Atlantic Fisheries Arbitration, the tribunal made several remarks as regards the conditions required for justifying the territoriality of bays in general, and it would appear that the considerations enumerated there, at a time when no geometrical or arithmetical criteria for defining a bay existed, still hold good today as regards historic bays, the territoriality of which cannot be determined - by their very nature - by geometrical or similar tests. Defining the term "bay" in general the tribunal said:

> "The interpretation [of the term 'bay'] must take into account all the individual

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1) Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 1927, p. 382.

> "circumstances which for any of the different bays are to be appreciated, the relation of its width to the length of penetration, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the higways of nations on the open sea and other circumstances not possible to enumerate in general." (1)

As may be readily seen, the tribunal referred to elements of geography ("width and length of penetration"), national security ("the possibility and the necessity of its being defended"), economy ("the special value .... for the industry") and to what may be regarded as the maritime interests of the international community in general ("the distance by which it is secluded from the higways of nations on the open sea"). The tribunal was at the same time careful enough to indicate that this list of considerations was by no means exhaustive and that in appropriate circumstances many other reasons might also be taken into account as additional grounds justifying an historic claim.

While the North Atlantic Fisheries Arbitration Award did not refer to "historic bays" in particular, this was explicitly done by the now defunct Central American Court of Justice in the Gulf of Fonseca case. There the Court expressly stated

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1) Scott, Hague Court Reports, 1st series, 1916, p. 187.

that it had determined the juridical status of the gulf "from a threefold point of view of history, geography and the vital interests of the surrounding States." (1)

As regards the historical element - or time factor - involved, the Court found that Spain, and subsequently the Federal Republic of Central America and later the three successor States of Nicaragua, Honduras and El Salvador

> "notoriously affirmed their peaceful ownership and possession in the Gulf .... and..... have performed acts and enacted laws having to do with the national security, the observance of health and with fiscal regulations." (2)

Thus the Court expressly referred to what was called in a previous chapter the manifestations of State authority, which, as was submitted there, are a prerequisite for a presumption of acquiescence in an historic claim, such acquiescence being the legal basis for the acquisition of an historic title. It is noteworthy that the Court attached paramount importance to the fact that the riparian States legislated for the gulf in question, and what is even more important: they enforced the relevant legislative measures.

The relevance of the concept of acquiescence as underlying the acquisition of the littoral States' title to the

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1) 11 AJIL (1917) p. 700.

2) Ibid.

Gulf of Fonseca becomes abundantly clear in another passage of the judgment where the Court said:

> "A secular possession such as that of the Gulf [of Fonseca] could only have been maintained by the acquiescence of the family of nations; and in the case here at issue it is not that the consensus gentium is deduced from a merely passive attitude on the part of the nations, because the diplomatic history of certain Powers shows that for more than half a century they have been seeking to establish rights of their own in the Gulf for purposes of commercial policy; but always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority." (1)

The Court went on to elaborate on various economic considerations which it also took into account in fixing the juridical status of the gulf, mentioning in particular the following:

(1) A projected railway line started by Honduras, the terminal of which was to be located near the coast of the Gulf;

(2) A railroad under the control of El Salvador starting at the Gulf;

(3) A projected prolongation of a railroad connecting the Real Estuary in the Gulf of Fonseca with the interior of Nicaragua. (2)

Turning from the enumeration of the particular economic

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1) Ibid. (Italics in original).

2) Ibid. at p. 704.

interests of each of the three riparian States, the Court alluded to their joint economic interests in the ownership of the Gulf. On this point the Court had the following to say:

> "The Gulf is surrounded by various and extensive departments of the riparian countries. These are of great importance because they are destined to great commercial, industrial and agricultural development; their products, like those of the departments in the interior of those States must be exported by way of the Gulf of Fonseca and through that Gulf must also come the increasing importations." (1)

Dealing with the question of the geographical configuration of the Gulf which facilitated the exercise of effective authority over it by the coastal States, the Court remarked that:

> "the configuration and other conditions of the Gulf facilitate the enforcement of fiscal laws and regulations and guarantee the full collection of imposts against frauds against the fiscal laws." (2)

Lastly, the Court referred also to the strategical aspect - which too is largely the outcome of the geographical shape of the Gulf - and pointed out that:

> "the strategic situation of the Gulf and its islands is so advantageous that the riparian States can defend their great interests therein

1) Ibid. at p. 705.

2) Ibid. at p. 705.

"and provide for the defense of their independence and sovereignty." (1)

It was the combined strength and the cumulative effect of all the above mentioned considerations which caused the Court to reach its conclusions as to the historic character of the riparian States' rights. However, these considerations in themselves - indispensable as they are for the establishment of an historic title - could not have been deemed sufficient for the acquisition of such a title, had it not been for the fact that in the circumstances of the case they - in their entirety - warranted a presumption of acquiescence in the historic claim of the riparian States on the part of the international community. This is clearly brought out in the Court's conclusions where it is observed that the above-mentioned circumstances "combine all the characteristics or conditions that the textwriters on international law, institutes and precedents have prescribed as essential to territorial waters, to wit, secular and immemorial possession accompanied by _animo domino_, both peaceful and continuous, and by _acquiescence on the part of other nations_." (2)

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1) Ibid.

2) Ibid. (First italics in original, second added).

It would therefore appear that the geographical factor as well as the economic considerations and the elements of national defence and other vital interests of the coastal State are relevant in the establishment of an historic title to the extent that they indicate the degree of consent accorded to such historic claims by the nations affected by such a national pretension; in the case of a maritime historic claim, "the nations affected", are the entire international community.

While the ultimate conclusion reached by the Court as regards the juridical status of the Gulf of Fonseca is believed to be erroneous, for the reasons given further below, [1] the various considerations enumerated by the Court as being instrumental in the acquisition of a maritime historic title are certainly correct. In fact, this enumeration is the most exhaustive list that has been given by any international tribunal in respect of the motives underlying and justifying a maritime historic claim. [2]

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1) See section VII below.

2) Another valuable illustration for what has been regarded as manifestation of State authority over maritime areas is to be found in the Grisbadarna Arbitration award where the tribunal mentioned among the various acts through which Swedish sovereignty over the banks in question was displayed, the placing of beacons, the measurement of the sea and the installation of a light-boat.(Scott, Hague Court Reports, 1st series, 1916, at p. 130).

In advancing various national claims to historic rights over certain bays the claimant States have usually stressed one or another aspect of these motives. Thus in his opinion relating to the juridical status of Delaware Bay, Attorney General Randolph of the United States dwelt mainly on the geographical aspect, pointing out that the whole bay was bounded by United States territory, and that "the Delaware does not lead from the sea to the dominions of any foreign nations." (1) He also referred to the various American assertions, as expressed and enforced in different acts of legislation and to the interests of security of the United States involved.

The elements of configuration, defensibility and the degree of assertion of sovereignty were relied upon by the Judicial Committee of the Privy Council in the Direct United States Cable Co. v. The Anglo-American Telegraph Co. in deciding the territorial status of Conception Bay. (2)

It is fitting to indicate at this juncture that the so-called "vital interests" of the coastal State, taken in

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1) Moore, International Law Digest, 1906, vol. I, pp. 735-739; see also the decision of the Second Court of Commissioners of Alabama Claims in the "Alleganean" case, where Chesapeake Bay was treated as another historic bay of the United States on similar grounds. (Moore, International Arbitrations, 1898, vol. IV, pp. 4333-4341.)

2) (1877) 2 A.C. p. 394 et seq.

isolation, do not appear to have been recognized in the past as a sufficient ground for the acquisition of an historic title, and were relied upon only <u>in conjunction</u> with all the other considerations which, through their combination, warrant the inference of an international acquiescence. (1) Thus the concept of acquiring an historic title to a given area on purely "vital" grounds, i.e. by reason of the subjective interests of the claimant State, as conceived by that State itself, are equally unjustified. on the maritime plane as they are in general, with the sole difference that in the case of a maritime claim based on such a ground - affecting as it normally does a great number of nations - it is even more un-likely to be accepted that in respect of "ordinary" historic claims. In rejecting claims to "vital" bays, based solely on the real or imaginary needs of the coast State, Gidel observes:

> "Ce seraient des prétentions arbitraires que celles qui seraient fondées purement et simplement sur des besoins ou des intérêts de l'Etat riverain ...." (2)

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1) The role of the "legitimate interests" of the claimant State in the establishment of an historic title was dealt with at some length in chapter 4, section V above, and the views submitted there as regards the acquisition of an historic title in general hold good also in respect of the acquisition of a maritime historic title.

2) Gidel, op.cit. vol.III, p.635; see to the same effect Bourquin loc.cit. at p.51; see, however, the contrary opinion expressed by Senhor Magalhães, the Portuguese delegate to the 1930 Hague Codification Conference, where he invoked such considerations of "vital interests" as justifying an historic claim. (Series of L.o.N.P. 1930, vol.XVI, p.106).

Thus the interests of the coastal State will be taken into account - alongside other pertinent factors - to the extent that they are clearly evidenced by a long usage and recognized, either expressly or tacitly, by the family of nations.

In a previous chapter the various manifestations of State authority over a given territory were considered at some length. In summing up this section it may be said that the same requirements apply also to maritime areas, with proper adjustments, rendered necessary by the fact that normally State authority over maritime areas is exercised in a more sporadic and isolated manner than over terrestrial areas. The principle, however, remains the same: the claimant State will be required to prove such a degree of effective display of State authority as would be normally expected from a State in possession of a similar body of water under similar circumstances.

Normally the assertion of State sovereignty over maritime areas will express itself by the exclusion from the water areas in question of all foreign vessels and their subjection to the domestic legislation of the coastal State. Other manifestations of State authority and assertions of State sovereignty will, however, be also taken into account. To quote Gidel:

"En ce qui concerne la nature de ces actes d'appropriation, il est difficile d'en préciser rigoureusement le caractère: l'exclusion de ces parages des navires étrangers, leur soumission à des règles émanant de l'Etat riverain et dépassant le domaine habituel, de la réglementation édictée dans l'intérêt de la navigation, serait évidemment des actes pleinement démonstratifs de la volonté de l'Etat. Il serait trop rigoureux de n'admettre que ceux-là." (1)

V. Historic waters; historic bays.

A. On historic bays in general.

The term "historic waters" is applied nowadays in respect of maritime areas in general, with reference to bodies of water which - in spite of their being beyond the normal limits of a State's maritime domain - are treated as if they were part of the maritime appurtenance of the littoral State. Thus this term denotes all waters which, owing to an unusual geographical configuration combined with overriding economic interests, strategical factors etc., are subjected to the riparian State's authority in derogation of the normally applicable rules of international law.

While from the legal point of view the theory of "historic bays" forms only one aspect of the more general doctrine of "historic waters", it is nonetheless true to say that historically and chronologically this latter doctrine

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1) Gidel, op.cit. vol. III, p. 633.

evolved from the more limited concept of "historic bays" and is in fact merely an extension of this concept which was already frequently resorted to in the last century. This fact is hardly surprising when one bears in mind that a great number of bays display a close link and intimate relationship with the countries washing their shores and thus comply with the requirements usually enumerated for the establishment of a maritime historic title. It is felt therefore that a closer perusal of the problems surrounding historic bays might afford a welcome opportunity for a better understanding of the problems attendant on historic waters in general. Furthermore, the greater part of the literature that has been devoted to the problems of maritime historic titles deals more specifically with historic bays.

Consequently the present section is devoted to a discussion of the theory of historic bays, while the next deals with historic waters other than historic bays.

The origins of the theory of historic bays go back to the nineteenth century when the modern concept of the freedom of the high seas emerged as the paramount rule of modern maritime international law. It thus became necessary to fix the precise boundary between the high seas - over which all States were deemed to enjoy a sort of common ownership - and the maritime appurtenances of the littoral States - over which the coastal States were exercising all or a part of the rights of

sovereignty. For obvious reasons many littoral countries were keen on extending the limits of their jurisdiction as far as possible and were looking for a legally valid pretext for the extension of their jurisdiction beyond the almost universally accepted three-mile limit. The geographical situation of certain bays, the close link between them and the States by whose land territories they were enclosed, the defensibility of their entrances by the coastal States, their economic interests, all these and other factors combined to make the bays the suitable object for the introduction of a theory which was destined to grant to the littoral States rights going beyond the normally applicable rules of international law. The riparian States' main purpose was to advance the starting line of the territorial sea further seawards, towards the opening of the bay. The result would be twofold:

(a) Parts of the sea which would have been otherwise considered as territorial waters, would become internal waters of the littoral State;

(b) Through the extension of the internal waters, the territorial waters were to be measured from various points further seawards, thus carrying the marginal belt of the littoral State into parts of what would have been normally considered as the open sea.

Before going further into the legal problems pertaining

to historic bays, it would appear pertinent to deal briefly with the definition of "bays" in general.

Article 7, paragraph 4, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (subsequently referred to as the "Territorial Sea Convention") defines a bay, for the purposes of the article, as:

> "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." (1)

This definition has removed an important stumbling - block in international law. Up to 1958 there does not seem to have been any commonly accepted definition of the term "bay". As a good illustration of the confusion that had pervaded this subject serve the pleadings of the parties to the Fisheries case where considerable space and energy were devoted to an effort to formulate such a definition, (2) relying on various authorities who had tackled that problem before. Some authors went even as far as to distinguish between "bays" - an expression reserved for smaller

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1) Cmnd. 584 (1959) p. 21.

2) See e.g. ICJ, Fisheries case, Pleadings, Oral Arguments, Documents, vol. I, pp. 422-425; see also ibid, vol.II, pp. 467-472.

indentations - and "gulfs" - a term which was meant to denote only larger indentations. [1] Such a distinction, however, is borne out neither by law nor by practice [2] and the terms appear to be interchangeable.

The term "historic bays" is designed to define all "those areas of water the legal status of which - with the consent of other States - differs from what it ought to have been according to the generally recognized rules of law." [3] Gidel, while giving this definition, criticises it at the same time on the ground, that the word "historic" in this context is inappropriate. It is not the bays, he asserts, that have a "history", for there is no bay without its history. The States advancing "historic claims" over certain bays mean to indicate thereby that, owing to some peculiar circumstances, they are entitled to "historic rights" over a given bay. [4]

It used to be common ground that the principle of

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1) See e.g. Colombos, in whose view "bays which penetrate deep into the land are called gulfs." (Colombos, op.cit. p. 152).

2) Thus the area known as Hudson Bay comprises a vast body of water, whereas the Gulf of St. Tropez is one of the small bays.

3) This is the English translation of the definition given by Gidel, which in its origin is as follows: "L'expression 'baies historiques' .... désigne les espaces maritimes dont le statut juridique n'est pas, du consentement des autres Etats, celui qu'il devrait être aux termes des règles généralement admises." (Gidel, op.cit. vol.III, p. 623).

4) Ibid.

historic bays did not have to be invoked in all those cases where the width of the entrance of the bay was less than six miles (that is to say, less than twice the commonly accepted breadth of territorial waters), provided that the bay was engulfed by one and the same State. (1) These bays are territorrial, even without resorting to the doctrine of historic bays. Says Oppenheim:

> "Such gulfs and bays as are enclosed by the land of one and the same littoral State, and have an entrance from the sea not more than six miles wide, are certainly territorial." (2)

The problem of historic bays arises, accordingly, solely with regard to bays the entrance of which exceeds twice the width of territorial waters. (3)

Various criteria have been suggested in the past with a view to setting an upper limit to the width of the entrance of bays which might be regarded - on historic grounds - as

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1) As to historic claims raised regarding "multinational" bays, see sub-section B below.

2) Oppenheim, op.cit. vol. I, p. 505.

3) In view of the lack of general agreement as to the breadth of the territorial sea, any reference to an arithmetical definition on this point is avoided.

territorial bays of the littoral States. (1) The strictest of those suggestions - amounting virtually to an absolute negation of the theory of historic bays - was advanced by Lord Fitzmaurice, when he declared in the House of Lords on 21 February, 1907, on behalf of His Majesty's Government, that only bays the entrance of which does not exceed six miles were to be regarded as territorial bays and that no excep - tions to that rule could be recognized. (2) Different

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1) The term "territorial bays" is used in this study to denote bays or gulfs, the waters of which are regarded as internal waters of the coastal State. The choice of this term might perhaps look somewhat unfortunate for it is likely to lend itself to the misleading impression that the waters of the bay are territorial waters, rather than internal waters. It should be borne in mind, however, that the more or less clear-cut distinction between internal waters and territorial waters is of comparatively recent origin and appears to have crystallised only in the course of the 1930 Hague Codification Conference. Prior to that Conference doctrine and practice alike do not seem to have taken due account of the distinction existing between these two categories of water (see Gidel, op.cit. vol. I, pp. 44-62). The term "territorial bay" had already gained widespread currency in the nineteenth century. Rivier, for example, writing in 1896, asserted that "territorial gulfs are governed by the principles of law which also govern internal seas ..... The littoral sea begins where the territorial gulf ends." (Rivier, Principes du Droit des Gens, 1896, vol. I, p. 154, as translated from the French in the U.N. Memorandum on Historic Bays, United Nations Conference on the Law of the Sea, Official Records, vol. I, Preparatory Documents, p.17).

2) Hansard (Lords), 4th Series, vol. 169, col. 989.

writers pleaded for a ten-mile test, (1) and, as has been pointed out by Oppenheim, "the practice of several States, such as Germany, Belgium and Holland, accords with this opinion." (2) The practice of other States, however, goes much beyond this limit. In the Memorandum on Historic Bays prepared by the United Nations Secretariat for the First Geneva Convention on the Law of the Sea (3) a list is given of various bays claimed by the littoral States as territorial bays on historic grounds although their entrances by far exceed the width of ten miles. Among these bays one might mention the Bay of Cancale with an entrance of 17 miles (claimed by France as a territorial bay), (4) and the Bays of

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1) See e.g. Cavaré, Le Droit International Public Positif, 1951, p. 512; see also Brierly, The Law of Nations, 5th ed. 1955, p. 172.

2) Oppenheim, op.cit. vol. I, p. 506.

3) United Nations Conference on the Law of the Sea, Official Records, vol. I, Preparatory Documents, Document A/Conf. 13/1.

4) See the French Reply to the questionnaire submitted to various Governments by the Preparatory Committee of the 1930 Hague Codification Conference, as reported in Ser.L.o.N.P. 1929, vol. II, p. 160.

Chaleur (16 miles entrance) [1] and Miramichi (14 miles entrance) [2] which are both regarded by Canada as terri - torial bays. The most extreme example in this respect is perhaps the instance of Hudson Bay, with an entrance of 50 miles and embracing 580,000 square miles, which is claimed by Canada as part of her territory. [3]

Thus the width of the entrance of a bay does not seem to be, in itself, of direct relevance in the establishment of an historic title by the littoral State. The only bearing this consideration seems to have on the acquisition of an historic title lies in the fact that an excessively wide

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1) See Mowat v. McFee, (1880) Reports of the Supreme Court of Canada, vol. 5, p. 66, where the Supreme Court of Canada held that the bay was in its entirety "within the present boundaries of the Provinces of Quebec and New Brunswick and within the Dominion of Canada." This finding was upheld by the Permanent Court of Arbitration in the North Atlantic Fisheries Arbitration (see Scott, Hague Court Reports, 1st series, 1916, p. 189), and found also acceptance in the Treaty concluded between the United States and Great Britain on 20 July, 1912 (see Treaties and Conventions between the United States and other Powers, 1910-1923, vol.III, p.2632).

2) See Annex 64 to the Norwegian Counter-Memorial in the Fisheries case, ICJ, Fisheries case, Pleadings, Oral Argument Documents, vol.II, p. 271) where an extract of the British case in the North Atlantic Fisheries Arbitration has been reproduced. In that extract reference was made to various acts of legislation in which the territoriality of Miramichi Bay was asserted.

3) See e.g. Johnston in 15 BYIL (1934) pp. 1-20; a more exhaustive list of the bays which are claimed as territorial bays by the littoral States, on historic grounds, can be found in the Memorandum on Historic Bays prepared by the U.N. Secretariat, loc.cit. pp. 3-10).

entrance strongly militates against the presumption that the bay in question is sufficiently closely linked up with the land domain of the coastal State and correspondingly weakens any inference that the littoral State is, in fact, capable of exercising effective control over the bay in question. If, however, it can be proved that the coastal State did in fact exercise such authority and control over the bay and a reasonable inference of international acquiescence in that practice can be drawn, then the excessive width of a bay's entrance will not prevent its being recognized as an historic bay.

Meanwhile, the problem of historic bays in general seems to have lost much of its former significance and acuteness in view of the adoption by the 1958 Geneva Conference on the Law of the Sea of article 7, paragraph 4, of the Territorial Sea Convention. This article reads as follows:

> "If a distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters." (1)

The provision contained in this article appears to represent a concession made to the countries favouring throughout the deliberations of the Conference the recognition of a

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1) Cmnd. 584 (1959) p. 21. (Italics added).

twelve-mile limit for the breadth of the territorial sea, twenty-four miles being twice the suggested width of the marginal belt. The adoption of the twenty-four mile limit departed from the original proposal by the International Law Commission of a twenty-five mile limit, (1) which was later reduced - following an amendment put forward by Sir Gerald Fitzmaurice - to fifteen miles. (2) The First Committee of the 1958 Geneva Conference on the Law of the Sea reversed, however, this proposal and recommended, by a majority of four votes, the adoption of a twenty-four mile limit. (3) This recommendation was carried by the Plenary by 49 votes to 19, with 9 abstentions. (4)

As a logical extension of the provision contained in article 7, paragraph 4, paragraph 5 of the same article stipulates that:

> "where the distance between the low-water marks of the natural entrance points of a bay exceeds

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1) See United Nations, General Assembly, Official Records, Tenth Session, Supplement No. 9 (A/2934) chap.III, art.7.

2) See ILC Yearbook, 8th session, 1956, vol. I, p. 197.

3) See United Nations Conference on the Law of the Sea, Official Records, vol. III, First Committee, p. 146.

4) Ibid, vol. II, Plenary Meetings, p. 63.

> "twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." (1)

The meaning of this stipulation is that in those cases in which the entrance of the bay exceeds twenty-four miles, a straight baseline will be drawn at a point nearest to the entrance where the opposing coasts are not more than twenty-four miles apart so as to confer on all the waters from the baseline landwards the status of internal waters.

This provision - carried by the plenary meeting of the Conference by 47 votes to 19, with 8 abstentions (2) - further reduces the practical significance of the theory of historic waters as regards its application to bays, because it transforms into internal waters all those parts of the bays landwards to the baselines the length of which does not exceed twenty-four miles, even though their entrance may be wider than twenty-four miles. True, the Conventions adopted by the Conference do not have, in themselves, the character of binding rules of international law and are in their nature no more than recommendations to the various States, subject to

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1) Cmnd. 584 (1959) p. 21.

2) United Nations Conference on the Law of the Sea, Official Records, vol. II, p. 63.

their signature and ratification.[1] So far none of the four Conventions adopted by the Conference has come into force, because they have not been ratified by at least 22 States, which is the minimum number required by the Conventions.[2] It is, however, equally true to say that the considerable number of States who voted in favour of article 7, and particularly the proportion of those who voted for its adoption as compared with those who opposed it (article 7, as a whole, was approved by 63 votes to 6, with 5 abstentions), certainly reflects the general mood of the international society and a consensus of opinion prevailing among the States of the world which must be surely reckoned with as expressing the views of at least those States which associated themselves with the article in question by supporting it during the voting.

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1) The provisions relating to the signature and ratification by the various States are laid down in articles 25-29 of the *Territorial Sea Convention*. (Similar provisions may be found in the remaining three Conventions.

2) Article 29 of the *Territorial Sea Convention* provides that it should come into force one month after the deposit of the twenty-second instrument of ratification with the United Nations (Cmnd. 584,[1959] p.26). By mid-October 1960 the *Territorial Sea Convention* was signed by 44 States, but it was ratified at the end of November of the same year by four States only, namely, Haiti, Cambodia, the United Kingdom and the Soviet Union. (see Meyer-Lindenberg, *Seerechtliche Entwicklungstendenzen* in 21 ZRV 1961, p. 40, n.6).

While the provisions contained in article 7, once they will have come into force, are likely to eliminate problems relating to the juridical status of a great number of hitherto "historic" bays, they certainly do not eliminate the problem altogether. The Conference was the first to recognize this fact, to which recognition it gave a twofold expression:

(a) Article 7, paragraph 6, of the <u>Territorial Sea Convention</u> stipulates that "the foregoing provisions shall not apply to the so-called 'historic bays'", (1) thus expressly excluding the problem of the remaining "historic bays" from the scope of the Convention's provisions.

(b) The Conference also adopted a joint Indian-Panamanian draft resolution, submitted by the First Committee, in which the United Nations General Assembly was requested "to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of such study to all States Members of the United Nations." (2)

Following the adoption of this resolution, the Sixth Committee of the United Nations General Assembly, on 4 December, 1959, unanimously recommended to the General Assembly the adoption of a resolution which requested the International Law

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1) Cmnd. 584 (1959) p. 21.

2) Ibid, p. 50.

Commission "as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate." (1) On 7 December, 1959, the General Assembly unanimously adopted this draft resolution. (2)

For the sake of completeness it must be added, however, that article 7 of the Territorial Sea Convention, in its entirety, refers solely to bays "the coasts of which belong to a single State." (3) This introductory remark of the article raises an important problem, namely, the question whether an historic claim may be asserted in respect of a "multinational" bay, that is to say, a bay which is enclosed by the territories of more than one littoral State.

B. Can multinational bays be claimed as historic bays?

As to the "historicity" of bays which are enclosed by more than one littoral State, doctrine and practice alike seem,

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1) United Nations General Assembly, Official Records, 14th Session, 1959, Sixth Committee, p. 241; for the text of the draft resolution see Document A/4333, para. 11.

2) United Nations, General Assembly, Official Records, 14th Session, 1959, Plenary Meetings, p. 649.

3) Cmnd. 584 (1959) p. 21.

on the whole, to uphold the view that such bays are incapable of acquiring the status of historic bays and cannot be appropriated by the littoral States or any of them, irrespective of the width of their entrances or other geographic, economic or strategic considerations. Thus the Swiss-Belgian writer Rivier stated as early as 1896:

> "Where there are several coastal States, the gulf is an open sea regardless of the width at the entrance." (1)

And Oppenheim seems to echo this view when he maintains that:

> "as a rule all gulfs and bays enclosed by the land of more than one littoral State, however wide their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated." (2)

To understand the reason why multinational bays are generally regarded as being incapable of acquiring the status of historic bays, it as well to remember that one of the main motives usually advanced in support of an historic claim to a bay is that the bay in question "does not lead from the sea to the dominions of any foreign nation." (3) This argument was

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1) Rivier, op.cit. vol. I, pp. 154-155.

2) Oppenheim, op.cit. p. 508.

3) See Attorney General Randolph's opinion as regards the juridical status of Delaware Bay, in connection with the naval incident of 1793 between the British vessel "The Grange" and the French vessel "L'Embuscade." (Moore, International Law Digest, 1906, vol. I, pp. 735- 739).

resorted to by the Second Court of Commissioners of Alabama Claims in the "Alleganean" case where the arbitral tribunal had to pronounce on the territorial status of Chesapeake Bay and found that it constituted United States internal waters. Amongst the reasons given by the tribunal for this finding was the fact that the bay

> "is entirely encompassed about by [United States] territory .... It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another." (1)

Thus it becomes evident that one of the major consider-ations which permit a given bay to be turned into an historic bay is the fact that by its incorporation into the national domain of the littoral State no harm is done or is likely to be done to another State and that the rights of such a State are not affected thereby. It is, however, abundantly clear that these considerations do not hold good in those cases where the shores of a bay are possessed by more than one littoral State. In such cases it can hardly be maintained that the bay "is not and cannot be made a roadway from one nation to another." This seems to account to a very large extent for the fact that multinational bays have come to be generally regarded as parts of the open sea, except the marginal belt to which each of the littoral States is entitled in accordance

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1) Moore, International Arbitrations, 1898, vol.IV, pp. 4338-4341.

with the general rules of international law. (1) This consideration which seems to be implicit in all those cases where multinational bays are involved, was given explicit recognition in an arbitration case which arose as a consequence of the seizure in 1843 of the United States vessel "Washington" by a British vessel within the Bay of Fundy. Umpire Bates rejected the British contention, according to which the bay was British domain, and explained this decision, inter alia, by the fact that:

> "One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passaquamoddy must sail through a large space of it." (2)

Commenting on this decision, Dana took the view that:

> "The real ground [for this decision] was that one of the assumed headlands belonged to the United States and it was necessary to pass the

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1) In some narrow bays the marginal belts of the various coastal States are likely to overlap. The solution in such case would be usually an agreement between the parties concerned, failing which article 12, paragraph 1, of the Territorial Sea Convention provides that the territorial seas of the participants should not extend beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the States is measured. (Cmnd. 584, [1959] p.22). The paragraph adds, however, that these general provisions shall not apply "where it is necessary, by reason of historic title or other special circumstances, to delimit the territorial seas of the two States in a way which is at variance with this provision." (Ibid.)

2) Moore, International Arbitrations, 1898, vol.IV, p. 4344.

> "headland in order to get to one of the ports of the United States." (1)

Fauchille appears to take the same view when he asserts that:

> "La sentence arbitrale .... relative à la baie de Fundy a considéré que cette baie était une mer libre ..... surtout parce que ses côtes n'appartenaient pas tous au même Etat ...." (2)

The only instance in which a claim to historic rights over a multinational bay seems to have been recognized by an international tribunal appears to be the Gulf of Fonseca case.(3) As has been already pointed out above, this gulf is bounded by the territories of Nicaragua, Honduras and El Salvador. (4) Its entrance is nineteen and a half miles wide. By a treaty concluded in 1914 between the United States of America and Nicaragua (the Bryan-Chamorro Treaty) the United States were granted for a period of 99 years certain rights in portions of Nicaraguan territory bordering on the Gulf of Fonseca as well as rights concerning the construction of an interoceanic canal. The validity of this treaty was disputed

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1) Quoted by Phillimore, op.cit. vol. I, pp. 287-289.

2) Fauchille, op.cit. vol. I, part II, p.304.(Italics added).

3) Reported in 11 AJIL (1917) p. 674.

4) During the period from 1522 down to 1821 the gulf formed part of the royal patrimony of the Crown of Castille. From 1821 down to 1839 it was part of Federal Republic of Central America. This Republic was dissolved in 1839 and the three successor States of Nicaragua, Honduras and El Salvador took its place.

by El Salvador which instituted proceedings against Nicaragua before the Central American Court of Justice. On behalf of El Salvador it was contended that Nicaragua was not entitled to grant any rights to the United States in the Gulf of Fonseca, since the Gulf constituted, on historical grounds, the common property of the three riparian countries.

In its judgment of 9 March, 1917, the Court upheld the contentions of El Salvador and unanimously held that the gulf was "an historic bay possessed of the characteristics of a closed sea".(1) The Court then proceeded to enumerate the considerations which led it to this conclusion and found, by a majority vote, that:

> "the three riparian States of El Salvador, Honduras and Nicaragua are .... recognised as co-owners of [the gulf's waters], except as to the littoral marine league which is the exclusive property of each." (2)

The Gulf of Fonseca case, however, rather than conforming with the rules of international law, seems to be a deviation from them. This apparently isolated case of the recognition of a multinational bay as an historic bay has come ever since under severe fire from doctrinal sources and, as far as can be ascertained, has not been followed since by any other tribunal.

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1) 11 AJIL (1917), p. 716.

2) Ibid.

Gidel considers this decisions as "une anomalie tout à fait notable dans le système logique des baies historiques." (1)

More recently the question of the "historicity" of a multinational bay arose once more with regard to the Gulf of Aqaba, which has been claimed by the various Arab States as forming part of "regional Arab waters". According to this view, the gulf in its entirety constitutes a "closed Arab gulf" and its waters are to be consequently regarded as "Arab territorial waters." (2) It has been also contended by Saudi Arabia that the gulf "is of the category of historical Gulfs that fall outside the sphere of international law", (3) on the ground that it forms "the historical route to the holy places in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since then, the Gulf has been an exclusively

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1) Gidel, op.cit. vol. III, p. 627. He also calls the judgment rendered in this case "un accident qui ne saurait en altérer la ligne." (Ibid.)

2) See e.g. the official statement of the Saudi-Arabian Government as published on 17 March, 1957, in the Mecca daily Al-Bilad al-Saudiyah, as cited in an article by Charles B. Selak Jr. on "The Legal Status of the Gulf of Aqaba" in 52 AJIL (1958) p. 660 et seq. at p. 676.

3) United Nations, General Assembly, Official Records, 12th Session, 1957, Plenary Meetings, p. 233.

Arab route under Arab sovereignty." (1)

The Gulf of Aqaba - with an approximately six-mile entrance - is about ninety-six miles long and its breadth at no point exceeds fifteen miles. The islands of Tiran and Sanafir, in the approach of the Gulf, reduce the navigable routes at the entrance of the Gulf to two narrow passages of a few hundred yards each. (2) In approximately 700 A.D. the gulf came under Arab domination as a result of the conquest of the whole area by the Arabs. In 1517 the Turks conquered the whole district surrounding the gulf and until the end of the First World War it formed an integral part of the Ottoman Empire. At present the gulf washes the shores of four States: the United Arab Republic (a coastline of about 100 miles), Saudi Arabia (a coastline of about 100 miles), the Hashemite Kingdom of Jordan (a three-and-a-half-mile coastline) and Israel (a six-mile coastline). The first two States possess the shores overlooking the entrance of the gulf, while each of the latter two possesses a small coastal strip at the head of the gulf.

When the status of the gulf was discussed during the

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1) Ibid.

2) For the geographical and hydrographical details relating to the gulf, see <u>United Nations Conference on the Law of the Sea, Official Records</u>, vol. I, <u>Preparatory Documents</u>, Document A/CONF. 13/15, pp. 202-203.

twelfth session of the United Nations General Assembly, the representative of Saudi Arabia, Mr. Shukairy, claimed that:

> "The Gulf of Aqaba is a national inland waterway, subject to absolute Arab sovereignty. The geographical location of the Gulf is conclusive proof of its national character ..... Thus by its configuration the Gulf is in the nature of a mare clausum which does not belong to the class of international waterways .... The Gulf is so narrow that the territorial areas of the littoral States are bound to overlap ... The Gulf of Aqaba is of the category of historical gulfs that fall outside the sphere of international law ...... Israel has no right to any part of the Gulf .... The area under Israel is nothing but military control without sovereignty whatsoever." (1)

It is difficult to conceive how this last assertion - namely, that Israel has no sovereignty over any part of the gulf's coastline, but only military control, an assertion which in itself is at least dubious - can in any way advance the historic claim put forward by the Saudi Arabian delegate. Even without the presence of Israel the gulf would still be enclosed by three different States. Those States have, in fact, some important features in common, notably, that the majority of their subjects are of the Arab racial stock, speak the same language and adhere to the Moslem faith. These common features, however, do not appear to be of any

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1) See p. 513, n.3 above; a statement to the same effect was made by Mr. Shukairy in the Sixth Committee of the United Nations at its 14th session. (See United Nations, General Assembly, Official Records, 14th Session, 1959, Sixth Committee, p. 227 et seq; see also Mr. Shukairy's statement in the First Committee of the 1958 Geneva Conference on the Law of the Sea, Official Records, vol.III, p. 3.

legal relevance, since international law - being a law of nations and not of religious creeds, languages or races - recognizes as its subjects States and not religions, races or linguistic groups. Thus it is hard to follow the line of argument adopted by Mr. Shukairy when he stresses the allegedly strong historical link existing between Islam and the Gulf of Aqaba. (1) At the present stage of international law the Saudi Arabian claim is likely to strike one as an utter innovation in support of which there do not seem to be any authorities. Thus the term "Arab territorial waters" or any similar expression must be regarded as being devoid of any legal significance.

The only part of the Saudi Arabian delegate's statement which seems to rest on more traditional legal ground is the passage where it is claimed that, owing to the peculiar geographical configuration of the gulf, it does not belong to the class of international waterways and that its narrowness causes rival national claims to overlap, thus eliminating the

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1) Here again there is considerable doubt whether the past history of the gulf in fact bears out the assertions of Mr. Shukairy. According to Melamid "due to the prevalence of strong northerly winds, the confined waters of the gulf are very difficult to navigate by northbound sailing vessels. As a result, the gulf was rarely used by ships prior to the advent of steam navigation .... For the same reason, Moslem pilgrim sailing ships do not appear to have used the Gulf." (Melamid, Legal Status of the Gulf of Aqaba, 53 AJIL (1959), pp. 412-413, at p. 412).

possibility of its being regarded as part of the high seas.

One of the main deficiencies inherent in this line of argument is, of course, the fact that the allegedly peculiar configuration of the gulf (namely, its narrow entrance which is dominated by two of the littoral States) does not lead the Saudi Arabian delegate to the conclusion that it is only the two littoral States that enjoy privileged rights at the entrance of the gulf. While Saudi Arabia is apparently willing to recognize the right of innocent passage through the entrance of the gulf to Jordan, she is denying the same right to Israel, which, like Jordan, possesses only a small coastal strip at the head of the gulf. The apparent contradiction in the rights suggested by Saudi Arabia for Jordan and Israel, respectively, cannot be explained away simply by the fact that the first happens to have a Moslem majority, while in the other the Moslems are the minority of the local population.

The assertion, according to which the legal status of a gulf is determined by the legal status which is presumed to prevail at its entrance, is equally fallacious. It is precisely the other way round: the juridical status of the gulf determines the rules governing the rights of passage through its entrance and the rights of the littoral State or States therein. If a given body of water is part of the open sea, then the strait linking this body of water with another part

of the open sea cannot be blocked in time of peace (1) even if the waters within the strait constitute part of the littoral State's territorial sea. This rule has now found express recognition in article 16, paragraph 4, of the <u>Territorial Sea Convention</u>, which provides that:

> "there shall be no suspension of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."(2)

This provision of the Convention was not, however, an innovation of the Conference, but is merely a restatement of a rule of law which had been in force already prior to it. Thus Oppenheim maintains that a strait which connects two parts of the open sea cannot be blocked for innocent passage even if it is a territorial strait, i.e. when its width does not exceed twice the width of the marginal belt. He goes on to say that "it is irrelevant that the strait is not a

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1) It is not intended here to go into the argument according to which there is no peace at present between Israel and her neighbours, because the Armistice Agreements concluded between the Arab States and Israel do not deprive the parties of their belligerent rights. This argument does not seem to affect the juridical status of the gulf as such, which is the question with which we are concerned here.

2) Cmnd. 584 (1959) p. 23; The adoption of article 16, paragraph 4, was vigorously opposed by the delegates of Saudi Arabia and the United Arab Republic (see <u>United Nations Conference on the Law of the Sea, Official Records</u>, vol.III, pp. 93-94; ibid, vol.II, p. 65).

necessary but only an alternative route between two parts of the high seas. It is sufficient that it has been a useful route for international maritime traffic." (1)

Thus the most that can be achieved by putting forward an historic claim to the Gulf of Aqaba is to turn those parts of the gulf which are outside the territorial sea of any of the littoral States into the common property of all the coastal States, in accordance with the decision rendered in the Gulf of Fonseca case. For the reasons given above such a course would, however, do not appear to be commendable at all. The mere fact that various national claims to marginal belts over certain parts of the gulf overlap, does not alter in the least the juridical status of the gulf. The general provisions for such an eventuality are to be found in article 12, paragraph 1, of the Territorial Sea Convention. (2)

The correct legal position as regards the juridical

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1) Oppenheim, op.cit. vol. I, p.512; this rule has found recognition also in the judgment rendered by the International Court of Justice in the Corfu Channel case (ICJ Reports, 1949, p. 28); see to the same effect Brüel, International Straits, 1947, vol. I, p. 34.

2) See p.510, n.1 above; true, the article does not apply "where it is necessary by reason of historic title .... to delimit the territorial seas of the two States in a way which is at variance with this provision" (ibid.). A careful perusal of the article's wording would, however, indicate that it excludes from its scope merely those cases where historic claims have already been recognized. It surely is not meant to apply to those cases in which an historic claim is based on the difficulty of delimiting the territorial seas.

status of the Gulf of Aqaba seems to have been stated in 1957 by the various leading maritime Powers of the world, when - giving their views at the 11th session of the United Nations - they rallied to the concept that the gulf was an international waterway by reason of its being possessed by more than one littoral State. The delegate of the Netherlands asserted that:

> "Inasmuch as the Gulf of Aqaba is bordered by four different States and has a width in excess of the three miles of territorial waters of the four littoral States on either side, it is, under the rules of international law, to be regarded as part of the open sea ... The Straits of Tiran consequently are, in the legal sense, straits connecting two open seas, normally used for international navigation ....." (1)

Earlier in the debate the delegate of France had observed that in the view of his Government:

> "The Gulf of Aqaba by reasons partly of its breadth and partly of the fact that its shores belong to four different States, constitutes international waters ....." (2)

The United Kingdom delegate associated himself with this view when he declared that "the Gulf of Aqaba is not only bounded at its narrow point of entry by two different countries, Egypt and Saudi Arabia, but contains at its head the ports of two

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1) United Nations, General Assembly, Official Records, 11th Session, 1957, Plenary Meetings, p. 1283.

2) Ibid. p. 1280.

further countries: Jordan and Israel." (1) According to the United Kingdom delegate, this fact in itself sufficed in order to put the Gulf of Aqaba into a different category from those instances in which historic claims have been recognized in the past. (2)

On behalf of the United States of America Ambassador Cabot Lodge referred to a United States aide-mémoire to Israel of 11 February, 1957 (3) in which it had been stated that:

> "The United States believes that the gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the gulf and through the Straits giving access thereto." (4)

A similar view was taken up by the delegates of Italy, (5) Belgium, (6) Sweden, (7) Denmark, (8) and Canada. (9)

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1) Ibid, p. 1284.

2) Ibid.

3) 36 Department of State Bulletin, 432 (1957).

4) United Nations, General Assembly, Official Records, 11th session, 1957, Plenary Meetings, pp. 1277-1278.

5) Ibid. p. 1295.

6) Ibid. p. 1296.

7) Ibid. p. 1303.

8) Ibid. p. 1303.

9) Ibid. p. 1296.

It is also worth mentioning in this connection that in the Memorandum on Historic Bays prepared by the United Nations Secretariat for the First Geneva Conference on the Law of the Sea, (1) the Gulf of Aqaba does not appear among the bays which have been recognized as historic bays or are claimed as such. This ominous omission - following closely the debate in the United Nations General Assembly on the status of the Gulf of Aqaba - cannot be regarded as devoid of any meaning. Even more illuminating in this respect is the fact that in an article published in 1957, the Lebanese author Malek does not list the Gulf of Aqaba among the bays recognized as historic bays or claimed as such. (2)

The International Law Commission has in the past declined to put forward any suggestions as to the "historicity" of gulfs surrounded by more than one littoral State on the ground that "the Commission has not sufficient data at its disposal concerning the number of cases involved or the regulations at

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1) See United Nations Conference on the Law of the Sea, Official Records, vol. I, Preparatory Documents, p. 1.

2) Malek, La Théorie dites des "Baies Historiques", 6 Revue de Droit International pour le Moyen Orient (1957) p. 101.

present applicable to them." (1)

Having regard to the resolution adopted by the United Nations General Assembly on 7 December, 1959, in which it requested the International Law Commission "to undertake the study of the question of the juridical régime of historic waters, including historic bays", (2) it is to be expected that the Commission will have to concern itself with the problem whether or not multinational bays are capable of being turned into historic bays. (3)

C. The effects of territorial changes along the coast of a bay.

Owing to territorial changes occurring along the coast of a bay, it might well happen that a bay which was formerly surrounded by a single State, becomes, as a result of such changes, enclosed by the territories of more than one coastal State (e.g. the

1) ILC Yearbook, eighth session, 1956, vol. II, p. 269.

2) United Nations, General Assembly, Official Records, 14th session, 1959, Plenary Meetings, p. 649.

3) Recent publications regarding the legal status of the Gulf of Aqaba include Bloomfield, Egypt, Israel and the Gulf of Aqaba, 1957; Selak, The Legal Status of the Gulf of Aqaba, in 52 AJIL (1958) p. 660 et seq.; Gross, The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba, in 53 AJIL (1959) p. 564 et seq.; Hartwig, Der Israelisch-Ägyptische Streit um den Golf von Akaba, in 9 Archiv des Völkerrechts, (1961) p. 27 et seq. For a presentation of this case by an Egyptian writer see Hammad, The Right of Passage in the Gulf of Aqaba, in 15 Revue Egyptienne de Droit International (1959) p. 118 et seq.

Gulfs of Fonseca and Aqaba).

Conversely, there exists the possibility that a hitherto multinational bay is brought, as a result of territorial changes along its shores, under the sway of a single littoral State. Thus the question arises how such changes are likely to affect the juridical status of a given bay.

The authorities available on this point are far from being plentiful. The reason for this dearth of learned authority seems to be the fact that during the last century or so - that is to say, since the crystallisation of modern maritime international law - comparatively few instances of such changes have occurred. Thus the arguments advanced on this point have a rather speculative character and the views expressed are of a purely tentative nature.

As far as the "splitting up" of a formerly "single-national" bay is concerned, the Gulf of Fonseca seems to provide an appropriate example. This Gulf, as will be recalled, was surrounded down to 1821 exclusively by the dependencies of the Spanish Crown, and in the period 1821-1839 by the Central American Federation. In 1839 this federation was dissolved and ever since the gulf has been enclosed by three littoral States; Nicaragua, Honduras and El Salvador.

In its judgment relating to the juridical status of the gulf, the Central American Court of Justice held that the

portions of water falling outside the marginal belts of the littoral States constituted the joint property of all three of them. (1) Thus the Court seems - by implication - to have taken the view that the changes which had occurred along the coasts of the gulf did not affect its status at all, and since the gulf formerly "belonged" to the State which possessed its shores in their entirety, the sole fact that that single State was now replaced by States, was no sufficient ground for altering the juridical status of the gulf. It also emerges from the Court's judgment as a matter of course that none of the littoral States was entitled to deprive any of the other littoral States of its rights in the gulf, even though not all the littoral States might enjoy possession over the entry of the bay. (2)

The decision reached in the Gulf of Fonseca case has, however, met with severe criticism and is still regarded as a sort of anomaly in international law, which does not reflect the general rule. According to Bolak:

> "The Gulf of Fonseca situation appears to be unique. Water areas surrounded by the

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1) 11 AJIL (1917) p. 716.

2) The entrance to the Gulf of Fonseca is possessed by Nicaragua and El Salvador, while Honduras owns a part of the coast inside the Gulf.

> "territory of a single coastal State and thus having the status of 'closed seas' which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas regardless of the narrowness of their entrances." (1)

The change of the character of such water areas from a closed sea into essentially high seas, is, however, generally not brought about automatically through the territorial changes along the coast. As a rule, special treaty arrangements provide for the recognition of the new status of the maritime area in question. In this connection, Selak mentions the Black Sea as a case which aptly illustrates this point. From 1484 onwards - when the Turks completed the conquest of its entire littoral - until 1774 - when Russia secured a foothold on its southern coast - the Black Sea was a Turkish lake. By the Treaty of Kutchuk-Kainardji of 1774 Russia was not only recognized as a littoral State, but also obtained rights of navigation in the Black Sea and a right of passage through the Turkish Straits. Later developments culminated in the Montreux Convention of 1936 which provides for "freedom of transit and navigation by sea in the Straits .... without limit of time," (2) for all merchant vessels in time of peace.

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1) Selak, loc.cit. p. 693.

2) 173, League of Nations Treaty Series, pp. 213-241.

Commenting on the significance of this Convention, Brüel observes that:

> "the principle of the freedom of navigation was proclaimed in the Montreux Convention as a principle of international law independent of the will of the parties." (1)

According to the same writer, the insistence on the freedom of navigation through such straits was necessary because:

> "to apply the ordinary rules regarding national waters, territorial waters and the open sea to straits would be to confer upon the littoral State .... privileges in straits that would not seem compatible with the interests of sea - traffic in being able to use these waters as ways of communication independently and not subject to the discretion of the littoral State ..... It would be all the more serious as a great number of the commercially most important straits are navigable only in such a way that shipping is bound to pass through the territorial waters, in one or more places, of one or several littoral States." (2)

As to the application of the above-mentioned principle to the Gulf of Aqaba, it would appear that ever since the dissolution of the Ottoman Empire and the emergence of more than one littoral State on the shores of the gulf, it has become an international waterway and its entrance - connecting as it does two parts of the open sea - cannot be blocked to the international maritime traffic on the ground that the navigable

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1) Brüel, International Straits, 1947, vol.II, pp. 424-425.

2) Ibid. vol. I, p. 37.

passage of the Strait of Tiran falls within the territorial sea of one or two of the littoral States. It also follows that the Palestine hostilities of 1948 and the establishment of the State of Israel in that year are immaterial facts from the point of view of the legal status of the gulf, as its juridical regime as an international waterway had already been determined some thirty years earlier and the succession of Israel to the former mandated territory of Palestine as one of the coastal States of the gulf in no way altered that regime.

It is more difficult to speculate on the possible legal implications of territorial changes whereby a formerly multinational bay becomes surrounded by one State only. In fact, the general trend of the territorial changes that have taken place during the past 150 years has not been in this direction. The number of States has been steadily on the increase rather than on the decrease and year after year more new members have been seeking admission into the international community. On a purely academic basis two possible solutions suggest themselves:

(a) It may be argued that, since the waters of such a bay formerly constituted a part of the international maritime domain, no single State will be allowed to deprive the international community of this possession and to incorporate it into its own maritime domain. This principle has found now

expression also in article 2 of the 1958 Geneva Convention on the High Seas, which stipulates that "the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." (1) Thus it may be argued that the territorial changes along the shores cannot eo ipso alter the legal status of the water area and the littoral State will have to acquire an historic (adverse) title to these waters, in compliance with the requirements laid down for the establishment of such a title.

(b) On the other hand, it may be validly maintained that the littoral State - which now possesses the whole of the bay's littoral - ought not to be put in a worse position than any other nation possessing the coast of a bay in its entirety merely by virtue of the fact that its possession is of comparatively recent standing.

These two conflicting points of view do, in fact, represent different approaches to the problem of the relationship between purely national and international interests. Those favouring the hegemony of international law would in all probability subscribe to the first suggestion, while others, more preoccupied with the specific interests of the littoral State, might prefer the latter concept. No clear-cut answer to this

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1) Cmnd. 584 (1959) p. 27.

question is attempted here. Suffice it to say that the possible clash of opinions on this point may be regarded as yet another illustration of the strong impact which interests reaching far beyond the purely legal sphere are likely to have on the process of shaping the juridical rules governing international life.

VI. Historic waters other than historic bays.

Following the emergence of the theory of historic bays, the doctrine of historic waters began to be applied also to other water areas which seemed to fulfil the requirements similar to those on which the claim to an historic bay was founded.

A. Historic rights of delimitation.

Generally speaking it might be said that the various claims to historic waters are in fact claims to an historic right of delimiting territorial waters in a manner which

constitutes a departure from the normal method of delimit - ation. [1]

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1) According to Johnson, "as regards the basic question of methods of delimiting territorial waters .... three methods are theoretically possible ....
(a) The Norwegian method of using straight base lines connecting the headlands of bays and the outermost islands, islets and reefs, and measuring the territorial sea from these base lines .... this method may generally be described as the 'headland theory' .....
(b) A method known as the *courbe tangente* or 'arcs of circles method' .....
(c) A method, known as the *tracé parallèle*, which consists of drawing on the chart an exact replica of the coast-line so many miles out to sea from that coast-line..." (see Johnson, *The Anglo-Norwegian Fisheries Case*, 1 ICLQ (1952) p. 145, at pp. 151-152; Italics in original).
Commenting on the applicability of the various methods of delimitation, Johnson remarks that "the so-called *tracé parallèle* method, although theoretically feasible along a verystraight coast-line, becomes progressively impracticable along a very indented coast-line such as that of northern Norway ..... The arcs of circles method of delimiting the territorial sea is really the inverse of the process used by a ship to discover whether she is inside or outside territorial waters .... any person on the coast, wishing to draw the limit of territorial waters on a chart, draws arcs of four miles radius [assuming the breadth of the territorial sea to be four miles] from an infinite number of points along the coast. In technical language, the outer line of territorial waters is then formed by the outer 'envelope' of all these arcs". (ibid. pp. 152-153). For a general discussion of the problem of delimiting territorial waters, see Boggs, *Delimitation of Seaward Areas under National Jurisdiction* in 45 AJIL (1951) p. 240 et seq; see also, by the same author, *Delimitation of the Territorial Sea*, in 24 AJIL (1930) p. 541 et seq.; see also Gidel, op.cit. vol.III, pp. 503-516. For a critical analysis of the judgment in the *Fisheries* case as regards the various methods of delimitation and the interpretation given to them by the parties to the dispute and by the Court, see Waldock, *The Anglo-Norwegian Fisheries Case*, in 28 BYIL (1951) p. 114, at pp. 133-136. For a more detailed explanation of the application of the arcs of circles method see also ICJ, *Fisheries* case, *Pleadings, Oral Arguments, Documents*, vol.II, pp.752-753 (Annex 42 of the United Kingdom Reply).

The 1930 Hague Codification Conference made an attempt to regulate the question of the manner of delimitation. The Conference, however, proved abortive and broke up without reaching agreement on any of the substantive points and the matter remained unsolved. The controversial nature of the subject was clearly brought out in the pleadings of the parties to the _Fisheries_ case where a great deal of the argument turned on the fact whether the method of delimit - ation by straight baselines, as applied by Norway, was valid in international law. The United Kingdom asserted that, from the replies that had been given by the various governments to the questionnaire submitted to them by the Preparatory Committee of the Hague Codification Conference, it clearly emerged that "the majority of .... governments which replied to the question favoured the main principle that the tide mark on the coast is the base-line." (1) The United Kingdom thus challenged the validity in international law of the "Norwegian system" of straight base-lines. It also contended that only Norway, Sweden, Poland and the Soviet Union had come out in favour of the "headland theory", and went on to submit that:

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1) ICJ, _Fisheries_ case, _Pleadings, Oral Arguments, Documents,_ vol.II, p. 446.

> "There does exist a general rule of international law requiring a State in principle to delimit its maritime belt by reference to the tide mark on its physical coast and that any departures from this base-line have to be justified as falling under one of the specifically recognized exceptions .... Norway is bound by this general rule except to the extent that she ..... can establish an historic right entitling her to exceptional maritime territory." (1)

The United Kingdom at the same time denounced the method of "constituting an imaginary coastline by the joining of lines between the extreme points selected arbitrarily along the coast" (2) as being contrary to international law.

Norway, on the other hand, maintained that "ni la méthode du tracé parallèle, ni celle de la courbe tangente ne peuvent ..... être considérées comme consacrées par une règle générale du droit international" (3) and went on to say that the "headland theory" was the only practicable method where the coast was broken up by indentations and insular formations off the mainland. (4) While denying the existence of a rule of international law in favour of the tracé parallèle method,

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1) Ibid. p. 452.

2) Ibid.

3) Ibid. vol. I, p. 405.

4) Ibid. p. 406.

Norway claimed, that, even if such a rule existed, it would not be binding on her, because she "par une attitude constante et non-équivoque a manifesté son refus de l'accepter."(1)

The Court found, by eight votes to four, that the "Norwegian system" of delimitation was not contrary to international law. In view of the peculiar geographical features of the Norwegian coast the Court held that:

> "the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions." (2)

This passage of the Court's judgment has evoked criticism on the ground that it was not clear, to quote Johnson, "whether the Court intended to reject the coast-line rule as a rule of international law altogether .... [or merely] rejected the coast-line rule as a binding rule on Norway."(3) The same author expresses the view that the Court did, in

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1) Ibid. p. 412.

2) ICJ Reports, 1951, p. 139.

3) Johnson, in 1 ICLQ (1952) at p. 155.

fact, attempt to eliminate this rule entirely, but, in view of the considerable array of authorities in favour of this rule,[1] it preferred to undermine it by first equating it with the tracé-parallèle method and then dismissing it as impracticable.[2]

The Court resorted instead to the "general direction of the coast" method, which consists, according to the Court, "of selecting appropriate points of the low-water mark and drawing straight base-lines between them."[3] This passage of the Court's judgment, as well as the principle underlying it, have since come under severe doctrinal criticism. The Court's statement, according to which the "general-direction-of-the-coast" method, as interpreted by the Court, had been followed by several States and that it had "not encountered objections of principle by other States",[4] has been met by Waldock who asserts that "the Court appears to have made

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1) For the main authorities on this point see Waldock, loc. cit. at p. 131.

2) Johnson, loc.cit. at pp. 156-157.

3) ICJ Reports, 1951, p. 129; see, however, the dissenting opinions of Judges Read (ibid. p. 187) and McNair (ibid, p. 161) who both rallied to the coast-line principle as to what they regarded as an established rule of international law.

4) Ibid.

a minority practice the basis of a general rule of customary law." (1) Referring to the introduction by the Court of various economic-historic considerations as supplementary factors confirming and even legalizing the "general-direction-of-the-coast" method, the same writer points out that "the Court's criteria .... are so flexible that they make the validity of many claims a matter of guesswork .... The general direction of the physical coast leaves much to mere opinion." (2)

The novelty of this judgment, from the point of view of the establishment of a maritime historic title, lies in the fact that the Court recognized an historic right to certain waters, deriving not from an historic claim to a given area of water - as is the case with historic claims over bays, for instance, - but from an historic right to delimit territorial waters in a given manner. The Court found that:

> "the method of straight lines established in the Norwegian system .... had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that

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1) Waldock, in 28 BYIL (1951) p. 148.

2) Ibid.

"they did not consider it to be contrary to international law." (1)

It will be noted that in the establishment of the "Norwegian system" two factors were regarded as vital by the Court:

(a) a constant and sufficiently long practice; and

(b) the attitude of other governments.

These two requirements of manifestation of State authority, on the one hand, and acquiescence of the governments affected, on the other hand, are in fact the two concomitant factors which are indispensable in the establishment of any historic title. It thus emerges that the rules governing the acquisition of an historic right of maritime delimitation are subject to the same process as the building up of an "ordinary" historic title.

In justifying the application to the Norwegian coast of

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1) Ibid. p. 139; The application of the straight baselines method of delimitation affects the question of the acquisition of maritime historic rights in yet another way. Not only can a State acquire an historic right of delimitation by straight baselines - as was held in the Fisheries case - but the adoption of this method of delimitation as a novel practice in those cases in which article 4 of the Territorial Sea Convention has sanctioned such practice, may give rise to non-exclusive historic claims (such as rights of passage and fishing) on the part of other States. This aspect of the problem will be dealt with in more detail in sections VII and VIII below.

the straight base-lines method, the Court referred, as has been mentioned above, to its peculiar geographical configuration as one of the reasons warranting the adoption of this course. The Court found that:

> "since the mainland is bordered .... by the 'skjaergaard' which constitutes a whole with the mainland, it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities." (1)

The Court went on to say that the tracé-parallèle method might be applied without difficulty to an ordinary, unbroken coast. "Where, however", the Court said, "a coast is deeply indented and cut into .... or where it is bordered by an archipelago such as the 'skjaergaard' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark and can only be determined by means of geometrical construction." (2)

Summing up its remarks on what may be termed the "geographical factor" in the acquisition of Norway's right to apply the "Norwegian system", the Court pronounced as follows:

> "the real question raised in the choice of base-lines is in effect whether certain sea

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1) Ibid, p. 128.

2) Ibid. pp. 128-129.

> "areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters." (1)

The Court also referred to the relevance of the economic factor to the acquisition of a maritime historic title and took into account the dependence of the Norwegian population in certain localities on the exploitation of the sea. Thus the Court registered the fact that:

> "in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing." (2)

It appears, however, that the economic factor was not regarded as a determining factor in the legal sense and was taken into account merely in conjunction with the geographical and other relevant aspects. It thus appears as an element of probative rather than of constitutive value. (3)

In his analysis of the *Fisheries* case, Sir Gerald

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1) Ibid. p. 133.(Italics added).

2) Ibid. p. 128; in another passage of the judgment the Court remarked: "There is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." (Ibid. p. 133). See also ibid. at p. 142 where the Court refers to certain economic considerations relating to the Lopphavet.

3) See to this effect Fitzmaurice in 31 BYIL (1954) pp. 400-402.

Fitzmaurice reaches the conclusion that the Court had, in fact, laid down four criteria for determining the validity or otherwise of given straight baselines. They all are, according to Sir Gerald, "different expressions of [the] basic principle of the close dependence of the territorial sea on the land domain." (1) In the opinion of Sir Gerald, the baselines must

> "(1) follow the general direction of the coast; (2) only enclose waters genuinely possessing the character of internal waters; (3) lie 'inter fauces terrarum'; and (4) be moderate and reasonable and drawn in a reasonable manner."(2)

On the whole it would appear that the Court's judgment in the *Fisheries* case considerably reduced the scope of the theory of "historic waters" by its awarding recognition to the general direction of the coast rule and by sanctioning the straight baselines method whenever "more than mere curvatures" cut into the coast. This opinion is voiced, amongst others, by Johnson, when he asserts, rightly, it is believed, that:

> "by laying so much stress .... on the flexibility of the general rules of international law relating to delimitation, by rejecting the coast-line rule as a rule of law and by including 'long usage' as a factor to be

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1) Ibid. p. 404.

2) Ibid. p. 404 (Italics in original); for a critical evaluation of each of these criteria, see ibid. pp. 404-411.

> "considered in assessing the validity, even under general international law, of straight base-lines drawn, not across bays only, but across sea areas 'sufficiently closely linked to the land domain to be subject to the régime of internal waters', the Court immeasurably reduced the scope of 'historic waters' as waters specially exempted, by virtue of an historic title, from the general rules of law." (1)

Seen now in retrospect, a decade after the pronouncement of the judgment in the _Fisheries_ case, this prognosis seems to have been borne out indeed by subsequent trends in the law of the sea. The _Fisheries_ case, no doubt, represented an attempt to incorporate, as it were, the doctrine of historic waters into _general_ international law and to transform what was always considered as an exception to the rule into one aspect of the general norm.

The developments at the 1958 Geneva Conference on the Law of the Sea - and in particular article 4 of the _Territorial Sea Convention_, dealing with situations in which the application of the straight baselines method of delimitation is permissible - in fact amount to an indirect introduction of the theory of historic waters into the Convention. This is so despite the fact that the Conference professed to have

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1) Johnson, 1 ICLQ (1952), pp. 163-164; the same view is expounded also by Fitzmaurice who claims that "the pronouncement of the Court must considerably reduce the importance and scope of the historic bay principle." (see 31, BYIL [1954] p.415). Waldock goes even further when he asserts that "there is now no room left for the distinction between historic and other bays." (see 28 BYIL [1951] p. 156).

excluded historic waters from the scope of its discussions and in one of its resolutions called on the General Assembly of the United Nations to arrange for a study of the juridical régime of historic waters, since the International Law Commission, and consequently the Conference itself, had not provided for the régime of historic waters. (1)

From the point of view of the subject-matter of this work it is also noteworthy that the Convention reaffirmed the general and well-established principle that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast," (2) and that the application of the straight baselines method was relegated once more to a subordinate position, although its suitability was recognized for certain types of coast lines. The relevant provisions of article 4 of the Convention read as follows:

> "1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
> 2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying

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1) Cmnd. 584 (1959) p. 50.

2) Article 3 of the Territorial Sea Convention, Cmnd. 584 (1959) p. 20.

> "within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.
> 3 ....
> 4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage." (1)

Thus the article seems to follow, on the whole, the principles laid down by the International Court of Justice in the *Fisheries* case. It requires accordingly that "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast" (2) and that the sea areas lying within such baselines "must be sufficiently closely linked to the land domain to be subject to the régime of internal waters." (3)

A further indication of the impact of the Court's judgment on the drafting of this article is to be found in paragraph 4 stating that in cases in which the geographical configuration warrants the application of straight baselines, "account may be taken, in determining particular baselines,

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1) Article 4 of the *Territorial Sea Convention*, Cmnd. 584 (1959) p. 20.

2) Compare with ICJ Reports, 1951, p. 133.

3) Compare ibid.

of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage." (1)

It would appear that the adoption of article 4, and especially of paragraph 4 thereof, may be regarded as a triumph for those who throughout the discussions preceding its adoption wished to confine the scope of the principles laid down in the Fisheries case by giving them the strictest possible interpretation. (2)

Commenting on the provisions contained in article 4, paragraph 4, of the Territorial Sea Convention, Sir Gerald Fitzmaurice pointed out that "they make it clear that economic interests are not per se a justification for the institution of straight baselines, thus correcting a very common misapprehension about the effect of the judgment in the

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1) Compare ibid.

2) See e.g. ILC Yearbook, eighth session, 1956, vol.I, p. 186, where Mr. Sandström and Sir Gerald Fitzmaurice expressed the wish that the wording of the article be brought into conformity with the findings of the International Court of Justice in the Fisheries case. Sir Gerald maintained there that "the Court's decision had not postulated economic interests as a ground per se for establishing a baseline system independently of the low water mark." See also further remarks to this effect made by Mr. Sandström and Sir Gerald (ibid. at p. 187), which met with the opposition of Mr. Krylov.

Norwegian [Fisheries] case, namely that it indicated the existence of an economic interest as sufficing in itself to justify the use of straight baselines." (1)

Article 4 of the Territorial Sea Convention did at the same time secure, as Sir Gerald Fitzmaurice was quick to point out, a more favourable position to a State having an indented coast, inasmuch as such a State is not only allowed to apply the straight baselines method, but is also permitted to take into account, in drawing these baselines, its peculiar economic interests, a concession which is not normally made in favour of a State which, being less fortunate, has an "ordinary" coast-line. (2)

Thus the pre-eminence of the geographical factor in the application of the straight baselines method has become evident and was sanctioned by the overwhelming majority of the States which participated in the voting on this article. (3)

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1) Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea, 8 ICLQ (1959) p. 73, at p. 77. (Italics in original).

2) See on this point more generally Fitzmaurice in 31 BYIL (1954) p. 420.

3) In the First Committee of the Conference the article was carried by 44 votes to none, with 13 abstentions. (See United Nations Conference on the Law of the Sea, Official Records, vol. III, First Committee, p. 161). In the plenary session of the Conference the article in question was adopted by 63 votes to 8, with 8 abstentions. (Ibid. vol.II, p. 63).

It is worth mentioning that the requirement for the sea areas lying landwards of the straight baselines being "sufficiently closely linked to the land domain to be subject to the régime of internal waters" in fact amounts to a reference, though obliquely and in a paraphrased manner, to the test of effectiveness, which, as has been amply shown above, is a prerequisite for raising a presumption of acquiescence. As will be recalled from the previous section - dealing specifically with historic bays - the relationship existing between the coastal State and the bay in question is of vital importance in the acquisition of an historic title to the bay, because the stronger the relationship, as manifested in the exercise of State authority by the coastal State over the bay, the stronger the assumption that the international community which refrained from raising any express objections to these State activities, did, in actual fact, acquiesce in the coastal State's pretensions to exclusive authority in the bay. The same considerations hold good with regard to other maritime areas also, and it thus becomes apparent that the theory of historic waters is normally applicable merely to those areas of water which, owing to the geographical configuration of the adjacent land territories, may be considered as possessing a sufficiently close relationship with the land domain. Only then can they be subject to the regime of internal waters (i.e. exclusive State authority),

the exercise of which is indispensable if an inference of international acquiescence is to be drawn.

Paragraph 1 of article 4 expressly mentions two different situations which warrant the adoption of the straight baseline method, namely,

(a) localities where the coast-line is deeply indented and cut into; and

(b) a fringe of islands along the coast in its immediate vicinity.

The first alternative possibility represents the normal case for the application of the straight baselines method. The reference to "localities" was inserted following a United Kingdom draft amendment the intention of which was "to exclude the application of the straight baseline method in cases of isolated curvatures in the coast." (1)

The second alternative possibility mentioned in the article has also its root in the Judgment of the International Court of Justice in the _Fisheries_ case. Confronted with a coast which is almost entirely covered by a continuous island

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1) Ibid. vol.III, p. 157, by Sir Gerald Fitzmaurice.

fringe, as is the case with Norway's "skjaergaard" (1) the Court remarked that:

> "the coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the 'skjaergaard'". (2)

From this finding it followed that:

> "the 'skjaergaard' ..... constitutes a whole with the mainland, [and] it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities." (3)

Thus, by regarding the outer line of the island fringe as the starting point for the delimitationof Norway's territorial sea, the Court in fact converted all waters lying between the "skjaergaard" and the mainland into internal waters.

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1) The western coast of Scotland, as well as parts of Canada's coast, display a similar geographical configuration. See in this connection Judge Read's remarks in ICJ Reports, 1951, p. 193, and the observations made by Judge McNair ibid. at pp. 169-170, where he also analyses the linguistic similarity of the Norwegian term "skjaergaard" and the expression "skerry" which is used in Scotland.

2) Ibid. p. 127.

3) Ibid. p. 128.

B. Water areas lying within and around island formations.

Another, and more usual, possibility of island formations off the coast of the littoral State is that of "coastal archipelagoes", which was also canvassed at some length by the parties to the _Fisheries_ case. (1) The Court itself remarked in its judgment that "the attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays [requiring that the distance between such islands should not exceed twice the breadth of the territorial sea] have not got beyond the stage of proposals." (2) Thus the Court declined to accept the United Kingdom submission according to which the length of the baselines which may be drawn at the outer line of the "skjaergaard" should not exceed ten miles (a distance which at that time was believed to be the maximum permissible closing line for ordinary territorial bays). The Court associated itself on this point with the Norwegian contention, according to which there did not exist any upper

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1) See e.g. ICJ, _Fisheries case_, _Pleadings, Oral Arguments, Documents_, vol.II, pp. 517-553, where the United Kingdom introduced a distinction between coastal and mid-ocean archipelagoes; see also ibid. vol.III, pp. 366-394 containing the Norwegian concept on this point.

2) ICJ Reports, 1951, p. 131.

limit as regards the length of such baselines. [1]

The Territorial Sea Convention follows the majority judgment in the Fisheries case in allowing the drawing of baselines in such cases along the outer limit of the island fringe. No limit is fixed for the permissible length of baselines, nor does the Convention specify what distance is regarded as being within the "immediate vicinity" of the coast. The vagueness of these provisions and the looseness of the terminology applied are surely disturbing, because this lack of precision is likely to raise doubts and uncertainties as to what baselines do or do not "depart to an appreciable extent from the general direction of the coast."

It is felt that in examining the juridical regime of historic waters one of the main tasks of the International Law Commission will lie in this sphere rather than in the definition of historic bays and the determination of their juridical status. Should the International Law Commission's attempts on this point prove futile, and should no objective test for the length of baselines in such cases be forthcoming, then one can only envisage a series of controversies between States and it will be eventually left to international

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1) The Court's decision on this point was vigorously challenged by the dissenting judges. Sir Arnold (now Lord) McNair's observations are to be found ibid. at pp. 163-164, and Judge Read's remarks at p. 194.

adjudication to determine the juridical status of each of the bodies of water involved in these controversies.

The judgment of the International Court of Justice in the *Fisheries* case appears to have drawn a line of cleavage between "coastal archipelagoes", on the one hand, and "mid-ocean archipelagoes", on the other hand. Similarly, article 4 of the *Territorial Sea Convention* covers only the case of coastal island groups and questions relating to the admissibility of drawing baselines between various mid-ocean islands allegedly composing one geographical unit, as well as to the length of the admissible baselines and to the juridical status of the waters enclosed by such baselines, was left open by the Conference.

Professor François, the special rapporteur of the International Law Commission on the Law of the Sea, in his first report on the regime of the territorial sea, included a special article (draft article 10) dealing with problems relating to groups of islands, without distinguishing between such formations lying off the mainland or in the mid-ocean,(1) and in subsequent drafts, submitted to the International Law Commission, various distances ranging between five and twenty-

1) ILC *Yearbook*, fourth session, 1952, vol.II, pp. 36-37.

five miles were put forward as maximum distances between which straight baselines could be drawn. (1) At later sessions of the Commission several members proposed the omission of any maximum length at all, while others insisted on a numerical limitation. It was finally decided not to include any provision with regard to "mid-ocean" archipelagoes and in its commentary on draft article 10 (islands), the Commission remarked that concerning the problem of island formations:

> "the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagoes .... It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules, it will give attention to it." (2)

In a Memorandum prepared for the 1958 International Conference on the Law of the Sea, (3) Jens Evensen gave a survey of State practice and past codificatory attempts on this question and recommended that the drawing of straight baselines be permitted, provided "they do not depart to any

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1) See on this point Sørensen, The Territorial Sea of Archipelagos, in the Special Issue of NTIR of July, 1959, published on the occasion of Professor François' 70th birthday, carrying the title "Varia Juris Gentium - Liber Amicorum J.P.A. François", pp. 315-331, at p. 319.

2) ILC Yearbook, eighth session, 1956, vol. II, p. 270.

3) See United Nations Conference on the Law of the Sea, Official Records, vol. I, Preparatory Documents, Document A/CONF.13/18 pp. 289-302.

appreciable extent from the general direction of the coast of the archipelago viewed as a whole." (1) He also suggested that waters situated inside such baselines be considered as internal waters if they are so closely linked to the surrounding land domain as to be treated in much the same manner as the surrounding land. Those passages of water, however, which form "legal straits",(namely, straits connecting two parts of the open sea), shall, notwithstanding their status as internal waters, remain open for the innocent passage of foreign ships. (2)

During the general debate held in the Second Committee of the Conference, the delegate of the Philippines, speaking on behalf of a country which consists of a group of islands, claimed that compact outlying archipelagoes should be treated as a whole and that the waters lying between and within the islands should be regarded as internal waters. He invoked on this point the theory of historic waters, which applied, according to him, to archipelagoes in much the same manner as to historic bays. (3) In support of his claim he relied on his country's legislation which stipulates that all the

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1) Ibid. p. 302.

2) Ibid.

3) See United Nations Conference on the Law of the Sea, Official Records, vol. IV, Second Committee, p. 7.

waters lying in, between and around the different islands formed an integral part of the Philippines' maritime domain, subject to its exclusive sovereignty, irrespective of their size. (1) He further maintained that there was no reason to deprive States consisting mainly or solely of archipelagoes of rights which were conceded to States with heavily indented coasts.(2)

A similar attitude was taken up by the delegate of Indonesia representing - according to his own statement - a country consisting of 13,000 islands scattered over a vast area. (3) He asserted that his country's territorial sea should be measured from baselines drawn between the outermost points of the outermost islands. (4)

The fears of the leading maritime Powers, who were anxious to forestall any further encroachments on the principle of the freedom of the high seas, were voiced in the statement made by Mr. Dean, the representative of the United States, in which he maintained that, if the straight baselines method were to apply to archipelagoes, then "areas of the

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1) Ibid.

2) Ibid.

3) Ibid. vol. III, pp. 43-44.

4) Ibid. p. 44.

high seas, formerly used by ships of all countries would be unilaterally claimed as territorial waters or possibly even internal waters." (1) Such a course would, it was alleged, also contribute towards violating "historic rights" of innocent passage. (2)

The Conference failed in its attempts to lay down any rules concerning the territorial sea of archipelagoes, just as the 1930 Hague Codification Conference had failed on this point some 28 years before. (3) In view of the fact that the doctrine of historic waters was invoked in the course of the Conference's proceedings as underlying the rights of the State possessing an archipelago to treat the waters enclosed by straight baselines as historic waters, and having regard to the Conference's wish not to look into the problem of historic waters, it would not be altogether surprising if the International Law Commission, which was requested by the United Nations General Assembly to arrange for a study of historic waters, (4) should give careful attention to the

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1) Ibid. p. 25.

2) Ibid.

3) For a survey of the proceedings of the 1930 Hague Codification Conference on this question as well as of the various drafts prepared by learned bodies and societies, see Waldock in 28 BYIL (1951) pp. 143-145.

4) See p. 507, n. 2 above.

problems attendant on the juridical status of archipelagoes when dealing with the problem of historic waters in general.(1)

The questions relating to the treatment of island formations and coastal archipelagoes raised also a further question, namely, that of the juridical status of the straits formed by such formations. The normal rules applicable to straits provide, as has been already mentioned before, that straits the width of which does not exceed twice the breadth of the territorial sea should be regarded as territorial straits. (2) A further rule provides, to quote Oppenheim, that "foreign merchantmen cannot be excluded from passage through territorial straits". (3) This rule, however, applies only "when they connect two parts of the open sea."(4) Where, however, a strait or channel connects the open sea with a territorial gulf or bay, foreign vessels can be

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1) For a detailed discussion of the various legal aspects surrounding the waters in and around archipelagoes, see Evensen loc.cit. and Sørensen, loc.cit.

2) Oppenheim, op.cit. vol. I, p. 510. The author refers to straits "which are not more than six miles wide", on the obvious assumption that the breadth of the territorial sea is three miles. In view of the fluidity of present-day international law on this point it was deemed appropriate not to indicate any precise numerical limit.

3) Ibid.

4) Ibid.

excluded. (1) This provision, in fact, transforms such a strait into the littoral State's internal waters.

This problem too arose in the *Fisheries* case with regard to the Indreleia, a navigational route inside the Norwegian island fringe, which, according to the United Kingdom contention, connected two parts of the open sea, and through which there consequently existed a right of passage. The United Kingdom claimed that the Indreleia formed a continuous passage to the Arctic Sea from the North Sea and, since it was a waterway connecting two parts of the open sea (legal strait), a right of passage existed through it as in territorial waters. (2) Thus the United Kingdom envisaged the possibility of territorial waters lying within a belt of internal waters, (3) a concept which did not commend itself to the majority of the Court which declined to associate itself with this view. The Court held that:

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1) Ibid; see to this effect also the judgment rendered in the *Corfu Channel* case, where the International Court of Justice held that in the case of a channel belonging to the class of international waterways, "passage cannot be prohibited in time of peace." (ICJ Reports, 1949 , p. 29).

2) ICJ, *Fisheries* case, *Pleadings, Oral Arguments, Documents*, vol. II, p. 572.

3) Ibid, p. 556.

> "the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artifical aids to navigation provided by Norway." (1)

The Court therefore found that the juridical status of the Indreleia did not differ in any respect from that of the other waters included in the "skjaergaard". (2)

The Court might have arrived in all probability at a different conclusion had it found that the Indreleia was a real strait, and it is thus difficult to see why some writers have taken the view that the Court's decision on this point is a potential clash with - or at any rate the nullification of - the decision given in the Corfu Channel case, which recognized the right of passage through "legal straits". (3)

C. Historic rights to a greater breadth of the territorial sea.

Finally, yet another kind of "historic waters" ought to be mentioned, notably, the acquisition, on historic grounds, of a title to a wider marginal belt of territorial waters,

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1) ICJ Reports, 1951, p. 132.

2) Ibid.

3) See e.g. Waldock in 28 BYIL (1951), p. 158, n.3; see also Fitzmaurice in 31 BYIL (1954) p. 419.

irrespective of the method of delimitation to be applied for the measurement of this belt. In the *Fisheries* case, the United Kingdom, herself a staunch supporter of the three-mile limit, conceded that Norway had acquired, on historic grounds, a title to a four-mile limit, because the Norwegian claim could be traced back to the eighteenth century - i.e. to a period before the formulation of the three-mile limit rule - has been persistently asserted by Norway, has been never abandoned since, and has met with a more or less general acquiescence. (1) Thus the problem of the precise breadth of Norway's territorial sea was not in issue before the Court and the majority judgment did not fail to recognize this fact when it stated that:

> "The parties being in agreement on the figure of four miles for the breadth of the territorial sea [of Norway], the problem which arises is from what base-line this breadth is to be reckoned." (2)

Owing to the United Kingdom's admission of a four-mile limit for the Norwegian territorial sea, the Court did not have to pronounce on this point. Although such admission *inter partes* does not, of course, bind any third State, there

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1) ICJ, *Fisheries* case, *Pleadings, Oral Arguments, Documents*, vol. II, pp. 421-425.

2) ICJ Reports, 1951, p. 128.

is little likelihood indeed that any State will in the future challenge the Scandinavian concept of the four-mile territorial sea, and this particularly in view of the fact that in the meantime a considerable number of States have raised claims to a territorial sea of six and even twelve miles, claims which have made the formerly excessive Scandinavian pretensions look modest indeed. (1)

The fact should be registered, however, that the historic claim to a wider marginal belt is in all probability the only claim of a maritime historic title, where the requirement for a close geographical link with the adjacent land domain may be dispensed with. The juridical basis, though, for the validity of such a claim is the same as in all other cases in which maritime historic claims are advanced - acquiescence in such a claim on the part of the international community.

VII. The juridical status of historic waters.

A. Historic waters are internal waters.

Water areas which form the maritime domain of the coastal

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1) For the various national claims as regards the breadth of the territorial sea, see the Synoptical Table concerning the Breadth and Juridical Status of the Territorial Sea and Adjacent Zones, prepared by the United Nations Secretariat for the Second Geneva Conference on the Law of the Sea, Document A/CONF. 19/4 of 8 February, 1960.

State fall into two categories:

(1) internal waters; and

(2) the territorial sea.

Waters belonging to the first category consist, according to Oppenheim, of "lakes .... canals, rivers together with their mouths .... ports and harbours and .... some of ..... [the] gulfs and bays." (1)

The territorial sea consists, to quote again the same author, of "the waters contained in a certain zone or belt, called the maritime or marginal belt, which surrounds a State and thus includes a part of the waters in some of its bays, gulfs and straits." (2)

The distinction between these two categories is important for several reasons, among which the main ones are the following:

(a) Internal waters are assimilated in law to the land territory of the State and the rights which the littoral State enjoys over this portion of water are equivalent to

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1) Oppenheim, op.cit. vol I, p. 460; Other expressions employed to denote internal waters are "national waters" or "inland waters". Article 1 of the Territorial Sea Convention refers to "internal waters" (Cmnd. 584, (1959), p.20) and this term is accordingly used in this study.

2) Ibid. at p. 461.

those which it enjoys over its land territories;

(b) Consequently, the right of passage for foreign ships - which is generally admitted to exist in respect of territorial waters - does not apply to internal waters, and the littoral State is entitled to exclude such vessels from its internal waters;

(c) In cases where certain portions of water, such as bays, are recognised as being internal waters, the measurement of the territorial sea - by means of baselines - will start at the point where internal waters end. (1)

Thus it can be readily seen that the fixing of the juridical status of historic waters - i.e. the determination of their status as either internal waters or territorial waters - has far-reaching legal implications and is not merely a matter for academic discussion, for on the answer given to this question turn the rights of the claimant States in their

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1) This rule has been laid down expressly in article 5, paragraph 1, of the Territorial Sea Convention which provides that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." (Cmnd. 584 [1959] p. 21).

allegedly "historic"waters.[1]

It must be stressed from the outset that this answer, in turn, depends almost exclusively on the definition given to the term "historic waters". Given a strict interpretation, historic waters stricto sensu are only those waters over which the littoral State claims full sovereignty, with all the rights pertaining to such a claim, and not merely a claim for certain rights, which do not entail a claim for the exclusive possession by the claimant State. It is in this sense that Gidel, for instance, conceives the notion of historic waters, when he observes:

> "Les 'eaux historiques' ne sont donc pas, on ne saurait y insister trop fortement, des eaux où l'Etat adjacent revendique certains droits, certaines compétences distraites du faisceau de celle dont l'ensemble constitue ce qu'on appelle 'la souveraineté' ..... Il faut se tenir très fermement à ce point capital de la matière des 'eaux historiques', que les 'eaux Historiques' sont des eaux intérieures." (2)

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1) The discussion in this chapter on the juridical status of historic waters does not touch upon the question of the juridical status of the territorial sea, the width of which exceeds, on historic grounds, the normal breadth of territorial waters. (see section VI.C. above). This category of "historic waters" does not present any problems as to the juridical status of the waters in question. They form part of the territorial sea of the littoral State, with all the rights and duties flowing therefrom to the riparian State.

2) Gidel, op.cit. vol. III, p. 625-626.(Italics in original).

Gidel admits at the same time that normally the State putting forward an historic claim will not intend to enforce over the area in question all the rights which flow from a status of sovereignty and will content itself with the utilization of certain rights, such as the right of excluding foreign fishermen. The enforcement of such rights by the littoral State does not presuppose, according to Gidel, any historic claim, for it is perfectly legitimate for States to prohibit the fishing by foreigners not only in their internal waters, but also in their territorial seas. Therefore, Gidel goes on to say, if a State wishes to extend the marginal belt of exclusive fishing rights, it will be tempted either to extend the width of its territorial sea or to draw new base-lines further out to sea, thus automatically advancing the limit of its territorial sea. In the opinion of Gidel, States will normally resort to the second method, because the extension of internal waters can be done administratively, whereas the legislative measures required for the extension of the territorial sea are frequently the subject of a lengthy and not always friendly exchange of notes between the coastal State and other States protesting against such an extension of the territorial sea at the expense of the high seas. (1)

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1) Ibid. p. 625, note 1.

In another passage Gidel explains the inherent contradiction between, and incompatibility of, the concept of historic waters - being, as they are, internal waters - and the right of innocent passage through historic waters. He says:

> "La baie une fois tenue pour 'historique', la totalité de ses eaux deviennent des eaux intérieures avec toutes les conséquences que comporte le statut des eaux intérieures. L'Etat riverain n'est plus tenu notamment d'y admettre le 'passage inoffensif' des navires étrangers." (1)

To tell the truth, State authorities dealing with this problem in the past were not always precise enough in the terminology used by them and would thus often confuse territorial waters with internal waters. This confusion is clearly evidenced by the examples quoted in the _Memorandum on Historic Bays_ prepared by the United Nations Secretariat for the First Geneva Conference on the Law of the Sea, (2) where it is attributed to "the looseness of the terminology

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1) Ibid. vol.III, p. 625; the same view is expressed by Cavaré who holds that the juridical status of historic waters "se confond avec celui des eaux intérieures. En conséquence, le droit de passage inoffensif n'existe pas." (Cavaré, op.cit. vol. II, p. 514). According to Colombos, "the rights of jurisdiction of the littoral State over its territorial gulfs and bays are identical to those it enjoys over its national waters".(Colombos, op.cit. p.164).

2) See _United Nations Conference on the Law of the Sea, Official Records_, vol. I, _Preparatory Documents_, Document A/CONF.13/1, pp. 21-22.

employed rather than to difference of opinion on the actual principle." (1)

The various draft codes, prepared either by learned societies or under the auspices of international organisations, draw a sharp distinction between the legal regime of historic waters and the territorial sea. True, these various drafts do not refer to historic waters in general, but confine themselves solely to "historic bays"; however, this is accounted for, according to Gidel, by the fact that "it was never envisaged that it might apply except in areas which, by reason of their configuration, are generally not used as major international routes of transit." (2) Thus it may be safely assumed that the considerations underlying the juridical regime of historic bays do apply to the same extent to historic waters in general. From the fact that the datum line for the measurement of the territorial sea in territorial bays - and historic bays belong to this category - is a fictitious and imaginary baseline drawn at a certain distance from the coast, it necessarily follows that the waters landwards of this baseline are to be regarded as internal waters.

Article 4 of the draft Convention prepared by Schücking

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1) Ibid. p. 22.

2) Gidel, op.cit. vol. III, p. 626.

for the 1930 Hague Codification Conference - as amended as a result of the discussions held in the Committee of Experts appointed by the Assembly of the League of Nations in 1924 - expressly provides that the waters of bays defined in that article (i.e. bays bordered by a single State, where the distance between the two shores does not exceed ten marine miles, "unless a greater distance has been established by continuous and immemorial usage" (1)) are to be assimilated to internal waters. (2) Likewise, article 7, paragraph 4, of the <u>Territorial Sea Convention</u> stipulates that the waters enclosed by a baseline drawn across the entrance of a bay the width of which does not exceed twenty-four miles "shall be considered as internal waters." (3) Although paragraph 6 of the same article expressly excludes historic bays from the scope of the provisions of this article, (4) it is clearly understood that the intention of this stipulation was to recognize some departure from the restrictive rules envisaged for ordinary bays the entrance of which - if claimed as territorial bays - could not exceed a certain width, a

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1) Ser. L.o.N.P. 1927, vol. I, p. 58.

2) Ibid, p. 72.

3) Cmnd. 584 (1959) p. 21.

4) Ibid.

question which does not present itself with regard to historic bays.

It may be therefore confidently assumed that this provision is not meant to indicate any intention to distinguish between the legal regime of the waters of ordinary bays, recognized as territorial bays, and that accorded to historic bays, both of which are to be regarded as internal waters.

In this connection articles 4 and 5 of the Convention also appear to have some bearing on the subject-matter of the present section, although the term "historic waters" does not occur in them at all. Article 4 deals with those cases in which the coastal State is entitled to draw - for reasons specified in the article - straight baselines, (1) following the general rule laid down in article 3 which stipulates that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast ....." (2)

Article 4 refers, as will be recalled, to those instances in which the baseline may be drawn in a different manner and expressly recognizes the possibility for a State to acquire a wider belt of territorial waters than would have normally accrued to it in accordance with the general rule enunciated

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1) Ibid; see p. 543, n. 1 above.

2) Cmnd. 584 (1959) p. 20.

in article 3. Paragraph 1 refers to a somewhat unusual geographical configuration of the coastline (such as deep indentations into the coast or coastal archipelagoes) which warrant a departure from the general rule. Lest the "geographical factor" be abused by the unjustified exploitation of an allegedly unusual configuration, paragraph 2 contains what in actual fact amounts to a proviso to paragraph 1, stipulating that "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast."(1) It is also noteworthy that the article requires for the drawing of straight baselines that "the sea areas lying within the lines .... be sufficiently closely linked to the land domain to be subject to the régime of _internal waters_." (2) These words are significant for two reasons:

(a) they expressly lay down the rule - similar to that which appears in article 7, paragraph 4, as regards bays - that all areas on the landward side of the baselines are to be treated as internal waters.

(b) they make it clear at the same time that no drawing of straight baselines will be justified unless the sea areas lying within the lines can be regarded as sufficiently closely

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1) Ibid.

2) Ibid; (Italics added); see p. 543, n. 1 above.

linked to the land domain to be subject to the regime of internal waters.

This latter requirement is, as is well known, the main condition on the fulfilment of which a claim to an historic title rests. There can be no recognition of such a claim if the coastal State cannot prove "a sufficiently close link to the land domain" and the various elements which are indicative of such a link are the means by which the existence of such a title is proved. Article 4, paragraph 4, which permits the taking into account, in all those cases in which the straight baselines method is applicable, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by "long usage", is a clear expression of the idea that the economic factor in isolation has been rejected as a constitutive element of an historic title, and that it is only through its interplay with various other elements that it may be considered . (The precise role of the economic factor in the establishment of an historic title was discussed at some length above).(1)

Most illuminating, perhaps, from the point of view of the juridical status of historic waters is the provision contained in article 5, paragraph 2, which reads as follows:

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1) See chapter 4, section V, above.

> "Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or the high seas, a right of innocent passage ..... shall exist in those waters." (1)

The wording of this paragraph is self-explanatory and does not require elucidation. It appears at the same time pertinent to recall briefly the historical evolution of this provision. The problem of the rights of passage through waters which were hitherto regarded as part of the high seas or the territorial sea which were turned into internal waters as a result of the application of the straight baselines method, was first raised by the United Kingdom Government in its comments on the provisional articles concerning the regime of the territorial sea, as adopted by the International Law Commission in its sixth session. (2) At the seventh session of the Commission the special rapporteur, Professor François, rejected the United Kingdom proposal for preserving the right of innocent passage through such water areas. (3) One of the reasons given by Professor François for his viewing unfavourably

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1) Cmnd. 584 (1959) p. 21.

2) See United Nations, General Assembly, Official Records, tenth session, 1955, Supplement 9, pp. 43-44.

3) ILC Yearbook, seventh session, 1955, vol. I, pp. 196-197.

the United Kingdom proposal was his belief that it might give rise to a complex situation in which there would be, in fact, three types of water within the littoral State's marginal belt, namely,

(a) internal waters properly so-called;

(b) internal waters subject to the right of passage; and

(c) the territorial sea.

It would be extremely difficult, Professor François argued, to draw a proper demarcation line between the first and second of these two categories of water, particularly in the case of a deeply indented coastline. (1)

The matter was raised again at the eighth session of the Commission by Sir Gerald Fitzmaurice (2) and after lengthy discussions which ensued Sir Gerald's proposal was carried by 9 votes to 1, with 2 abstentions. (3)

In the course of the general debate held in the First

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1) Ibid.

2) ILC Yearbook, eighth session, 1956, vol. I, pp. 8-9; for the discussion see ibid. pp. 9-11.

3) Ibid. pp. 187-190; see also the special rapporteur's comments on this problem, ibid. vol.II, pp. 8-9 and the Commission's report on its eighth session to the General Assembly, containing draft article 5 with commentary, ibid. pp. 267-268. The Commission recommended the preservation of the right of innocent passage only through internal waters "where the waters have normally been used for international traffic." (ibid.)

Committee of the First Geneva Conference on the Law of the Sea, the United Kingdom Attorney-General, Sir Reginald Manningham-Buller, came out in support of the insertion into the Convention of a provision safeguarding the right of innocent passage through water areas which become internal waters through the application of the straight baselines method. He rightly pointed out that one of the effects of drawing straight baselines was "to enclose what might be large stretches and to convert them into internal or national waters; the areas in question would previously have been territorial waters through which a right of passage existed, or even part of the high seas. It seemed very doubtful whether a coastal State could deprive other countries of _established rights_ by actions of that kind." (1)

The italicized words of Sir Reginald's statement are interesting in that they seem to convey the idea of "historic rights in reverse" to which further reference will be made below. (2) Suffice it to say here that Sir Reginald's remarks aimed at safeguarding historic rights acquired by States _against_ the littoral State.

The United Kingdom proposal met with some

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1) _United Nations Conference on the Law of the Sea, Official Records_, vol. III, _First Committee_, p. 9(Italics added).

2) See section VIII below.

opposition [1] and the paragraph in question, as revised by the United Kingdom, was finally adopted by the Committee by 44 votes to 15, with 8 abstentions. [2] At the 19th plenary meeting of the Conference the paragraph was carried by 55 votes to 16, with abstentions. [3] It thus created a new kind of internal waters, which are subject to the right of innocent passage of foreign vessels, thus assimilating internal waters in this respect - and in this respect only - to the territorial sea.

B. The distinction between internal inland waters and internal non-inland waters.

The idea of distinguishing between two categories of internal waters had already been canvassed at the 1954 session of the Institute of International Law held at Aix-en-Provence. In a report submitted to the Tenth Committee of the Institute on "the distinction between the territorial sea and internal waters", the rapporteur, Mr. Frede Castberg, observed that:

1) See e.g. the statement made by the Yugoslav delegate, Mr. Katicic, United Nations Conference on the Law of the Sea, Official Records, vol. III, First Committee, p. 158.

2) Ibid, p. 160.

3) Ibid. vol. II, p. 63.

"Un Etat peut être autorisé, en fondant sur des raisons historiques, économiques, ou sociales, à fixer de longues lignes de base entre les îles et les rochers lorsqu'il s'agit de calculer la limite extrême de la mer territoriale, et surtout lorsqu'il est question de la limite territoriale du droit acquis exclusif de la population aux pêches côtières. *Il n'est toutefois pas certain que l'Etat juge opportun de considérer toutes les eaux en deçà des lignes de base comme des eaux intérieures au sens du droit international.* Il peut estimer équitable ou utile d'étendre le droit de passage des navires d'autres Etats, en temps de paix, aussi à une partie des eaux qui se trouve en deçà des lignes de base." (1)

In his conclusions Castberg submitted that:

"*Les limites des eaux intérieures de l'Etat riverain peuvent être tracées de manière différente dans des buts différents*, par des dispositions législatives édictées pour cet Etat, à condition toutefois qu'il ne soit pas porté atteinte par cette mesure aux droits des autres Etats, surtout à leur droit de libre passage inoffensif dans la mer territoriale." (2)

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1) 45 Annuaire de l'Institut de Droit International, Aix-en-Provence session, April-May, 1954, vol. I, pp. 126-127 (italics added); in a footnote Castberg invokes the support of Raestad who in an article published in 1931, discussing the problem of internal waters, as it had posed itself at the 1930 Hague Codification Conference, declared that "il est naturel que les Etats étrangers intéressés s'opposent à ce que toutes les portions d'eaux, qui se trouvent à l'intérieur des lignes de base soient declarées etre des eaux intérieures dans toute l'acception de ce terme." (Raestad in 7 RDI (1931), p. 134).

2) 45 Annuaire de l'Institut de Droit International, Aix-en-Provence session, April-May, 1954, vol. I, p.172. (Italics added).

In lending his support to this concept of Castberg which recognises different kinds of internal waters for different purposes, Sir Gerald Fitzmaurice, in a letter written to the rapporteur, states:

> "I share this basic idea with you, but I would express it rather differently. I would prefer to say that all waters inside the baseline from which territorial waters are measured, are internal waters; but that a further distinction is to be drawn between those internal waters which are genuinely _inland_ waters (e.g. rivers, creeks, inland lakes, canals, etc.) and those which are not (e.g. large bays and waters between the mainland and islands off the coast). Generally speaking, there is no right of passage through the former, but there is, or should be, through the latter. (If this idea were adopted, the expressions 'internal waters' and 'inland waters', instead of meaning the same thing, as they do at present, would each have a distinct meaning). Under no circumstances should the extension of internal waters made possible by the new base line method operate so as to impede the right of innocent passage through what would be territorial sea if the older coast-line (or tide-mark) rule were still applied." (1)

Thus Fitzmaurice suggested not only the adoption of a new terminology which would distinguish between _internal inland waters_ and _internal non-inland waters_, but also suggested that internal non-inland waters be in all cases assimilated to the territorial sea as far as the right of innocent passage of foreign vessels through such waters is

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1) Ibid. p. 206. (Italics in original).

concerned. It is noteworthy that this suggestion went considerably further than that eventually adopted in article 5, paragraph 2, of the Territorial Sea Covention where the right of innocent passage was conceded only through those internal waters which had been previously considered as part of the territorial sea or the high seas and whose status was altered as a result of drawing straight baselines.

The Castberg-Fitzmaurice concept met with the vigorous opposition of Professor François who objected to the introduction into international law of a new category of waters having a status halfway between internal waters and the territorial sea. In his letter to Castberg, Professor François pointed out that:

> "Dans le système que vous préconisez on adopterait trois zones de mer différentes: la mer territoriale, les eaux intérieures et une troisième zone, qui est ni mer territoriale, ni eaux intérieures et dont le régime juridique reste quelque peu indécis. Je voudrais contester que le droit international reconnaisse l'existence de cette troisième zone .... il ne suffit point de démontrer à cet effet, comme vous le faites, que certains Etats n'exercent pas les droits qui leur reviennent dans les eaux intérieures, sur toute l'étendue de ces eaux. Il appartient toujours à l'Etat de ne pas faire usage, sur des parties de son territoire, de la plénitude de ses droits sans qu'il en résulte une modification essentielle du statut juridique de cette partie du territoire .... Il prête à confusion de créer de nouvelles 'zones' .... et de vouloir, comme vous le proposez, 'reconnaître que la limite des eaux intérieures peut être tracée de manière différente sous différents

> "rapports'.... il faut ... maintenir la règle nette et pratique du droit international en vertu de laquelle la limite extérieure des eaux intérieures coincide avec la limite intérieure de la mer territoriale ..." (1)

The opposition to the Castberg-Fitzmaurice concept was further strengthened by Gidel who threw the whole weight of his authority behind the line taken up by Professor Francois. In his letter to the rapporteur he maintained that:

> "Le morcellement que vous suggérez d'établir dans les eaux intérieures serait, je le crains, infiniment dangereux et ne ferait que jeter le trouble là où nous avons la bonne fortune de voir régner l'accord dans la pratique comme parmi les auteurs. Ce morcellement impliquerait que chaque Etat riverain pourrait composer à sa guise pour ses eaux intérieures un statut juridique particulier; il retiendrait dans ce statut individuel des eaux intérieures toutes les compétences qu'il estimerait lui être avantageuses et éliminerait toutes celles auxquelles correspondrait une charge .... Il n'est pas au pouvoir d'un Etat riverain de se créer pour ses eaux intérieures un statut juridique particulier dérogatoire à la catégorie juridique du droit international 'eaux intérieures'. Mais l'Etat riverain demeure libre de renoncer soit conventionnellement soit législativement à l'exercice de telle ou telle des compétences que le droit international commun reconnait à l'Etat riverain comme tel dans ses eaux intérieures." (2)

In view of the disagreement which arose among the various members of the Institute on this point, the

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1) Ibid. p. 208.

2) Ibid. pp. 219-223. (Italics in original).

rapporteur in his revised report, submitted to the 1956 session held at Granada, refrained from including any provision to this effect, and he suggested, referring to the right of access and passage through internal waters, that "sauf l'obligation contractuelle contraire, l'Etat riverain peut refuser aux navires étrangers tout accès aux eaux intérieures." (1) Sir Gerald Fitzmaurice did, however, take up this subject once more when commenting on the rapporteur's revised report. He maintained that "the right of innocent passage, at any rate for merchant ships in time of peace, is so universally recognized and so indispensable to the freedom and convenience of world communications that ... countries whose vessels have been accustomed ... to enjoy rights of innocent passage in certain waters on the basis that they are territorial waters, must be regarded as having acquired a vested interest in it or acquired a right to continue to enjoy such passage for their vessels through the same waters, notwithstanding the fact that by the establishment of a base-line, these waters have technically ceased to be territorial waters and have become internal waters." (2)

Invoking the doctrine of the abuse of right, Sir Gerald

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1) 46 Annuaire de l'Institut de Droit International, Granada session, April 1956, pp. 51-60, at p. 51.

2) Ibid. p. 69.

expressed the view that it would be in such cases an abuse of right if the full regime of internal waters were applied to such waters and if certain acquired rights (such as the right of innocent passage) were not taken into account. (1)

In the discussion that followed the submission of the revised draft at the plenary meeting of the Institute at its 1957 session in Amsterdam, Lord McNair supported the views put forward by Sir Gerald Fitzmaurice.(2) Colombos, likewise, criticized the wording of the revised draft as a retrograde measure being contrary to the applied principles of international law. (3)

At a later stage of the debate Professor François supported a concept which eventually found favour with the 1958 Geneva Conference on the Law of the Sea and is now embodied in article 5, paragraph 2, of the Territorial Sea Convention. Professor François asserted that:

> "on .... puisse .... accepter un régime spécial pour une certaine partie des eaux intérieures. Il peut exister un droit de passage non général qui existerait lorsque les eaux territoriales ont été tranformees en eaux intérieures." (4)

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1) Ibid.

2) 47 Annuaire de l'Institut de Droit International, Amsterdam session, September 1957, vol. II, pp. 173-174.

3) Ibid. p. 180.

4) Ibid. p. 194.(Italics in original).

Following the words of Professor François, Mr. Jenks suggested the adoption of a resolution which read as follows:

> "Sous réserve des droits de passage consacrés par l'usage, L'Etat riverain peut, sauf l' obligation contractuelle contraire, refuser aux navires étrangers l'accès aux eaux intérieures généralement reconnues comme telles ....." (1)

The italicized portion of this draft resolution is intended to safeguard traditional rights of passage which rest solely on usage and do not arise of any treaty pro - visions.

Mr. Quincy Wright tabled a resolution in which the right of innocent passage was recognised to foreign ships in all the "eaux maritimes intérieures", (2) thus adopting the distinction suggested by Sir Gerald Fitzmaurice between internal inland waters and internal non-inland waters.

In an obvious attempt to reconcile these conflicting views, M. Quadri suggested that a right of passage in internal waters be denied to foreign vessels "sous réserve des droit acquis, soit par l'usage, soit par convention." (3)

M. de Lapradelle, on the other hand, came out with a

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1) Ibid. p.195; (Italics added); see also to the same effect the words of M. Winiarski (ibid. p. 204) and M. Badawi (ibid. p. 205).

2) Ibid. p. 203; (Italics added); see also the statement made by M. Ripert (ibid. p. 206).

3) Ibid. p. 207.

draft resolution sanctioning the right of free passage for foreign vessels in internal waters except where there exists "an exceptional title and for a period as limited as possible." (1)

After protracted discussions, the Institute, by 42 votes to 6, with 7 abstentions, adopted a draft amendment tabled by the rapporteur which, in its relevant passage, read as follows:

> "Sous réserve des droits de passage consacrés, soit par l'usage, soit par convention, l'Etat riverain peut refuser aux navires étrangers l'accès aux eaux intérieures, à moins qu'ils ne se trouvent en état de danger." (2)

One cannot fail noticing the striking similarity existing between this resolution and article 5, paragraph 2, of the Territorial Sea Convention.

C. The juridical status of multinational bays.

It is noteworthy that throughout the proceedings of the Institute and the various international bodies, leading up to the Territorial Sea Convention, the discussions were invariably confined to bodies of water enclosed by one and single

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1) Ibid. p. 208.

2) Ibid. p. 220; the proviso regarding ships in distress was not disputed and was included in most of the draft proposals submitted during the debate.

littoral State. The question of the juridical status of waters surrounded by more than one littoral State was not touched upon at all. Professor François, in his capacity as special rapporteur of the International Law Commission on the Law of the Sea, referred to this matter when commenting on the remarks made by various governments on the draft articles submitted to them by the Commission. He informed the Commission that:

> "the Israeli Government inquired, inter alia, what was the position of bays whose coast line was shared by more than one State. The problem was one of the many which the Commission, aware that it was making a first effort to codify the matter, had deliberately refrained from attempting to solve." (1)

The same approach is also clearly reflected in the Territorial Sea Convention. Article 7, paragraph 1, as adopted by the Conference (article 7 is the article dealing with bays) prefaces the provisions contained therein by stating that:

> "This article relates only to bays the coasts of which belong to a single State." (2)

Thus the article, while explicitly excluding historic bays from its scope, followed the pattern set by earlier

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1) ILC Yearbook, eighth session, 1956, vol.I, p. 190.

2) Cmnd. 584 (1959), p. 21.

deliberations of international bodies and learned societies, a pattern which was described by Gidel in the following words:

> "Ni le Comité des Experts, ni aucune des compagnies savantes qui ont examiné la question des 'baies historiques' n'ont jamais a son propos, relevé que l'hypothèse d'une baie bordée par les territoires d'un seul Etat riverain." (1)

The Gulf of Fonseca case appears therefore to be to the present day the only instance in which the possibility of a multinational historic bay was envisaged and being what Gidel calls "une anomalie tout à fait notable dans le système logique des baies historiques", (2) it can hardly be taken as the last word on this point.

Referring to the right of passage through the waters of the bay, the judgment in the Gulf of Fonseca case accorded to the waters falling outside the exclusive property of each of the riparian States the status of territorial waters, in which the right of passage of foreign vessels is not contested. (3) This decision of the Court has been criticised by Gidel on the ground that it:

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1) Gidel, op.cit. vol. III, p. 627.

2) Ibid.

3) As to the relevant passage of the judgment see 11 AJIL (1917) p. 716.

> "n'attribue pas aux eaux de ce golfe le caractère d'eaux intérieures comme l'exigerait ce caractère de baie historique, mais le caractère d'eaux territoriales." (1)

The decision rendered in the Gulf of Fonseca case has been criticized on several occasions in the course of this chapter. For the sake of completeness it should be added, however, that this decision might be perhaps best understood bearing in mind the unique legal characteristics of the case. Historically, the Gulf of Fonseca was encompassed for several centuries by the dominions of the Spanish Crown, and in the period 1821-1839 it was surrounded entirely by the Federal Republic of Central America. These historical facts, however, could have hardly warranted in themselves the Court's decision in favour of El Salvador, had it not been for the existence of two legal considerations of the highest significance, namely,

(a) that the parties to the dispute were agreed that the Gulf is a closed sea. (2) Following the agreement between the parties on this point the Court was not called upon to consider whether or not the gulf formed part of the high seas (a problem which normally faces a tribunal confronted with an historic claim to maritime areas) and was able to

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1) Gidel, op.cit. vol. III, p. 627.

2) 11 AJIL (1917) p. 693.

exclude this question from the scope of its deliberations. The only remaining legal problem that had to be settled by the Court was whether the waters of the bay outside the territorial seas of the three littoral countries were divided into separate parts each of which belonged to one of the coastal States or whether they came, in their entirety, under the joint ownership of the three States; and

(b) that both parties to the litigation were signatories to the General Treaty of Peace and Amity, concluded by the Central American Republics in Washington in 1907, article II of which imposed upon the signatory States the duty not to alter in any form their constitutional order, because any alteration of that order was conceived as a menace to the peace and security of each of the States and of Central America in general. (1) This provision, in turn, was based on the principle that the signatory States were disintegrated parts of the Republic of Central America. Accordingly, the conclusion by Nicaragua of the Bryan-Chamorro Treaty constituted, in the opinion of El Salvador, a menace to "the transcendental interests that the Salvadorean people have always held, and still hold, constantly in mind as one of their greatest and legitimate aspirations: that of the

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1) For the text of this article see ibid. at p. 725.

reconstitution undiminished, with the brother peoples, of the great country that was once the master of the ancient Central American domain." [1] The Court found, by four votes to one, that the conclusion of the Bryan-Chamorro Treaty constituted a violation on the part of Nicaragua of the 1907 General Treaty of Peace and Amity. [2]

It is against this background that the Court's decision must be viewed, and, having regard to these exceptional and unusual circumstances, it is hardly surprising that a tribunal composed exclusively of Central American judges should have found as it did. Thus, if the Court's decision is limited to the case itself, without any pretension of its wider application under different circumstances, the Gulf of Fonseca case might perhaps appear to be less unjustified in law than most writers have been hitherto prepared to assume.

More recently the late Mr. John Foster Dulles, when United States Secretary of State, seems to have had this example set in the Gulf of Fonseca case in mind when he declared:

> "If the four littoral States which have boundaries upon the Gulf [of Aqaba] should all

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1) Ibid. at p. 680.

2) Ibid. at p. 694.

"agree that it should be closed, then it should be closed." (1)

He did not specify, however, what the status of such a closed multinational historic bay - outside the territorial waters of each of the littoral States - should be in such a case. It is at least debatable whether Mr. Dulles in fact gave a correct picture of the law as it is, for, according to Gidel, even the littoral States' agreement to "close" a multinational bay is not sufficient to achieve this legal effect, unless it receives the recognition or at least the acquiescence of other States. (2)

Thus it would be far more in accordance with the prevailing concepts of modern maritime international law if the waters surrounded by more than one littoral State would be considered as falling ex definitione outside the category of historic bays and if the waters beyond the marginal belts of each of the littoral States were regarded as part of the high seas.

VIII. Non-exclusive historic rights over maritime areas.

In the foregoing chapters, as well as in the foregoing

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1) Quoted after Gross, loc.cit. at p. 570.

2) Gidel, op.cit. vol. III, p. 604; see also to the same effect Oppenheim, op.cit. vol. I, p. 508.

sections of the present chapter, the acquisition of exclusive State rights based on an historic title was discussed. It was submitted that the meaning of the establishment of an historic title to territory was that the State which succeeded in proving the existence of such a title was to be regarded as the territorial sovereign over the territory in question, enjoying the aggregate of rights flowing from territorial sovereignty. Thus historic titles were classified among the titles recognized in international law as forming the juridical basis of a State's sovereignty over its territory.

The term "historic waters", likewise, was employed so far to denote maritime areas which, to quote the International Court's judgment in the _Fisheries_ case, "are treated as internal waters but which would not have that character were it not for the existence of an historic title." (1) As has been shown above, internal waters are regarded as part of a State's territory over which it is entitled to exercise full rights of sovereignty, (2) subject to minor qualifications, which were also referred to above.

In addition to the acquisition of historic titles

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1) ICJ Reports, 1951, p. 130.

2) See p. 563, p. 2 above.

stricto sensu there are, however, also claims of a more limited character which are also purported to rest on an historic basis. In contradistinction to the exclusive claims of sovereignty which characterize an historic claim properly so-called, the historic claims belonging to this second category will be termed henceforth "non-exclusive historic rights." Historic claims falling into the first group are normally claims "erga omnes", while those falling into the second group are raised "inter partes" only. (1)

By non-exclusive rights we understand rights falling short of sovereignty, which are acquired by a State at the expense of another State, this latter being the sovereign over the area over which the non-exclusive rights are asserted. To this category of non-exclusive rights belong the rights of passage through another State's territory, or through its internal waters, as well as traditional fishing rights acquired by the nationals of a State in waters which are claimed by another State as part of her maritime belt (the so-called "historic rights in reverse").

Non-exclusive historic rights may be acquired, needless to say, not only in respect of maritime areas, but over land territories also. A recent example for the recognition by

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1) This matter has been briefly dealt with already in chapter 3, section VII above.

the International Court of Justice of terrestrial non-exclusive historic rights is the judgment given by the Court in the case concerning <u>Right of Passage over Indian Territory</u>,[1] in which the Court recognized the existence of traditional Portuguese rights of passage through certain parts of Indian territory.[2]

The problem of the existence of non-exclusive historic rights in general was given passing reference in chapter 3, section VII above and it was pointed out there that, since non-exclusive historic rights prevail in our days mainly in the maritime sphere, it was deemed appropriate to deal with this matter at some length in the chapter devoted to the specific problems surrounding maritime historic rights.

Non-exclusive State rights, which are basically rights conferred upon the "dominant" State, such as would not normally accrue to it under the general rules of international law, are frequently termed "<u>international servitudes</u>". The existence of the institution of servitudes in the sphere of international law has been often criticized in the past both

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1) ICJ Reports, 1960, p. 6.

2) Ibid. at p. 40.

for reasons of substance and terminology, (1) and some writers went as far as to deny its very existence. (2)

Commenting on the status of servitudes in international law, Lauterpacht maintains that "of all attempts to apply to relations between States conceptions taken from private law, none has caused more confusion or has brought the recourse to analogy into more disrepute than the efforts to introduce the conception of servitude into international public law." (3)

Similarly, Váli points out that "the 'servitude' of international law is the traditional scapegoat of international jurisprudence." (4) The same writer goes on to say that this doctrine "has suffered .... contemptuous criticism and blunt rejection, and at the same time enjoyed ..... unsubstantiated approval and wanton praise." (5)

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1) Váli, Servitudes of International Law, 2nd ed. 1958, p.43; for a criticism of the terminological aspect see also McNair, So-Called State Servitudes, in 6 BYIL (1925) p.111 et seq.

2) See e.g. Nys, Les Prétendues Servitudes Internationales, 7 RDILC (1905) (Deuxième Série) p. 118; see also the same writer in 13 RDILC (1911) (Deuxième Série) p. 314.

3) Lauterpacht, Private Law Sources and Analogies in International Law, 1927, p. 119.

4) Váli, op.cit. p. 42.

5) Ibid.

Recent textbooks of international law, he further points out, "while often maintaining a cautious reserve, generally approved of the existence ..... of the concept of international servitudes."[1]

Whatever attitude one is tempted to adopt as to the suitability of this doctrine to meet the requirements of international life, and the problems of terminology involved, it is felt that, as far as non-exclusive *historic* rights are concerned, the doctrine of international servitudes should not be invoked as the legal basis underlying those rights. The reason for this contention is that, according to the generally-accepted definition of international servitudes, they are based on *treaty provisions*, whereas the source of historic rights is, *ex definitione*, in customary international law. The source of such rights is a certain practice which was followed for a sufficiently long time to warrant the conclusion that it has been recognized by the parties affected by this practice.

An international servitude, on the other hand, is, according to Váli, "a permanent (durable) legal relationship *established by a particular international treaty* whereby one State, or a certain number of States, is or are entitled ..

1) Ibid. p. 43.

to exercise rights within part or the whole of the territory of another State, for a special purpose or interest relating to the territory in question." (1)

Now, it is clear, as has been said before, that if an international treaty regulating such a relationship had been in existence, the need for invoking an historic claim would not arise at all. The theory of historic rights comes into play, as was submitted elsewhere, only in those cases where no such conventional source of rights and correlative obligations exists.

Thus non-exclusive historic rights are rights akin to international servitudes, but differing from the latter as to their source: while international servitudes arise out of a contractual relationship between the States concerned, non-exclusive historic rights are based on special norms of customary international law and find their justification in the tacit acquiescence of the affected States in certain practices exercised at the expense of their sovereignty.

It is worth distinguishing non-exclusive historic rights in this sense from the so-called "natural restrictions" on

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1) Ibid, p. 309 (italics added); see also to the same effect Oppenheim, op.cit. vol. I, p. 536; Starke, An Introduction to International Law, 4th ed. 1958, p.173; Cavaro, op.cit. vol. I, p. 288; Sibert, Traité de Droit International Public, 1951, vol. I, p. 383.

State sovereignty. By "natural restrictions" we mean those limitations which are imposed on a State eo ipso, as a corollary to its sovereignty. These are "general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike ..... Thus, for instance, it is .... a 'natural' restriction on territorial supremacy that a State is obliged to admit free passage of foreign merchantmen through its territorial maritime belt." (1)

By non-exclusive historic rights, however, we understand rights of a different nature, i.e. rights which do not normally accrue to the claimant State by virtue of any general rule of law, but which are the outcome of an exceptional local and isolated process, which creates rights in favour of the "dominant" State, at the expense of the "servient" State (e.g. the right of passage through the internal waters of another State).

In at least one important respect the acquisition of non-exclusive maritime historic rights differs from the acquisition of an historic title in general. Among the requirements for the establishment of an historic title (involving the

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1) Oppenheim, op.cit. vol. I. p. 536.

acquisition of exclusive rights of sovereignty) the requirement for the possession of the claimant State being _à titre de souverain_ was already mentioned and it was submitted that an historic title could be acquired only through the acts of persons in the service of the State or authorised to act on its behalf. (1) This, however, is not the case where a State claims merely non-exclusive historic rights. According to Fitzmaurice, such rights may be acquired also through the private acts of individuals acting on their own. "Thus", says Fitzmaurice, "if the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them (and although they are private vessels having no specific authority) acquired a vested interest that the fisheries of that area should remain available to its fishing vessels (of course on a non - exclusive basis) - so that if another country asserts a claim to that area as territorial waters which is found to be valid or comes to be recognized, this can only be subject

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1) See Chapter 4, section II.E. above.

to the acquired rights of fishery in question, which must continue to be respected." (1)

The reason for the distinction between the acquisition of non-exclusive rights over land territory and maritime areas, respectively, lies, according to Sir Gerald, in their different legal status. The sea being res communis, international law confers a positive and substantive right to exploit its resources and not merely a faculty to do something which is not prohibited in international law. Thus a State interfering with the activities performed by another State's nationals on the high seas would obviously commit an international wrong. On the other hand, a State occupying land territory which was hitherto res nullius will be allowed to interfere with the private acts of exploitation undertaken there by private individuals, nationals of another State, without committing an international wrong. (2)

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1) Fitzmaurice in 30 BYIL (1953) p. 51; According to the same author "there would seem to be justice in this idea - for if a State can by a long-continued usage and practice build up a prescriptive or historical right to the waters of an area originally and in its essence res communis, so equally should a State which has specifically exercised its communal rights in respect of that area as such, over a long period of time, be entitled to continue to do so, notwithstanding the change in the status of the area. Indeed, it could be said, that the latter claim is the stronger - since it involves the retention and continued exercise of an existing right, not the acquisition of a new one. (Ibid.; italics in original); see also chapter 4, section II.E. above.

2) Ibid. p. 52.

Fitzmaurice therefore arrives at the conclusion that exploitation by private individuals of a land territory which is res nullius cannot, even if continued for a long period of time, give rise to any acquired rights which would be valid in the face of a subsequent appropriation of the territory by another State. Such exploitation of a maritime area may, however, lead to the formation of a vested interest, conferring special rights in relation to that area.(1)

Non-exclusive maritime historic rights fall into two main groups:

(a) historic rights of passage;

(b) historic fishing rights.

The existence of "historic rights of passage" through certain maritime areas was already dealt with when discussing the problems relating to the transformation of given bodies of water into internal waters by means of applying the straight baselines method of delimitation.(2) For reasons of convenience it was deemed fit to discuss this type of non-exclusive maritime historic rights in the previous sections - rather than in the present one. Owing to the fact that the problem of the preservation of maritime historic rights of passage normally arises through the

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1) Ibid.

2) see sections VI and VII above.

application of the straight baselines method and the resulting incorporation into the riparian State's maritime domain (as internal waters) of what was hitherto regarded as part of the open sea, or of the territorial sea, it was felt that the juridical problems attendant on such historic rights of passage could hardly be separated from the problems surrounding the application of the straight baselines method and from the questions relating to the juridical status of historic waters in general.

It is therefore proposed to direct attention in this section to the main remaining aspect of maritime historic rights, namely, historic rights of fishing. In fact, claims of non-exclusive historic rights of fishing have been one of the most controversial features of the law of the sea in recent years and the impossibility of securing the necessary two-thirds majority for any proposal on this topic caused the Second Geneva Conference on the Law of the Sea to break up without any tangible results.

According to the general rules of international law, a State is entitled to exclude from its territorial waters all foreign fishermen and to reserve the fishing banks within that area for the fishing activities of its own population. Such rights, do not, however, accrue beyond the territorial sea, although the littoral State may have certain rights to

legislate on fishing matters beyond those limits.[1]

Owing to the recent, and almost universal, trend which may be discerned in State practice for States to extend their territorial seas, fishermen of different countries - and mainly those who used to engage in distant-water fishing - find themselves deprived of fishing rights in areas which were formerly recognized as part of the high seas, but which are now claimed as part of the territorial sea of the littoral State. Thus arises the question of the historic right of the foreign fishermen to fish in what has allegedly become part of the maritime domain of another State, a right which is frequently based on time-honoured practice and age-long exercise of fishing activities. Such rights have been frequently termed "historic rights in reverse", thereby indicating that, in contradistinction to the "ordinary" claim of historic character, where the littoral State endeavours to assert certain rights to be acquired at the expense of the international community at large, here the international community or one of its members insists that its acquired rights be respected and protected from any possible encroachment by the coastal State.

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1) See the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Cmnd. 584 (1959) p. 34.

The 1958 Geneva Conference on the Law of the Sea being unable to agree on the question of historic fishing rights, the 1960 Geneva Conference took up the matter again. At this Conference Canada put forward a proposal under which each nation would have a three-mile territorial sea, with an adjacent nine-mile belt in which the coastal State would be entitled to reserve fishing for its nationals. It was realized from the outset - and the Canadian proposal bears witness to this effect - that the problem of exclusive fishing rights was inextricably linked up with the problem of the breadth of the territorial sea. This was clearly reflected also in the words of the well-known international lawyer, Señor García Amador, who, speaking on behalf of Cuba in the Committee of the Whole of the Conference, pointed out that the recognition of any historic fishing rights would inevitably lead to a clash with the coastal State's rights, whenever the latter extended its territorial sea beyond the traditional limits, thereby claiming exclusive fishing rights over areas of the high seas in which the nationals of another State had been fishing in the past. According to Señor García Amador:

> "The State whose nationals had thus traditionally fished an area of the high seas could be said to have acquired prescriptive rights in that area; those rights could carry even greater weight than those of the coastal State itself - for example, where the latter's nationals engaged in little or no fishing activity in the area. And the argument was even more

> "cogent where the activities of the nationals of the coastal State were such that they could not possibly affect the productivity of the local fish stock or stocks." (1)

The United States delegate, Mr. Dean, also supported the preservation of historic fishing rights of foreign nationals in the zone between 6 and 12 miles from the coast, provided that no increase in foreign fishing would be permitted and that all increased productivity would thus benefit exclusively the riparian State. (2) He also suggested that a five-year practice be considered as sufficient for the establishment of such a right; (3) this suggestion was a departure from the original American proposal submitted to the First Geneva Conference on the Law of the Sea when the United States suggested a ten-year practice. (4)

The Peruvian delegate opposed the five-year dead-line on the ground that historic rights could not be acquired in

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1) See _Second United Nations Conference on the Law of the Sea, Official Records_, Document A/CONF. 19/8, p. 41.

2) Ibid. p.46; for the text of the American proposal see ibid. p. 166; the United States proposal was supported by the United Kingdom (ibid. p.58), the Netherlands (ibid. p.59), Italy (ibid. p.64), Portugal (ibid. p.72), the Federal Republic of Germany (ibid. p.73), Australia (ibid. pp.81-82) and Ceylon (ibid. p. 99).

3) See ibid. p. 166.(Document A/CONF. 19/C. 1/L.3.

4) See _United Nations Conference on the Law of the Sea, Official Records_, vol.III, _First Committee_, p. 253, Annexes A/CONF. 13.C. 1/L. 159.

ten, let alone five years, because "only in the context of centuries could the term 'historic rights' be meaningful."(1)

The delegate of Canada based his country's opposition to the perpetuation of historic fishing rights on the ground that "to do so would discriminate against newly emergent States and those countries which did not yet possess the economic resources needed for building up long-distance fishing." (2) The same idea was conveyed in a more radical manner by the delegate of Iceland who denounced the "so-called 'historic rights'" as being "on par with colonial rights, a concept that was fortunately obsolescent." (3) The delegate of Bulgaria, likewise, saw in the concept of historic rights "a product of an invidious tendency .... to elevate the dominant position of technically advanced countries into a system of legally sanctioned privileges." (4)

Another reason given by the Canadian delegate for his rejection of the theory of historic rights was the fact that:

> "it would penalize countries which had sought to establish a rule of law through international

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1) Second United Nations Conference on the Law of the Sea, Official Records, p. 62.

2) Ibid. p. 50; the Canadian delegate was supported by the delegates of Colombia (ibid. p.60), Poland (ibid. p.68), Yugoslavia (ibid. p.70), Guatemala (ibid. p.78), Norway (ibid. p.84), and South Korea (ibid. p.102).

3) Ibid. p. 79.

4) Ibid. p. 113.

> "agreement under United Nations auspices, and which had accordingly refrained from taking unilateral action to extend their territorial sea beyond three miles." (1)

The Australian delegate, while supporting the United States proposal, criticized the application in this context of the term "historic rights", saying it might create confusion as to the juridical nature of the rights involved. "Under the general law of nations", he said, "all States could fish as of right in that specified zone of the high seas, and therefore the fishing rights currently exercised by distant-water fishing had been, and were, perfectly lawful by definition and their present validity did not depend on the duration of their exercise." (2)

This approach to the problem of acquired fishing rights was wholeheartedly supported by Professor Gros, the delegate of France, who observed that "the expression 'historic right' meant nothing. The only thing historic about it was the coastal State's eagerness to colonize the high seas. The States which practised distant water fishing fished in the high seas and it was incorrect to speak of historic rights in that connexion." (3)

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1) Ibid, p.50; see also to the same effect the delegate of Uruguay, ibid. p.90.

2) Ibid. p. 82.

3) Ibid. p.118.

The New Zealand delegate introduced the idea of the gradual lapse of historic rights within a period to be specified [1] and was supported in this approach by the delegate of Israel. [2] This notion of the gradual expir - ation of historic rights was the basis of the joint American-Canadian proposal which envisaged the lapse of historic fishing rights - which had been in existence for at least five years - after a transition period of ten years. [3] This proposal received 54 votes in favour, and 28 against, with 5 abstentions, [4] but, since it failed by an odd vote to receive the necessary two-thirds majority, the Conference broke up without having achieved anything on this point.

Commenting on the deliberations of this Conference, Bowett has pointed out - rightly, it is believed - that the term "historic rights" was perhaps an unfortunate choice when applied to the preservation of fishing rights in what was hitherto regarded as part of the high seas, "for ..... the sponsors of this proposal never intended any relation with

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1) Ibid. p. 97.

2) Ibid. p. 100.

3) Ibid. p. 169, Document A/CONF. 19.C. 1/L.10.

4) Ibid. p. 30.

the doctrine of prescription .... As the Australian delegate pointed out .... these fishing rights, having been exercised on the high seas, were _per se_ lawful." (1) The unsuitability of the term "historic rights" in this connection is further increased by the fact that, contrary to the original proposals which had been laid before the 1958 Geneva Conference on the Law of the Sea, the draft resolutions tabled at the 1960 Conference envisaged the introduction of "historic rights" which would fade away after a transition period of ten years. It is difficult to see how rights of such a temporary nature, which are to be enjoyed only for a definite period of time and not in perpetuity, are to be regarded as "historic rights" in the meaning normally attached to this term.

The reasons for this novel approach and for the proposals advocating the introduction of a "phasing-out" period lay outside the legal sphere and the problem essentially was, according to Bowett, "to find a compromise period which would allow the coastal State to look forward to exclusive rights in the not-too-distant future and at the same time, allow the fishing States to make the appropriate adjustments to

1) Bowett, _The Second United Nations Conference on the Law of the Sea_, 9 ICLQ (1960) p. 415, at p. 424. (Italics in original).

their economy." [1] The main purpose of those who suggested an allowance for such a transition period was to enable the States affected by the extension of the exclusive fishing zones of the coastal States to re-equip their fishing industry and to prepare it in time to meet the new situation. [2]

The attempts of the Conference to regulate the problem of historic fishing rights in the form of a multilateral convention having proved abortive, it should be expected that the affected States will now seek their remedy in the form of bilateral agreements. This is what in fact seems to have happened since 1958 and the tendency to rely on bilateral treaties rather than to await the possible, but now unlikely, conclusion of an international convention has gained momentum since the deliberations of the Second Geneva Conference on the Law of the Sea have come to nought. This, in fact, had been the practice of States even before the 1958 Geneva Conference on the Law of the Sea. One of the

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1) Ibid. at p. 426.

2) It has been estimated, for example, that about ten per cent. of the total British catch came from the four-twelve mile zone off Iceland. (see Alexander, in 14 YBWA (1960), p. 252, n. 17).

pertinent examples is the Anglo-Soviet Fisheries Agreement which was signed in Moscow on 25 May, 1956. (1)

Under this agreement British trawlers were enabled to fish up to three miles from the Soviet coast in certain areas of the Barents Sea. (The Soviet Union claims a twelve-mile limit for its territorial sea). The agreement, which came into force on 12 March, 1957, - following the exchange of ratification instruments between the parties - runs for five years and is terminable by one year's notice. According to reports published on 1 July, 1961, the Soviet Government had denounced the agreement on 2 March, 1961, (2) which is therefore due to expire in March, 1962. It remains to be seen whether - failing the conclusion of another fisheries agreement between the parties replacing the present one - the United Kingdom-which supports the three-mile-limit concept of the territorial sea - will be prepared to press on the recognition of the fishing rights of foreign fishermen outside the three-mile belt in the face of the twelve-mile Soviet claims.

In 1959 the United Kingdom and Denmark reached an

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1) Cmnd. 148 (1957), United Kingdom Treaty Series No. 36 (1957) this agreement superseded the Anglo-Soviet Fisheries Agreement of 22 May, 1930.(see League of Nations Treaty Series, vol. 102, p. 103).

2) "The Times" of 1 July, 1961.

agreement regulating off-shore fishing in a six-mile zone off the Faroe Islands. (Denmark is responsible for the external relations of the archipelago). The conclusion of this agreement was precipitated by the decision of the Lagting of Thorshavn, of 6 June, 1958, to extend the territorial sea of the Faroe Islands from three to twelve miles, a decision which affected adversely the activities of British fishermen who used to fish outside the three-mile limit. (1) On April 27, 1959, the United Kingdom and Denmark reached an agreement, after secret negotiations, according to which British fishermen would be allowed to fish outside a marginal belt of six miles during certain seasons of the year. (2) This agreement is terminable after four years, by one year's notice. (On May 30, 1961, the Scottish trawler "Red Crusader" was shot at by the Danish frigate "Niels Ebbesen" after it was allegedly found trawling inside the six-mile limit off the Faroe Islands.) (3)

Shortly after the failure of the 1960 Geneva Conference

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1) For the text of the resolution adopted by the Lagting, see 28 ASJG, (1958), p. 207, doc. 11.

2) For the text of the exchange of notes between the two Governments, see United Kingdom Treaty Series, 1959, No. 55, Cmnd. 776.

3) See "The Times" of 31 May, 1961, p. 12.

on the Law of the Sea Norway intimated that she contem - plated the extension of her maritime belt reserved for the exclusive fishing activities of her nationals so as to include a twelve-mile zone measured from the baselines. After three rounds of talks held alternately in Oslo and London an agreement was reached on the lines of the joint American-Canadian proposal which had failed to get the necessary majority at the Second Law of the Sea Conference, and which had been supported by both the United Kingdom and Norway. According to the terms of this agreement, the United Kingdom acquiesced in the extension of the Norwegian exclusive fishing belt up to twelve miles, if and when Norway saw fit to decide on such extension; Norway at the same time agreed that British fishermen should exercise their traditional rights of fishing in the outer six-mile zone for a transitional period of ten years, starting from 31 October, 1960. (1) Meanwhile, the extension of the Norwegian fishing limit came into force on 1 July, 1961.

A similar pattern was followed in the settlement of the much-publicized Anglo-Icelandic Fisheries Dispute which had clouded the relations between the two States for over a decade. Denmark, which was formerly the sovereign of Iceland

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1) See "The Times" of 30 September, 1960, p. 9.

claimed from 1859 onwards a territorial sea of four miles. After the accession of Iceland to independence in 1944, a law dated 5 April, 1948, empowered the Government to esta - blish within the limits of Iceland's continental shelf areas in which fishing would be subjected to Icelandic juris - diction. (1) A Fisheries Convention concluded in 1901 between Great Britain and Denmark in which the latter had limited her exclusive rights of fishing off the coasts of Iceland and the Faroe Islands as against Great Britain to a three-mile zone (2) - was terminated by Iceland as from 1951. A series of regulations which came into force since 1950 first prohibited fishing by foreign fishermen within a marginal belt of four miles, as measured from newly drawn straight baselines (3) and later culminated in the Icelandic order of 30 June, 1958, which fixed a twelve-mile "fisheries limit" within which "all fishing activities by foreign

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1) For the English text of this law see United Nations Legislative Series, Laws and Regulations on the Regime of Territorial Seas, 1957, vol. II, p. 515.

2) 94 BFSP, p. 29.

3) Iceland did not, however, enforce these regulations as against the United Kingdom pending litigations in the Fisheries case.

vessels" were prohibited.[1] This order evoked strong protests on the part of a number of States.[2] Subsequently British trawlers fishing within the four-twelve mile zone were frequently fired on by Icelandic coast guards and trawling was carried on under the protection of the Royal Navy.

Following the failure of the Second Geneva Conference on the Law of the Sea, the parties to the dispute started negotiations with a view to reaching a bilateral solution of the problems in issue. Under an agreement published in London on 27 February, 1961, and simultaneously laid before the Althing in Reykjavik for approval, the United Kingdom Government undertook not to object to a twelve-mile fishing zone round Iceland; the Icelandic Government, on its part, dropped its objections to fishing by British vessels in certain parts of the six-twelve mile zone for a transitional

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1) For the English text of this order see 28 ASJG (1958), p. 365; At p. 355 there see also the Memorandum on the Fishing Question submitted by Iceland in September, 1958, to the United Nations General Assembly.

2) For a list of the protesting States see Goy, L'Affaire des Pêcheries Islandaises, 87 Journal du Droit International, (1960), p. 371, at pp. 393-395; Among recent publications referring in detail to the Anglo-Icelandic Fisheries Dispute see also Alexander, Offshore Claims and Fisheries in North-West Europe, 14 YBWA (1960), p. 236 et seq.

period of three years. The United Kingdom also agreed not to object to the redrawing of the baselines from which the twelve-mile marginal belt was to be measured in a manner favourable to Iceland, which is to apply both during the transitional period and afterwards. In establishing a transitional period of only three years, the agreement is clearly more favourable to Iceland than the agreement reached with Norway, which, it will be recalled, allowed for a transitional period of ten years.

The Icelandic Government have not dropped their ultimate objective of extending the limits of the exclusive fishing zone over the whole of Iceland's continental shelf - which has in some places a breadth of even fifty miles - but agreed to give a six month's notice before claiming any extension beyond the twelve-mile zone and accepted the jurisdiction of the International Court of Justice in a dispute about any such claim in the future. (1) The Althing of Reykjavik approved the agreement on 9 March, 1961, by 33 votes to 27, and two days later the agreement was given effect by an exchange of notes between the two Governments. Thus, it may be confidently assumed that this dispute which has marred the relations between the two countries for over a decade has

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1) For a report on this agreement see "The Times" of 28 February, 1961.

finally found a settlement satisfactory for both parties.

IX. Are claims to the sea-bed and subsoil of "historic" character?

It now remains to be seen whether the rights of States over their continental shelves may be properly regarded as "historic rights" in the meaning given to this term in the present study.

The continental shelf has been defined by the 1958 Geneva Convention on the Continental Shelf (subsequently referred to as the "Continental Shelf Convention") - for the purposes of the Convention - as including

(a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(b) the seabed and subsoil of similar submarine areas

adjacent to the coasts of islands. (1)

This definition represents a major step forward in spite of its obvious deficiencies (e.g. it is uncertain whether all submarine areas adjacent to the coast which are capable of exploitation are covered by the definition, including portions of water of a depth greater than 200 metres before a shallower depth is reached; equally, the introduction of the concept of exploitability, being in itself a test subject to changes on account of the growing scientific and technical knowledge, is not sufficiently precise and is likely to give rise to doubts and disputes). Still, the definition with all its vagueness and looseness of terminology is by far superior to the definitions which were resorted to only a few years ago. As late as 1952 Mouton defined the continental shelf as "the part of the sea-bottom and the soil underneath which is covered by shallow waters up to a depth where the slope of the sea-bottom increases noticeably in steepness, which fringes large parts of the

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1) See article 1 of the Continental Shelf Convention, Cmnd. 584 (1959), p.40; This definition combines the criteria of depth and exploitability. For a more detailed analysis of these and other possible criteria see Gutteridge, The 1958 Geneva Convention on the Continental Shelf, in 35 BYIL (1959) p. 102 et seq. at p.106; The author, herself a member of the United Kingdom delegation to the Conference, also gives a brief survey of the various stages which preceded the adoption of this definition on pp. 107-110.

continents, over varying distances from the coasts." (1)

The problems relating to the continental shelf are of comparatively recent standing. As has been observed by Johnson, "before 1939 this problem was little discussed, except in connexion with special questions such as the Ceylon pearl fishery or the Channel Tunnel." (2)

The first instrument concerning the continental shelf was a treaty concluded between the United Kingdom and Venezuela in 1942, regarding the submarine areas of the Gulf of Paria (3) which was followed by the Submarine Areas of the Gulf of Paria (Annexation) Order, 1942. The real impetus to the development of this concept was given, however, only three years later by the Truman Proclamation of 28 September,

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1) Mouton, The Continental Shelf, 1952, p. 1; Writing in 1950 Lauterpacht remarked that the expression "continental shelf" was "no more than a general indication of title to areas of indeterminate extent." (27 BYIL [1950] pp. 384-385). This opinion truly reflects the confusion that pervaded this sphere until recently. For a detailed investigation of the various tests suggested in an attempt to find a working definition see also Johnson, The Legal Status of the Seabed and Subsoil in 16 ZaV (1955-1956), pp.451-500.

2) Johnson, loc.cit. at p. 451; for further references on this point see n.2 there.

3) United Kingdom Treaty Series, 1942, No. 10, Cmnd. 6400.

1945 [(1)] which formed the starting point for a series of similar proclamations by the Latin-American and other States.

The novelty of this problem is relevant inasmuch as "historic rights" have been defined in an earlier chapter [(2)] as being either rights the origins of which cannot be traced or adverse rights, acquired at the expense of the former owner of the title. Neither of these assumptions would appear to apply in respect of the continental shelf. This statement necessitates, of course, a closer investigation of the nature of States' rights over their continental shelves and an examination of the basis of the title on which State claims over the continental shelf are founded.

The precise nature of State rights over the continental shelf formed for years one of the focal points of controversy. [(3)] Various suggestions were put forward as to the

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1) Published in 40 AJIL (1945) Supplement, pp. 45-48; see also United Nations Legislative Series, Regulations on the Regime of the High Seas, 1951, vol. I, pp. 38-39.

2) See chapter 3, sections V and VI above.

3) See the award rendered in the arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu-Dhabi where Lord Asquith, the Umpire, discusses at some length the doctrine of the continental shelf, its substance and history; (see 1 ICLQ (1952) p. 247.)

basis of these rights, and occupation, prescription and sovereignty "ipso jure" were mentioned on different occasions as possible roots of title to these areas. The clarification of this problem was greatly hampered by the inconsistent terminology employed by the various national proclamations. Some of them asserted rights of sovereignty of the coastal State,[1] while others contented themselves with assertions of "jurisdiction and control".[2]

The various national pretensions to exclusive rights of one kind or another over the continental shelf have been divided by Mouton as falling into three categories:

(a) claims to limited rights over the continental shelf outside the territorial waters (mainly over mineral resources);

(b) claims assuming the form of full sovereignty over the sea-bed and subsoil; and

(c) claims amounting to an extension of the territorial sea to distances going much beyond its normally accepted limits.[3]

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1) For examples see Lauterpacht, loc.cit. p. 389.

2) For examples see ibid. p. 388.

3) Mouton, The Continental Shelf, 85 Hague Recueil (1954) vol. I. pp. 367-379.

As has been pointed out by Johnson, "the distinction between the first group and the second group is far less marked than that between the second and the third group. As a matter of practice it would be difficult for a country to assert a claim to the mineral resources of the continental shelf without also exercising control over all the natural resources of that shelf." (1)

There is little doubt, that in view of the provisions of article 3 of the Continental Shelf Convention the third group (namely, the group claiming sovereignty over the superjacent waters of the continental shelf) may be disregarded from the point of view of international law. Article 3 stipulates that:

> "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or .... that of the airspace above those waters." (2)

Moreover, as has been pointed out by Mouton, those claims must have been considered as being contrary to international law even prior to the adoption of that Convention.(3)

The concept, according to which the title of the coastal State is based on "occupation", in the meaning habitually

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1) Johnson, loc.cit. at p. 476.

2) Cmnd. 584 (1959) p. 40.

3) Mouton, 85 Hague Recueil (1954) vol. I, p. 424.

given to this term in international law, appears to be untenable for different reasons.

Firstly, it is at least debatable whether the sea-bed and subsoil are capable of "occupation", i.e. appropriation in the sense in which land territory can be brought under the effective occupation of a State. These doubts persist even if we are to assume that the sea-bed and subsoil do, in fact, constitute a "territory" in the legal sense of this term, an assumption, which, again, is far from being unquestioned. (1)

Secondly - and this seems to be the stronger practical ground for denying "occupation" as the root of title to the continental shelf - the invocation of this concept invariably presupposes that the territory in question was hitherto <u>res nullius</u> capable of appropriation by the first newcomer. The adoption of this concept with regard to the continental shelf would entail that in all those cases in which the coastal State did not appropriate its continental shelf, any other State would be entitled to do so. It is not difficult to foresee the chaotic conditions which would follow, were such a course of action sanctioned by international law. Moreover, such a policy would clearly be to the disadvantage of the new and emerging nations as well as those who, for the

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1) Lauterpacht, loc.cit. p. 416.

lack of economic means and technical and scientific knowledge, are unable - for the time being at least - to exploit their continental shelves in the manner in which this is being done by the "rich" countries.[1] In fact, all the proclamations by States relating to the continental shelf explicitly referred to the fact that the submarine areas in question bordered on their territories, thus stressing the special relationship linking them - to the exclusion of all other States - to their continental shelves.[2]

The reliance of an historic title or a title akin to prescription must be equally dismissed. If it is true that, in the appropriation of its continental shelf, the coastal State has an exclusive and monopolistic status - and this assumption seems to be the correct one ever since the inception of this doctrine - then clearly the right of the coastal State over its continental shelf cannot be regarded as an adverse right, a right acquired as against a former possessor. Historic rights, however, do in the majority of

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1) Ibid. at p. 420.

2) Article 2, paragraph 3, of the Continental Shelf Convention does not appear to be relevant on this point. It reads as follows: "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation." (Cmnd. 584, (1959), p.40). From the context it would appear that the term "occupation" is not employed in the sense of meaning one of the modes of acquiring territory, but refers rather to a factual situation, i.e. that of exercise of State authority.

cases belong to this category, as has been amply illustrated above. The acquisition of such adverse rights is effected through the acquiescence of the party or parties affected and this acquiescence expresses itself habitually through the lack of protest against the exercise of effective authority by the newcomer. Article 2, paragraph 3, of the Continental Shelf Convention makes it, however, sufficiently clear that the coastal State's rights do not presuppose the exercise of such authority - neither effective, nor notional.(1)

In a minority of cases, it has been shown, historic rights are founded on "immemorial possession", i.e. on a situation which has lasted for so long that it is impossible to provide proof for a different situation; the origins of this situation remain at the same time uncertain. This test cannot be applied, for obvious reasons, to a situation which seems to have originated only about a quarter of a century ago.

Yet another possibility for justifying the rights of the coastal State over its continental shelf would be by resorting to the concept of the "inchoate title", in a specific connotation differing from that with which this

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1) See p. 621, n.2 above.

notion is normally associated. (1) In this connection the invocation of this theory would mean that the littoral State is entitled ipso jure to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely inchoate. (2)

This theory has been rejected by Mouton on the ground that the continental shelf - being a comparatively new conception - could not be justified on such a basis. "How", he asks, "could rights concerning a geographical formation exist before people were aware of its existence? .... And who had heard of resources in the continental shelf 30 years ago?" (3)

The wording of article 3 of the Continental Shelf Convention seems also to militate against this concept of an inchoate title which has to be followed up by proclamation, since it explicitly lays down the rule that "the rights of

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1) By "inchoate title" international law usually understands the acquisition of an imperfect title, the perfection of which is subject to the fulfilment of some further requirements. Thus discovery, for instance, was considered in the past as an inchoate title which could be perfected if followed up within a reasonable period of time by effective taking of possession.

2) Lauterpacht, loc.cit. p. 422.

3) Mouton, op.cit. p. 269.

the coastal State do not depend .... on any express proclamation." [1] Paragraph 2 of the same article, however, stipulates at the same time that the rights of the coastal State are not affected by their non-exercise and the fact that the littoral State chooses not to undertake the activities to which it is entitled does not confer such right on any other State. Thus it can still be maintained that the littoral State does possess a sort of title *ipso jure* which is a result of its owning the coast to which the continental shelf is adjacent. The title thus invoked would appear to be a mixture of a claim *ipso jure* coupled with the doctrine of contiguity. This idea was advanced by Waldock when he suggested that "we should recognise an entirely new doctrine of customary law under which the continental shelf vests *ipso jure* in the coastal State on the analogy of territorial waters or territorial air space ..... The suggested new doctrine of the continental shelf, therefore, is not merely novel, but involves a reversal of existing customary law." [2] Mouton, while admitting that this is an attractive idea, has his doubts as to its usefulness in explaining the juridical status of the continental shelf. He contends that the

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1) Cmnd. 584 (1959) p. 40.

2) Waldock, The Legal Basis of Claims to the Continental Shelf, in 36 Grotius Transactions (1950), p. 115, at pp. 142-143.

theory of contiguity has not acquired the status of a generally recognized rule of international law and, whatever its value in the past, it is now obsolete. (1)

The notion of contiguity as the legal basis underlying the national claims to rights over the continental shelf has met with the approval and support of Lauterpacht, who observes that most of the proclamations on this topic have invoked the fact of contiguity and of geographical unity.(2) He stresses at the same time the fact that "the basis of title appears to be not contiguity in the accepted sense, i.e. as connoting horizontal prolongation of the already occupied territory, but a different, and apparently more intense, degree of unity - a unity provided by the fact that the shelf is supposed to constitute the base, the platform, on which the continent rests." (3) Referring to the objections that are usually raised against this concept - namely, that (a) it has never become part of international law and that it was rejected by international tribunals; and that (b) it represented a theory which, because of its vagueness and comprehensiveness, was full of dangerous implications

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1) Mouton, loc.cit. p. 428; see on this point chapter 4, section IV above.

2) Lauterpacht, loc.cit. pp. 423-424.

3) Ibid.

- Lauterpacht remarks that neither of these objections can be regarded as valid. Basing himself on doctrine, State practice and international case-law alike, (1) he reaches the conclusion that this concept may be legitimately resorted to even to-day. He warns at the same time that this theory - like that of "effective occupation" - is one of relative value, and he suggests that it should be used "with such discretion as the equities of the case and considerations of stability require." (2)

As to the second objection, Lauterpacht remarks that "no device can prevent the abuse of a rule or principle, however otherwise useful and reasonable, by unilateral claims of States which refuse to submit disputed issues to impartial adjudication." (3)

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1) Ibid. pp. 425-427.

2) Ibid. p. 429.

3) Ibid. p.430; see however, Böhmert, Meeresfreiheit und Schelfproklamationen, in 5 Jahrbuch für Internationales Recht, (1955), pp. 25-26 where the author criticises the views propounded by Lauterpacht on the ground that the theory of contiguity never achieved the degree of a legal norm of international law; see also the same author, ibid. vol.6 (1956) pp. 88-92; see also the criticism levelled by Waldock against this doctrine, as applied to the claims to the continental shelf, in 36 Grotius Transactions (1950) pp. 137-142, where he regards the concept of contiguity as "a thoroughly dangerous principle being one of the banners under which nationalist expansion has frequently sought to justify itself" (ibid. at p.139). He also points out that contiguity "once adopted as a legal principle, would sooner or later be used to attack established titles." (ibid.)

Gidel, likewise, regards the title of the littoral State to its continental shelf as based on a "droit inhérent", flowing from the fact of geographical proximity. (1)

These views seem to have found substantial support in the provisions contained in the <u>Continental Shelf Convention.</u> Article 3, paragraph 3, has been already referred to above. It embodies the principle that the rights of the coastal State to its continental shelf should not depend on occupation, effective or notional, or on any express proclamation. Paragraph 1 of the same article provides that "the <u>coastal</u> State exercises over the continental shelf sovereign rights ... ..." (2) The italicized word of the passage just quoted seems to convey the idea that the rights of the State are a result of its being the coastal State, which, in fact, amounts to the adoption of the theory of contiguity in disguise. This argument only gains additional weight in view of the

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1) Gidel, <u>A propos les Bases Juridiques des Prétentions des Etats Riverains sur le Plateau Continental</u>; Les Doctrines du "Droit Inhérent", in 19 ZRV(1958) pp. 81-101, where he claims that, since the continental shelf is "une extension de la masse continentale riveraine, il est juste que l'Etat riverain ait le droit d'exploiter ... les ressources naturelles du plateau continental; il serait dangereux pour la sécurité de l'Etat riverain que le plateau continental fût l'objet, à cet effet, d'activité de la part d'autres Etats .... l'exploitation <u>optima</u> du plateau continental ne peut se faire qu'.... avec le consentement de l'Etat riverain". (ibid. p. 9 ; italics added).

2) Cmnd. 584 (1959) p. 40; (Italics added).

provisions of paragraph 2 of the same article which stipulates that the rights of the coastal State "are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities or make a claim to the continental shelf, without the express consent of the coastal State." (1)

It may be pertinent to add that, according to article 2, paragraph 4, of the Convention, the natural resources, the exploration and /exploitation of which is within the exclusive right of the coastal State, include, in addition to the mineral and other non-living resources of the sea-bed and subsoil, also living organisms belonging to the sedentary species, which are defined as "organisms which, at the harvestable stage, are either immobile on or under the seabed or are unable to move except in constant physical contact with the sea-bed or the subsoil." (2) Thus, all those forms of sedentary fisheries which are performed within the continental shelf of the coastal State - in so far as they are covered by the definition given in the Convention - are merged in the doctrine of the continental shelf and are reserved exclusively for the littoral State. The remaining forms of sedentary fisheries,

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1) Ibid.

2) Ibid.

as well as those carried out on the high seas, and the relevance of historic claims to such fisheries, will be discussed in the next section.

X. Sedentary fisheries as historic rights.

The term "sedentary fisheries" has been used in the past in a twofold meaning:

(a) to denote fisheries of sedentary species, i.e. organisms which are found on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil;

(b) to denote fisheries carried out by means of structures erected on the sea-bed for mobile species.

The former kind of sedentary fisheries will be referred to henceforth as "natural sedentary fisheries", while the latter will be called "structural sedentary fisheries".

The origins of known sedentary fisheries go back as far as the sixth century A.D. The best-known instances of ancient sedentary fisheries are the pearl fisheries off the coasts of Ceylon and India, in the Persian Gulf (Bahrein, Kuwait, Quatar) as well as sponge fishing off the coasts of

Tunisia and pearl fishing off the coasts of Australia. (1)

The rights of exclusive sedentary fisheries on the high seas of the nation/als of States which have been engaged in such activities do not appear to have been seriously questioned by writers on international law. "Qui doutera" asks Vattel, "que les pêcheries de perles de Bahrein et de Ceylan ne puissent légitimement tomber en propriété?" (2)

The nature of the coastal State's exclusive rights to sedentary fisheries has been less clear. Certain writers have invoked "occupation" as the basis of such rights, (3) while others have relied on the doctrine of prescription. (4)

Oppenheim takes the view that these fisheries form an exception to the doctrine of the freedom of the high seas. Referring to the Ceylonese and Bahreini pearl fisheries, he asserts that we are faced with an historically recognised

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1) For a detailed study of State practice on this point in general see Papandreou, La Situation Juridique des Pêcheries Sédentaires en Haute Mer, in 11 Revue Hellénique de Droit International, (1958) pp. 1-148, at pp. 40-75.

2) Vattel, op.cit. Book I, section 287.

3) See e.g. Westlake, op.cit. part I, pp. 190-191; see also Hurst, Whose is the Bed of the Sea? in 4 BYIL (1923-1924) pp. 34-43.

4) See e.g. Lindley, op.cit. p. 169.

anomaly of customary international law, based on the absolute and general recognition by the international community.(1)

Whatever the juridical basis of exclusive State claims to sedentary fisheries on the high seas, it would appear that the process of formation of those rights is in fact identical with that observed in the emergence of historic rights in general, namely, assertion of exclusive State authority, on the one hand, and acquiescence in such exercise of authority, on the other hand. Gidel, who considers the right to exclusive sedentary fisheries outside the territorial sea of the State as irreconcilable with the general notion of the freedom of the high seas, maintains that such rights can be acquired only through "*l'usage effectif et prolongé* d'une partie de la haute mer aux fins de pêcheries sédentaires, *sans* que les autres Etats et spécialement ceux qui pourraient du fait leur situation géographique faire valoir des objections particulières aient opposé à cet usage des *protestations formelles et persistantes*." (2)

The above-quoted passage from Gidel, and in particular its italicized words, clearly bring out his conviction that the rights to exclusive sedentary fisheries on the high seas

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1) Oppenheim, *Der Tunnel unter dem Ärmelkanal und das Völkerrecht, Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1908, vol.II, pp. 6-10.

2) Gidel, op.cit. vol.I, pp. 500-501.

are acquired in precisely the same manner as historic rights in general.

When the problem of sedentary fisheries was first discussed by the International Law Commission, it was agreed there that "sedentary fisheries should be regulated independently of the problem of the continental shelf".(1) The reason for this distinction was, according to the comment contained in the 1951 Report of the Commission, that "the problems relating to the continental shelf are concerned with the exploitation of the _mineral resources_ of the subsoil, whereas in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g. stakes embedded in the sea-floor. This distinction justifies a division of the two problems."(2) The Commission at the same time recognized the historic rights of coastal States to regulate sedentary fisheries in areas where such fisheries have long been maintained and conducted by the nationals of that State.(3)

In 1953 the International Law Commission reversed its

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1) ILC _Yearbook_, third session, 1951, vol. II, p. 143.

2) Ibid. (Italics added).

3) Ibid.

former opinion on this question when it concluded that "the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted ..... [and] the sovereign rights of the coastal State over its continental shelf cover also sedentary fisheries."(1) The former draft article on sedentary fisheries was accordingly dropped. After much discussion in the Fourth Committee of the First United Nations Conference on the Law of the Sea it was decided to include natural sedentary fisheries also in the definition of "natural resources", the exploration and exploitation of which are reserved for the coastal State.(2) The relevant provision was carried in the Plenary Meeting of the Conference by 59 votes to 5, with 6 abstentions. (3)

Thus it would appear that the coastal State's rights to sedentary fisheries in its continental shelf were assimilated by the Conference to the rights accruing to the coastal State in that area in general.

As to traditional rights of sedentary fisheries outside the continental shelf, i.e. on the high seas, the relevant

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1) ILC Yearbook, fifth session, 1953, vol. II, p. 214.

2) See Cmnd. 584 (1959) p. 40, article 2, paragraph 4.

3) See United Nations Conference on the Law of the Sea, Official Records, vol. II, Plenary Meeting, p. 15.

provision is to be found in article 13, paragraph 1, of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, which reads as follows:

> "The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals, *except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals.* Such regulations, will not, however, affect the general status of the areas as high seas." (1)

Thus this provision - if and when it comes into force - will have the effect of safeguarding traditional structural sedentary fisheries rights on the high seas. It does not provide, however, for natural sedentary fisheries rights in such areas. The silence of the Convention on this point may be interpreted as either amounting to a denial of the existence of such rights or as indicating that, inasmuch as such rights have been based till now on customary norms of international law, this situation is not intended to be

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1) Cmnd. 584 (1959) p.38.(Italics added). According to paragraph 2 of the same article, "the expression 'fisheries conducted by means of equipment embedded in the floor of the sea' means those fisheries using gear with supporting member embedded in the sea floor, constructed on a site and left there to operate permanently, or, if removed, restored each season on the same site."

altered by the Convention.

It may be confidently asserted that the legal problems attendant upon sedentary fisheries in general have lost momentum considerably since the incorporation of this problem within the general question of the juridical status of the continental shelf. One is therefore tempted to subscribe to the proposition made by Young, in whose view "[the] proponents of national claims to sedentary fisheries were rescued from an increasingly precarious position by the timely advent of the continental shelf concept." (1) It may be also doubted whether this concept of traditional sedentary fisheries rights has ever acquired such notoriety as to make a lack of challenge equivalent to acquiescence. According to Young, from time to time some examples of State practice ran against the concept. (2)

Thus it can be safely predicted that henceforth the status of sedentary fisheries will have to be considered as part and parcel of the continental shelf doctrine. (3)

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1) Young, Sedentary Fisheries and the Convention on the Continental Shelf, 55 AJIL (1961) p. 359, at p. 369.

2) See ibid. p. 360 n. 7 and p. 369 n. 38.

3) This has been the course followed by the Government of Australia in an attempt to exclude Japanese fishermen from areas which Australia considered to be traditional fishing grounds of her nationals. For a discussion of the legal problems involved see O'Connell, Sedentary Fisheries and The Australian Continental Shelf, in 49 AJIL (1955) p.185 et seq. See also Mouton in 85 Hague Recueil (1954) vol. I, pp. 445-449; see also Papandreou, loc.cit. pp. 40-49.

CHAPTER 7.

CONCLUSIONS.

I. Summary of main submissions.

The main submissions contained in the present study are as follows:

(1) Acquisitive prescription - as understood in the municipal legal systems - has no place in international law, because international law has no fixed period of prescribing and does not require the adverse possession of the claimant to be in good faith, these being two attributes which are normally required for the operation of acquisitive prescription. (Chapter 2, sections I. to IV.).

(2) Consequently, acquisitive prescription cannot be regarded as the legal basis of an historic title in international law; doctrine and practice alike bear witness to the fact that the juridical validity of such a title is based on the doctrine of acquiescence rather than on prescription. (Chapter 2, sections V. to VIII; chapter 3, sections IX. to XIII.).

(3) An historic title is built up by means of the same process as any customary norm of international law, namely, through

(a) a continuous practice, which

(b) is followed with an <u>opinio juris</u>.

(Chapter 3, section II.).

(4) Owing to the consensual basis of international law, the binding force of the customary norms of international law flows from their <u>recognition</u> by the international community. (Chapter 3, section III.).

(5) Acquiescence differs from recognition in its form of expression, i.e. it is a tacit recognition inferred from silence in circumstances where lack of objection amounts to consent. (Chapter 3, section IV.).

(6) The time element in the formation of a customary norm of international law has only a probative value. The efflux of time becomes, however, significant in the establishment of historic titles, because it makes up for the "generality of practice", which is normally lacking in these cases. (Chapter 3, section V.).

(7) Some historic rights may be regarded as relics inherited from a now obsolete legal order. (Chapter 3, section VI.).

(8) There exist alongside historic titles proper (implying a claim of full rights of sovereignty) also <u>non-exclusive historic rights</u>; non-exclusive historic rights are reminiscent of "international servitudes", but differ from them in that they are <u>customary</u> rights, whereas "international servitudes" are based on <u>treaty</u> provisions.

(Chapter 3, section VII. and chapter 6, section VIII).

(9) The display of effective authority by the claimant State over the disputed territory is a prerequisite for a presumption of acquiescence on the part of the rival State. (Chapter 4, section II.).

(10) "Effectiveness" varies from place to place, in accordance with the nature of the territory involved. (Chapter 4, section II.A.).

(11) "*Effective*" authority must be *continuous*, but "continuity" too varies from case to case, according to circumstances. (Chapter 4, section II.B.).

(12) Effective authority displays itself through the intention and will to act as sovereign, as evidenced by manifestations of sovereignty over the disputed territories. (Chapter 4, section II.C. and section II.D.).

(13) The authority displayed must be *à titre de souverain*. (Chapter 4, section II.E.).

(14) Acquiescence is inferred from lack of protest where protest would have been expected to signify an objection. (Chapter 4, section III.B.).

(15) A territorial situation must be "*notorious*", if a presumption of acquiescence is to be inferred, but no express notification is required to ensure notoriety, because international law widely resorts to the concept of "*constructive*

knowledge". (Chapter 4, section III.C.).

(16) The acquisition of an historic title may be delayed by resorting to the device of protest, but protest of itself will not suffice to prevent the acquisition of an historic title unless followed up by other adequate measures within a reasonable period of time. (Chapter 4, section III.D.).

(17) The geographical factor and the economic element (the so-called "legitimate interests"), as well as the time factor cannot, in themselves, validate an otherwise invalid historic claim, but the existence of these elements - separately or in conjunction - will strongly militate in favour of a presumption of acquiescence. (Chapter 4, section IV. to VI.).

(18) Acquiescence should not be confounded with estoppel, although acquiescence invariably creates an estoppel. (Chapter 4, section VII.).

(19) In accordance with the rules of intertemporal law, the validity of the acquisition of a territorial title will be decided in the light of the rules in force at the time of such acquisition, whereas the validity of the maintenance of the title will be determined in conformity with the contemporary rules of international law relating to territorial titles. (Chapter 5, section II.).

(20) The rights of the parties to a territorial dispute will be determined in the light of the situation which

prevailed at the time when the dispute arose (the "critical date"), although subsequent acts may be taken into account as facts providing evidence of the situation that existed at the critical date. (Chapter 5, section III.).

(21) Conflicting territorial claims have to be appraised not as to their intrinsic value, but rather as to the relative worth of each of them when confronted with the rival claim. (Chapter 5, section IV.).

(22) Since an historic title is established in derogation of the generally applicable rules of international law, the onus of proving the acquisition of such a title invariably rests on the party claiming to have built up an historic title, irrespective of whether it happens to be the applicant State or not. (Chapter 5, section V.).

(23) An historic title being an adverse title, any historic claim must be given the strictest possible geographical interpretation. (Chapter 5, section VI.).

(24) A maritime historic title - in contradistinction to an historic title over land territory - is acquired at the expense of the international community at large, and not merely at the expense of a single State. (Chapter 6, sections II. and III.).

(25) The manifestations of State authority over maritime areas differ from those over land territories and express themselves mainly through the exclusion of foreign vessels

and nationals from the areas claimed on an historic basis. (Chapter 6, section IV.).

(26) Only "single-national" bays can be claimed as historic bays. Bays which were formerly single-national bays and which have subsequently become "multinational" as a result of territorial changes, form part of the open sea, except for the marginal belts of the coastal States. (Chapter 6, section V.).

(27) In addition to bays, the doctrine of historic waters may apply also to historic methods of delimitation by straight baselines, to the delimitation by a State of its maritime domain surrounding an island formation in its possession, as well as to the extension of the territorial sea beyond its normal limits. (Chapter 6, section VI.).

(28) Water areas recognized as historic waters are assimilated to the internal waters of the littoral State. (Chapter 6, section VII.).

(29) States may acquire, on historic grounds, non-exclusive maritime historic rights of passage and fishing. Those rights exist mainly in waters which were formerly regarded as part of the high seas but which became internal waters or territorial waters owing to the extension of the territorial sea or the application of the straight baselines method of delimitation. (Chapter 6, sections VII. and VIII.).

(30) The title of the coastal State to its continental

shelf is not based on historic rights, but rather on a title ipso jure, coupled with the notion of contiguity. (Chapter 6, section IX.).

(31) Traditional rights of sedentary fishing beyond the territorial sea of the littoral State are acquired by means of the mechanism through which historic rights are normally established. (Chapter 6, section X.) .

II. Final remarks.

The term "historic title" - the emphasis being on the qualifying adjective "historic" - clearly brings out, in spite of the deficiencies inherent in the employment of this term, the distinctive feature which distinguishes this international territorial title from the remaining modes of acquisition of territory. This difference is marked by the fact that, while all the other titles rest on an instantaneous act having an immediate effect to which the origins of such titles can be traced, the historic title is the outcome of a lengthy process comprising a long series of acts, omissions and patterns of behaviour which, in their entirety, and through their cumulative effect, bring such a title into being and consolidate it into a title valid in international law. In these final remarks it is proposed to focus attention on the italicised word of the foregoing phrase,

because recent writers seized of the problems attendant on historic titles have, with increasing frequency and with a steadily growing emphasis, referred to the notion of "historical consolidation" as the legal concept which underlies the process of the formation of an historic title."(1)

The term "historical consolidation" with regard to the acquisition of an historic title was first resorted to in a dictum in the _Fisheries_ case where the International Court of Justice justified the juridical validity of the appli - cation by Norway of the "Norwegian method" of straight baselines on the grounds of "an historical consolidation which would make it enforceable as against all States." (2)

It was this dictum which encouraged recent writers to make it the starting-point for a new presentation of the topics relating to international titles in general and to an historic title in particular. De Visscher, who was himself a member of the International Court of Justice at the time when the decision in the _Fisheries_ case was given, took the lead when, in a book, first published in 1953, he interpreted

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1) Among these recent contributions on this subject, see De Visscher, op.cit.; see also Johnson, _Consolidation as a Root of Title in International Law_, in _Cambridge Law Journal_ (1955), p. 215 et seq.; see also Schwarzenberger, op.cit. [illegible], pp. 290-292 and in 51 AJIL (1957) pp. 310-311; see also Roche, op.cit. pp. 68-73.

2) ICJ Reports, 1951, p. 138.

the term "consolidation" as resting on a process of historical evolution and based on the maxim "*quieta non movere*", which had already found favour with the Permanent Court of Arbitration in the *Grisbadarna* case. (1) He points out that "proven long usage, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State." (2) He distinguishes "consolidation" from "prescription" by stating that, while the latter is based on the notion of adverse possession, the former can apply also to territories that could not be proved to have belonged to another State; the distinction between "consolidation" and "occupation" lies in the fact that "consolidation" applies not only to land territories, but can be resorted to also with regard to the acquisition of maritime areas. Finally, it differs from recognition, which has an instantaneous effect, in that it normally comes about through the acquiescence of States, which, in turn, is evidenced through a sufficiently prolonged absence of opposition by interested States. (3) The time factor as such, however, has no

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1) Scott, *Hague Court Reports*, 1st series, 1916, p. 130.

2) De Visscher, op.cit. p. 200.

3) Ibid. pp. 200-201.

creative force of its own and, where acquiescence can be otherwise proved, lapse of time is not required.

De Visscher has thus embraced under a single heading of "consolidation" both "prescription" and "immemorial possession", by founding both on the juridical basis of acquiescence.

The introduction of the notion of "consolidation" as a mode of acquiring territory has, according to Schwarzenberger, thrown light on the process of "evolution and expansion of international society." (1) He makes the point that by the recourse to this concept three essential features of this process become apparent:

(a) the acquisition of an international title is a gradual process;

(b) during the period of its initiation a territorial title is a relative one and its holder aspires to transform it into an absolute title, to be valid _erga omnes_; and

(c) the more absolute the title becomes, the more multiple its legal foundations.

The gradual evolution of the territorial title through a continuous and sometimes lengthy process of _consolidation_ is merely a reflection on the present imperfect stage of

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1) Schwarzenberger, op.cit. p. 292.

international law. It underlines, to quote once more from Schwarzenberger, "the unsatisfactory character of any attempt to put the operative rules into the strait jacket of private law analogies. Owing to the existence of a central authority in highly developed communities, absolute titles can be granted with immediate effect _erga omnes._ International society lacks such a central authority," (1) and the result is that territorial rights are, in their beginnings, frequently only relative rights which are perfected in the course of time and thus become absolute rights.

In order to achieve this degree of absolute validity, titles acquired by a process of consolidation must be constantly _maintained_, and it is one of the additional merits of the theory of consolidation that it combines under the same heading both the _acquisition_ of a territorial title and its subsequent _maintenance_. This aspect of the approach putting forward historical consolidation as a valid root of title appears to be particularly welcome, because the relative longevity of international persons has often made it necessary - in accordance with the rules of inter-temporal law - to apply different norms to the establishment and to the maintenance and extinction of titles, thus further obscuring

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1) Ibid.

the already complex rules governing this branch of international law. (1) To quote Judge Huber in his award rendered in the Island of Palmas case, "if the protestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist." (2)

This virtue of the doctrine of consolidation (i.e. that it makes the validity under international law of a territorial title contingent not merely on the proper acquisition of rights, but also on their maintenance) carries with it, incidentally, the seeds of the weakness of a title acquired by consolidation, and is one of the major sources of its vulnerability, in that it might compel a State to examine constantly its title to each portion of its territory. (3) The rigours of this criticism are, however, considerably reduced and mitigated by the fact that the manifestations required for the "maintenance" of an already acquired title

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1) For a more detailed discussion of this problem in relation to the application of inter-temporal law, see chapter 5, section II. above.

2) UNRIAA, vol. II, p. 839. (Italics added).

3) Jessup, in 22 AJIL (1928) pp. 740-741.

vary in accordance with circumstances. (1)

Seen in this light, the process of consolidation, rather than upsetting the territorial structure of international society and shaking the legal foundations of territorial titles, would appear to represent a welcome contribution towards the promotion of international stability. Here again, however, one has to be mindful of the danger inherent in excessive recourse to any legal device which is basically intended to fulfil the role of a safety valve. The doctrine of historic titles was originally invoked to provide for a smooth transfer of international law from the now obsolete notions of the Middle Ages to the more dynamic concepts of modern international law. With the emergence of the new sets of norms governing the rules of sovereignty, it became apparent that many a title, which was formerly held valid under a different regime of law, would be invalidated by the superseding rules of international law.

Thus, in order to achieve a necessary measure of stability in international relations and to ensure the harmonious co-operation of the Powers whose acquired rights might have been affected by too stringent an application of the new rules of law and a stubborn and indiscriminate insistence on their enforcement, international law was prepared

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1) Johnson, in Cambridge Law Journal, (1955), pp. 224-225.

to recognize the juridical validity of otherwise unlawful situations. It can be hardly denied that the invocation of the doctrine of historic titles and the resulting sanctioning of certain acquired privileged situations tends to operate to the advantage of what Westlake calls the "old countries",[1] (meaning essentially the European Powers, and applied both to the territories of the mother countries and their overseas dependencies), to the exclusion of the "new countries", i.e. all those countries which, owing to the brevity of their existence, were unable to build up such a privileged claim.

Against this background one might perhaps feel more sympathetic towards the assertion made by the delegate of Bulgaria at the Second Geneva Conference on the Law of the Sea. As was already mentioned elsewhere, the delegate of Bulgaria saw in the doctrine of historic rights " a product of an invidious tendency .... to elevate the dominant position of technically advanced countries into a system of legally sanctioned privileges." [2] Utterances such as this are, of course, far from being motivated by purely legal reasons,

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1) Westlake, op.cit. p. 90.

2) Second United Nations Conference on the Law of the Sea, Official Records, p. 113.

and it is not difficult to detect in them the familiar ring of argumentation characteristic of one of the major political trends of our days. Whether the Bulgarian delegate was right in accusing the supporters of the doctrine of historic rights of wishing to perpetuate under the cloak of this legal theory a dominant position acquired under an out-dated and now obsolescent international regime is a question which has its roots outside the sphere of law. He was doubtless entitled to warn that certain States might be tempted to abuse a legal device which was originally contemplated as an emergency solution to be applied in rare and exceptional circumstances. The dispassionate observer will have to admit, however, that any dangers inherent in the tendency to inflate the doctrine of historic rights are not circumvented at all when for the "historic" element is substituted the "vital" factor, a tendency which has been frequently displayed in the policies of the "new" countries. This practice is surely yet another proof of what has always been a truism for the impartial and unbiased observer, namely, that the vigilant and selfish preservation of special advantages is by no means the monopoly of the "old" countries. One has therefore to recognize the danger of excessive national pretensions, one of whose manifestations may be an exaggerated "historic" claim, whatever its origin, purpose and motivation.

The doctrine of historic rights must be regarded as a

necessary, though undesirable, device ensuring a measure of stability and good order required for the smooth functioning of the international community. It should be borne in mind at the same time that the ultimate objective of international law is a uniform world-wide legal system and that any regional, local or otherwise exceptional arrangement, however indispensable at present, constitutes an obstacle in the way of attaining this goal. The true interests of the international community lie therefore not in the perpetuation - let alone extension - of a regime which aims at disrupting the trends of unifying international law, but rather in an unflinching effort to reduce to a bare minimum the number of rules which are derogatory of the uniform rules of general international law and are relics of an ancient and more particularist legal order. Thus the diminishing significance and eventual fading away of the doctrine of historic rights - should this ever occur - might be regarded as a further milestone reached by international society in its efforts to shake off the yoke of particularism and to pave the way for the blessings of true internationalism.

APPENDIX A.

Uti Possidetis in International Law.

The term "uti possidetis" should be used with caution in international law. The term is derived from Roman law in which it was used to denote an edict of the praetor, the purpose of which was to preserve, pending litigation, an existing state of possession of an immovable "nec vi, nec clam, nec precario", as between individual claimants. The meaning of this term, when used with regard to international boundaries in Latin America, is somewhat different from that ascribed to it in civil law and is intended to denote permanent rather than temporary possession. In the words of the Uruguayan diplomatist Guani it means "que les pays formant notre continent ont domination et sont considérés comme possesseurs des territoires qui leur appartenaient respectivement .... au moment de la déclaration d'indépendance [en 1810] conformément aux limites, spécialement d'ordre administratif, que les Couronnes d'Espagnes et de Portugal avaient assignées à leurs provinces." (1)

When Spanish control over Hispanic America came to an end, each of the new States tended to follow the lines of

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1) Guani, La Solidarité dans l'Amérique Latine, 8 Hague Recueil, (1925), vol. III, p. 207, et seq. at p. 293.

cleavage which had previously divided the Spanish administrative units. However, the demarcation of these units had rarely been defined by the Spaniards and the resulting uncertainty caused a series of boundary disputes. In many instances the arbitrators appointed to settle these disputes were called upon by the parties to apply as their criterion the rule of <u>uti possidetis</u> of the period of independence. The assumption in all these cases was that it was possible to trace, by a study of the Spanish decrees, the precise lines of division of the former administrative units. However, more often than not, this assumption was not borne out by the realities; it was found that in many instances the new States exercised at the time of the cessation of the Spanish rule - sometimes <u>bona fide</u> and without intentional usurpation - State authority beyond the border lines apparently designated as the limit of their territorial jurisdiction. The State which had expanded in this manner was prone to insist that the meaning of <u>uti possidetis</u> was administrative possession as it <u>actually</u> existed at the time of independence, while the opposing party to the dispute usually contended that the principle implied the restriction of sovereignty to those areas which were <u>rightfully</u> occupied by the antecedent colonial unit. The two conflicting theories of <u>uti possidetis</u> became accordingly known as "<u>uti possidetis de facto</u>" and "<u>uti possidetis juris</u>", respectively and the resulting

confusion has led Lapradelle to suggest that the theory of <u>uti possidetis</u> be discarded altogether. (1)

According to the Award rendered in the <u>Guatemala-Honduras Boundary</u> Arbitration, a tribunal called upon to pronounce in a territorial dispute which is to be decided in accordance with the principle of <u>uti possidetis</u>, "must have regard (1) to the facts of actual possession; (2) to the question whether possession by one Party has been acquired in good faith, and without invading the right of the other Party; and (3) to the relation of territory actually occupied to that which is as yet unoccupied." (2)

In any event, the doctrine of <u>uti possidetis</u> can be considered merely as "a principle by which the American Republics have decided to adjust their boundary differences. But in no case has the International Community recognized as an institution of international law the principle of <u>uti possidetis</u> ..... It remains .... derogatory to general international law ..... binding only those .... [who] have by convention expressly agreed to it." (3)

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1) Lapradelle, <u>La Frontière</u>, 1928, p. 86.

2) UNRIAA, vol. II, p. 1352; this passage of the Award is also quoted in Green, <u>International Law through the Cases</u>, 2nd edition, 1959, at p. 369.

3) Bloomfield, <u>The British Honduras-Guatemala Dispute</u>, 1953, p. 94. (Italics in original).

More recently, it has been pointed out by Schwarzenberger that "even so obvious a 'loan' from Roman law as is the use of _uti possidetis_ in the Latin-American practice ..... is more indicative of the differences between this remedy in Roman law and its application on the inter-state level than of any supposed likeness between these two institutions." (1)

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1) Schwarzenberger in 51 AJIL (1957) p. 309. As to more detailed discussions on the theory of _uti possidetis_, see Moore, _Memorandum on Uti Possidetis_, 1913; see also Cumni, loc.cit. at pp. 293-310; see also Fisher, _The Arbitration of the Guatemalan-Honduran Boundary Dispute_, 27 AJIL (1933) p. 403 et seq, at p. 415 and the references mentioned there at p. 416, note 50; see also Waldock in 25 BYIL (1948) pp. 325-326; see also Bloomfield, op.cit. pp. 78-96.

LIST OF ABBREVIATIONS.

A.C.	=	Law Reports, Appeal Cases.
A.D.	=	(a) Annual Digest of Public International Law Cases, London-New York, 1919 - 1930.
		(b) Annual Digest and Reports of Public International Law Cases, London, 1931-1950.
AJIL	=	American Journal of International Law, Washington, 1907 -
ASJG	=	Nordisk Tidsskrift for International Ret (Acta Scandinavica Juris Gentium), Copenhagen, 1930 -
BFSP	=	British and Foreign State Papers, London, 1841 -
BYIL	=	British Yearbook of International Law, London, 1920 -
Cmd.	=	Command Papers published up to 1956.
Cmnd.	=	Command Papers published from 1956 onwards.
Co.Litt.	=	Coke's Commentary on Littleton's _Institutes of the Laws of England._
F. and F.	=	Foster and Finlason, 1856-1867.
Fisheries case	=	_Anglo-Norwegian Fisheries_ case, 1951.
Hague Recueil	=	Académie de Droit International, Recueil des Cours, The Hague, 1923 -
Hansard (Commons)	=	Parliamentary Debates (Hansard), House of Commons, Official Reports.
Hansard (Lords)	=	Parliamentary Debates (Hansard), House of Lords, Official Reports.

Hertslet's Treaties	-	Hertslet, L: A Complete Collection of the Treaties and Conventions ... between Great Britain and Foreign Powers, London, 1840-1925, 31 volumes.
How.	-	Vol. 42-45 of the U.S. (1843-1846), edited by Benjamin C. Howard.
ICJ	-	International Court of Justice.
ICJ Reports	-	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.
ICLQ	-	International and Comparative Law Quarterly, London, 1952 -
ILC	-	International Law Commission.
ILC Yearbook	-	Yearbook of the International Law Commission, 1949 -
K.B.	-	Law Reports, King's Bench Division.
Moore, International Arbitrations	-	Moore, J.B., History and Digest of International Arbitrations to which the United States has been a Party, Washington, 1898, 6 volumes.
NTIR	-	Nederlands Tijdschrift voor Internationaal Recht, Leyden, 1953 -
PCIJ Series A	-	Permanent Court of International Justice, Collection of Judgments.
PCIJ Series A/B	-	Permanent Court of International Justice, Judgments, Orders and Advisory Opinions.
PCIJ Series C	-	Permanent Court of International Justice, Acts and Documents relating to Judgments and Advisory Opinions given by the Court.
RDI	-	Revue de Droit International, Paris, 1927-1939.
RDILC	-	Revue de Droit International et de Législation Comparée, Brussels, 1869-1940

RGDIP	-	Revue Générale de Droit International Public, Paris, 1894.
Ser.L.o.N.P.	-	Series of League of Nations Publications.
UNRIAA	-	United Nations Reports of International Arbitral Awards, 1948 -
U.S.	-	Cases Argued and Adjudged in the Supreme Court of the United States.
YBWA	-	The Yearbook of World Affairs, London, 1947 -
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(a) English and French texts are quoted in their original;

(b) Quotations from modern languages - other than English and French - have been translated into English by the present writer.

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