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THE ACQUISITION OF
TERRITORY
IN INTERNATIONAL LAW

by

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FOREWORD

By her Will, the late Miss Olive Schill of Prestbury, Cheshire, an old friend of the University, whose portrait is painted in Lady Katharine Chorley's *Manchester Made Them*, left the sum of £10,000 to the University in memory of her brother, Melland Schill, who died in the 1914-18 war. The annual income from this sum is to be used to promote and publish a series of public lectures of the highest possible standard dealing with International Law.

Professor Jennings has written an up-to-date account of the manner in which territory can be acquired in the modern world.

This is a key subject in the international life of nations, and Professor Jennings' observations on the treatment of the subject are at once stimulating and original.

This study is commended to all serious students of law and politics concerned with territorial claims in the modern world.

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Chapter I

TERRITORIAL CHANGE

THE general theme of these five lectures is the rules of international law governing the acquisition of territorial sovereignty. Perhaps I should explain at the outset that the aim is not to give a systematic exposition of this part of international law. I shall assume that my audience already has some acquaintance with the basic rules governing the acquisition of territorial sovereignty. What I want to do is to draw your attention to certain difficulties and problems of general principle which require consideration. I should also explain that I shall not be concerned with the questions of the legal regime of maritime territory or of the air; these will, I understand, probably be the subject of a later course of lectures. Nor will it be possible, in the present lectures, to give more than passing attention to the special problems of the Polar regions.

In this first lecture I want to talk about some problems that affect the whole question of territorial change; in later lectures we shall turn to questions arising from particular 'modes', as they tend to be called, for the transfer of territorial titles.

THE NATURE OF TERRITORIAL SOVEREIGNTY

The whole course of modern history testifies to the central place of State territory in international relations. It is thus expressed by Professor Charles de Visscher:

The firm configuration of its territory furnishes the State with the recognized setting for the exercise of its sovereign powers. The at least relative stability of this territory is a function of the exclusive authority that the State exercises in it and of the coexistence beyond its frontiers of political entities endowed with similar prerogatives.

This stability is above all a factor of security, of the security that peoples feel in the shelter of recognized frontiers—a confidence that has grown in them with the consolidation, in a community of aspirations and memories, of the bonds uniting them to the soil that they occupy. It is this sentiment

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that explains the extreme sensitiveness of opinion to everything that touches territorial integrity.¹

Nor is it only in the actual relations between States that territory plays so large a part; for this is true also of the system of international law itself. The mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis. No rule is clearer than the precept that no State may lawfully attempt to exercise its sovereignty within the territory of another. The definition of Statehood itself has the possession of a more or less defined territory as a necessary element.² Nationality too depends upon a relationship of an individual to a territorial State. Unlawful force is that which is employed against the 'territorial integrity' of another State.³ Clearly, then, the legal rules and procedures for effecting territorial changes lie at the core of the whole system of international law. This, so to speak, is where we must look if we want to find out to what extent international law is really capable of controlling the actual behaviour of sovereign States.⁴

When we speak, however, of the rules governing the acquisition or loss of territory, we use an elliptical expression which may lead us astray unless we bear constantly in mind that what is intended here is not merely territory in the physical sense but State sovereignty in respect of territory.⁵ A territorial change means not just a trans-

¹ *Theory and Reality in Public International Law*, by Professor Charles de Visscher, English translation by Corbett (1957), p. 197.

² See e.g. Lauterpacht, *Recognition in International Law* (1947), p. 30. Also Oppenheim, *International Law*, vol. 1, 8th ed. (1955), p. 451: 'A State without a territory is not possible. . . .'

³ See again de Visscher, *loc. cit.*, 198: 'This same idea of the possessory protection of territorial sovereignty is the basis of territorial criteria for the definition of aggression, the only ones which, though too automatic, are practically applicable. It is because the State is a territorial organization that violation of its frontiers is inseparable from the idea of aggression against the State itself.'

⁴ See Max Huber in the *Island of Palmas* case printed in the Appendix to this work: 'The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.'

⁵ Cf. Rousseau, *Recueil des Cours, Académie de Droit International de la Haye*, vol. 93, 1958—1, 369, at p. 415: 'Ce phénomène est couramment désigné dans les manuels et ouvrages généraux sous l'expression "d'acquisition du territoire". La formule est évidemment impropre. Il ne peut en effet s'agir en l'espèce de l'acquisition du territoire comme tel, mais uniquement de l'établissement par un État de sa compétence sur un territoire sans maître ou sur un territoire soustrait par un acte juridique régulier à une compétence étatique antérieure.'

See also Brierly, *The Law of Nations*, 5th ed. (1955), p. 150, where it is pointed

ference of a portion of the earth's surface and its resources from one regime to another; it usually involves, perhaps more importantly, a decisive change in the nationality, allegiance and way of life of a population.

It is well to remember this when we come to examine the so-called modes of acquisition of territorial sovereignty because they are, as we shall see, obviously derived by analogy from the Roman Law rules governing the acquisition of land in private ownership.

There are, of course, even today, certain obvious points of resemblance between sovereignty over territory and property in land; but Westlake pointed out that the analogy belongs much more to the context of the feudal notions of the middle ages, 'the very essence of these notions being to confound in a common haze the right of the lord to rule in his manor and the right of our sovereign lord the king to rule in his kingdom'.¹ Yet in the context of the society of modern sovereign States the points of difference are much more significant than any resemblances.² We shall be wise to expect, therefore, that although the framework of the law is derived from the private law analogy of ownership in land, its development may be along quite different lines. And indeed the limited usefulness of the private law analogy becomes at once apparent from the fact that at the outset it was necessary to admit to the modes of lawful acquisition of territorial sovereignty the institution of 'subjugation', by which the successful deployment of armed force might serve not only to wrest the territory from the rightful sovereign but also to invest the conqueror

out that territorial sovereignty 'refers here not to a relation of persons to persons, nor to the independence of the state itself, but to the nature of rights over territory; and in the absence of any better word it is a convenient way of contrasting the fullest rights over territory known to the law with the minor territorial rights to be later mentioned'.

¹ *International Law*, Part I, *Peace* (1904), pp. 86, 87.

² See Cavaglieri, *Hague Recueil*, vol. 26 (1929—I), p. 385: 'Ce droit [le droit de l'État sur son territoire] embrasse tout le territoire dans sa composition unitaire et n'a par conséquent rien à voir avec le droit de propriété, qui serait exercé par des particuliers et dans la sphère du droit privé sur des fractions de ce même territoire. L'ancienne confusion du droit féodal entre *dominium eminens* et propriété privée est contraire à la notion moderne de l'État, aux buts différents des deux droits, dont l'un, celui de l'État, se propose la meilleure satisfaction d'une fonction essentiellement politique, tandis que le propriétaire ne veut qu'exploiter son bien de la manière la plus avantageuse pour intérêt particulier. Il n'y a qu'un seul point commun aux deux droits. C'est celui du pouvoir absolu et exclusif sur le domaine, avec un *jus excludendi alios* que l'État fait valoir énergiquement vis-à-vis des autres États et le propriétaire vis-à-vis des autres propriétaires. . . .'

with a superior title. We might even wish to question whether a system of rules that is compelled to make this concession is a system of true law at all; but we shall return to this problem in a later lecture.

THE MEANING OF TITLE

What do we mean when we speak of a title to territorial sovereignty?

The existence or not of a title depends ultimately upon the existence of certain facts. The primary meaning of 'title' is the vestitive facts which the law recognizes as creating a right. Thus, Salmond says:

... every right (using the word in a wide sense to include privileges, powers and immunities), involves a title or source from which it is derived. The title is the *de facto* antecedent, of which the right is the *de jure* consequent. If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and these facts are the title of the right. Whether a right is in-born or acquired, a title is equally requisite.¹

When we come to look more closely at the various modes which international law recognizes as creating a title to territorial sovereignty we shall find that all have one common feature: the importance, both in the creation of title and of its maintenance, of actual effective control. Every mode, like the Roman Law counterparts, requires the presence of *corpus* as well as *animus*.² Not since the 16th century, for example, has it been possible to argue that a mere discovery, coupled with an intention eventually to occupy, is sufficient to create a title. In this respect international law does but follow the pattern of the private law of property in land, for all land laws must stress the importance of possession. English law in particular has always accepted possession as being itself a root of title.³ And there is a sense in which any law of property is a rationalization of the factual distribution of possession. As Judge Huber put it in the *Island of Palmas* case:⁴

... practice, as well as doctrine, recognizes—though under different legal

¹ *Salmond on Jurisprudence*, 11th ed. (1957), by Glanville Williams, p. 378.

² See Lord Stowell in *The Fama*, 5 C. Rob., at p. 115: 'All concur . . . in holding it to be a necessary principle of jurisprudence, that to complete the right of property, the right to the thing and the possession of the thing itself should be united . . . this is the general rule of property, and applies, I conceive, no less to the right of territory than to other rights.'

³ On this whole question see especially H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), chap. III.

⁴ See Appendix.

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formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. . . . Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.

Yet if the legal right to territorial sovereignty is to have any real significance it must on occasion at least be capable of subsisting even when divorced from possession; it must mean that the State in which is vested the right can vindicate it before a Court and be enabled to recover a possession of which it has in fact been deprived: *titulus est justa causa possidendi quod nostrum est*. This is a testing requirement for a system like international law which, quite apart from other difficulties, still lacks any system of compulsory jurisdiction. Remembering that every State, moreover, tends to regard a question of territory as one affecting a vital interest, it will readily be understood that the tendency of the law has necessarily been to pay very great regard to factual possession as creating title and that excursions into the realm of an abstract title to sovereignty have been cautious and tentative. To quote Judge Huber again:

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.¹

Nevertheless, when occasion demands, the law does recognize an abstract title presently divorced from a material display: by no means the least important example would be, of course, the long-established rule that a belligerent occupant does not acquire sovereignty until after *debellatio*.

There is another general point to be mentioned here concerning title to territorial sovereignty. If a title to sovereignty means anything at all it means a real title, a title *erga omnes*. Nevertheless, experience shows that a decision between two competing claims is generally sufficient to establish title. On this point it will suffice to

¹ *Loc. cit.*

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recall a well-known passage from the Judgment of the Permanent Court of International Justice in the *Eastern Greenland* case:

Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim over a particular territory, is the extent to which 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. . . .

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, provided that the other State could not make out a superior claim. . . .¹

Now of course it is possible to imagine a disputed territory to which more than two States entertained possible claims. And in such a case the decision of a court as between two of the claims could not affect the standing of the others.² But it remains true that in most cases there are only two possible claimants and a decision between them suffices.³ In such cases there should be no doubt that a Court's decision in favour of one claimant or another is in principle opposable to the whole world and constitutes a title *erga omnes*, even though the successful State may have had to show very little in the way of sovereign activity. But of course the assumption here is that however little sovereign activity had to be shown, it was nevertheless activity that was unambiguously *à titre de souverain*.

Having now some notion of what we mean by title in relation to territorial sovereignty, we may turn to those so-called 'modes' which the law has accepted as establishing title.

THE PROCEDURES OF TERRITORIAL CHANGE

The books tell us there are five 'modes' by which territorial sovereignty can be acquired: (1) *occupation*, viz. of territory which is not under the sovereignty of anyone; (2) *prescription*, by which title flows from an effective possession over a period of time; (3) *cession*, or the transfer of territory by a treaty provision; (4) *accession* or *accretion*, where the shape of land is changed by the processes of

¹ *P.C.I.J. Reports*, Series A/B, No. 53, at p. 46.

² Cf. Article 59 of the Statutes of the International Court of Justice.

³ The position in international law is here perhaps nearer to the common law notion of the better right to possess rather than to the Roman Law notion of *dominium*.

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nature; and finally (5), *subjugation* or, if you prefer the older terminology, *conquest*.¹ One need only set this scheme alongside the facts of contemporary history to realize that it must be incomplete; for it has little or no place for some of the most important territorial changes of the last few years. The reason is not far to seek. The scheme is based upon the civil law modes for the transfer of property *inter vivos*; it does not provide, therefore, for the situation where a new State comes into existence.²

We have already noticed that territory is one of the ingredients of Statehood. It follows that when a new State is recognized by other States, the recognition includes an acknowledgment of the State's title to its territory; for Statehood is inseparable from the notion of State territory. This is not, of course, to suggest that recognition of a new State necessarily commits the recognizing State in respect of possibly outstanding disputes concerning the precise delimitation of frontiers or even in respect of considerable areas of territory over which title may be disputed. But apart from more or less important marginal questions of this sort, the recognized State's title to the main portion of its territory as a whole—its right so to speak to exist as an independent State in that part of the earth—is acknowledged.

But how was that title acquired? Clearly none of the five modes can help us because they all assume some activity by an existing international person; this quite apart from the further objection that the facts, at the creation of a new State, do not usually fit into any of these stock modes of acquisition; and this lacuna in the orthodox list of modes of acquisition becomes apparent, of course, when we inquire into the modes governing the *loss* of territory, because here we find, as they are stated in *Oppenheim*, that the list has grown into six: five correspond to the orthodox five modes of acquisition, namely, cession, operations of nature, subjugation, prescription, and dereliction, but the sixth, namely, 'revolt', does not. 'Revolt' is today an inadequate term for the many varied processes by which a new State may arise on the territory of another or others, but to this problem we shall return in a moment.

At this point one turns naturally to the law of succession. But there is no help here either. The law of succession of States—in so far as it is possible to discern any consistent principles—tends to accept the

¹ Some authorities would add a 6th mode, namely, *adjudication*.

² Cf. *Oppenheim-Lauterpacht*, vol. 1, 8th ed. (1955), p. 544: 'The acquisition of territory by an existing State and member of the international community must not be confused, first, with the foundation of a new State. . . .'

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change of territorial sovereignty as *datum*, and very little if anything seems to hinge on the method by which the change was brought about.

One is driven, therefore, to the position expressed in Oppenheim when it is said:

The formation of a new State is . . . a matter of fact and not of law. It is through recognition, which is a matter of law, that such new State becomes a subject of International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of international law, *and it matters not how this territory was acquired before recognition.*¹

If this is true, one may, therefore, regard the title to territory as arising simply from the fact of the emergence of a new State, or one may regard it perhaps as having been constituted by recognition, depending upon one's view of the legal nature of recognition.²

If we may pause a moment for a brief appraisal: we have here what seems a curious and anomalous situation. For transfers of territory between existing States the law lays down a series of modes through which alone a valid title to the sovereignty may be passed from one to the other; but for a territorial change coincident with the birth of a new State the law apparently not only fails to provide any modes of transfer but appears to be actually indifferent as to how the acquisition is accomplished. It is easy to see how this situation has arisen. We have already noticed that territorial sovereignty is a notion of great complexity which belongs to personality in the law as well as to the beneficial enjoyment of territory in the physical sense. In transfers between existing States the law has looked chiefly to the latter element and has therefore been inspired chiefly by the seductive private law analogy of transfers of ownership in land. But where a new State arises the law has looked chiefly to the emergence of the new subject rather than the incidental transfer of territory; it has looked to the sovereign, rather than the territorial, element of territorial sovereignty.

This has a further result. A new State is usually born either of an evolution within the sphere of constitutional law or of civil strife. In either event it is, at least according to traditional international law, a

¹ *Loc. cit.*, p. 544, italics supplied.

² This legal situation is carried to what is perhaps its logical extreme in the Irish doctrine of self-recognition. Thus Mr. De Valera in a letter to Lloyd George of September 13, 1921, put it this way: 'Our nation has forcefully declared its independence and recognizes itself as a sovereign State.' See P. N. S. Mansergh, *The Irish Free State* (1934), p. 29.

matter solely within the domestic sphere until the moment when recognition in one form or another comes into question. And this, of course, is precisely the reason why the mode of transfer of territorial sovereignty in this case is a matter of indifference to traditional international law; because the acquisition of territorial sovereignty in this case is by facts or legal processes or both working behind the screen of the domestic jurisdiction, and therefore proper to municipal law rather than to international law. It is recognition which marks the emergence of this complex of law and fact into the international sphere; but recognition by definition is a procedure by which the factual situation is acknowledged as bearing title. The new State brings its title with it, so to speak, as it steps into the realm of international law.¹

Such is the position in what we may call the traditional law. We may note, however, that international law and organization have begun to build important salients into this traditionally domestic sphere in which the new State is usually born. The mandates system under the League of Nations and the Trusteeship system under the United Nations are obviously important areas where international law comes in, so to speak, before the final emergence of any new State.² Again, Chapter XI of the Charter of the United Nations—the *Declaration regarding Non-self-governing Territories*—brings in international law and organization at a stage before a new State may be born. But these provisions of the Charter raise large questions that will call for fuller consideration at a later stage in this course.

This question of territorial changes brought about by the creation of new States prompts another reflexion. When we permit ourselves to look behind this screen of domestic jurisdiction we find a great variety of ways in which new international persons have emerged, ranging from violent revolution to a gradual and in some instances almost imperceptible devolution of sovereignty from the mother country to the nascent State. Moreover, in the latter class of case especially, we may find highly relevant many legal arrangements on

¹ The screening of the process of formation from international law has a further concomitant: the process is, in many circumstances at least, also screened from the prohibitions of the use of force in 'international' relations. See Charter of the United Nations, Art. 2(4).

² And indeed it will be remembered that, according to Lord McNair, territorial sovereignty in the ordinary sense of the words does not exist over trusteeship territory. In the *International Status of South-West Africa* case (*I.C.J. Reports*, 1950, p. 128).

the border line between municipal and international law, the exact legal status of which, however, may be something of a puzzle.¹ Having observed this distinction, we may be tempted to give it a legal meaning by applying to it the distinction, so often made in relation to the other five modes of territorial change, between original and derivative titles. For is it not true, as a matter of history, that some new States are consciously formed out of the sovereignty of the old, whereas others are created in violent opposition to the former territorial sovereign? Is it not reasonable to suppose, therefore, that a distinction between original and derivative titles may be relevant to the proper interpretation of the change of territorial sovereignty that takes place when a new State is created? It may be useful to linger briefly over this question.

It is argued by some authorities that State sovereignty cannot, by its very nature, be derived from another sovereignty and must therefore in all cases be original; sovereignty is not a transferable commodity.² But sovereignty, even territorial sovereignty, as we are beginning to see, means so many different things. In so far as it refers to the legal personality of a State it is, it must be conceded, obviously true that each sovereignty is 'original' and not derived in a legal sense from another, though it may be in an historical sense; for this is really no more than what is meant by the legal term 'person'. If it is a sovereign person of the law it is unique. But in so far as 'sovereignty' is used to mean rights, duties, powers and competences or titles it would seem that these might be derived, even in a legal sense, from another sovereignty. But here traditional international

¹ E.g. What exactly is the legal status in *international* law of the *Indian Independence* (International Arrangements) Order, 1947? Or the so-called Inheritance Agreements between U.K. and Ghana or U.K. and Malaya? On this whole question see E. Lauterpacht in *International and Comparative Law Quarterly*, vol. 7 (1958), pp. 534 ff.

² See e.g. Cavaglieri, *op. cit.*, p. 402: 'Il n'est pas juste d'ailleurs de concevoir l'acquisition dérivée comme la transmission de la souveraineté territoriale par l'un des États à l'autre. La souveraineté d'un État est, par sa nature, intransmissible. Elle est l'État lui-même dans l'expression la plus élevée, incommunicable de son existence. Elle n'existe qu'autant qu'existe cet État déterminé et disparaît par conséquent avec l'organisation sociale dont elle est la manifestation juridique. On ne peut donc pas concevoir que cette souveraineté passe d'un État à l'autre.'

It is interesting to note that a similar difficulty for similar reasons was felt in classical Roman law. Thus Buckland, *Text Book of Roman Law* (1905), p. 204, says: 'Indeed the conception of *dominium* as a seignory of sovereignty, a personal relation between the owner and the *res*, has led to the view that the notion of transfer of *dominium* is alien to the classical law, and that though the *res* is transferred, the ownership created is a new one.'

law was in an *impasse*: until the new State was created there was no person of the law which was capable of taking say a title to territory. It was therefore necessary, as Oppenheim suggests, for international law to accept the 'fact' of the position at the moment of creation of the new State. Yet in these days, when it is readily recognized that international personality is not confined to States, and when international law is in fact directly concerned with non-self-governing territories, it seems reasonable to allow that, in principle at least, some of the incidents of the creation of title, though originating in municipal law, might be regarded as having an effect in international law. Certainly it would seem that one key to the difficult problems of succession that arise in many of these cases¹ may be found in allowing that the investigation of a title may have to go back beyond the moment of recognition of a new State. In short, perhaps we have reached the stage, *pace* Oppenheim, where it may for some purposes be relevant to inquire how even a new State acquired its territory. For example, the new State of Israel came into being before its territory was at all settled and with acute disputes on several frontiers. The emergence of India and Pakistan as independent States precipitated the Kashmir question. Such questions could be submitted to an international tribunal. They have been dealt with in the United Nations. It is, therefore, no longer practical politics to say that the question of title to territory is settled by recognition of the new State. The history of the disputed area prior to recognition must be relevant.

At any rate it should be clear that, where real rights have been created which attach to a particular territory, these will subsist if the territory becomes part of a new State, just as they would if the territory were ceded to or annexed by an old State; for, of course, servitudes would presumably continue to bind the land irrespective of the mode of any new acquisition. Even if a mode of acquisition be an 'original' mode, this does not mean that a title is acquired free of incumbrances.² This was made clear in the *Right of Passage* case.³

To sum up the discussion so far, then, we find that in addition to the five orthodox modes for the acquisition of territorial sovereignty,

¹ See E. Lauterpacht, *loc. cit.*

² This seems also to have been the position in Roman Law. See Buckland, *Roman Law of Slavery* (1910), p. 277: 'There can be no doubt that *derelictio*, whether followed by *occupatio* or not, leaves the creditor's right intact.'

³ *I.C.J. Reports*, 1960, p. 6.

there is the case of the emergence of the new State—by far the most important case of territorial change at the present time—in regard to which, however, international law is singularly undeveloped, uncertain, and, it must be said, comparatively unstudied.

BOUNDARY DISPUTES

There is yet one more category of rules or principles for the determination of territorial sovereignty that must be mentioned if we are to complete our list; I mean that body of legal rules which is concerned specifically with frontier or boundary disputes. These cases may, of course, involve the 'modes' of acquisition that we have just examined. But the modes of acquisition concern title as such and may give little or no help in the problem of determining the precise line that a frontier should follow. Such a determination in detail commonly involves a treaty perhaps incorporating or authorizing detailed survey work by a boundary commission. Practice has naturally evolved a number of accepted rules, conventions and techniques which will both aid such a commission in its task and assist in the interpretation of its work if need be: such principles as that of the *Thalweg*, or the mid-channel, in the case of international river boundaries, the convention of following the watershed of a mountain frontier, or the line of an escarpment and so on. These rules may be serviceable whatever the mode of acquisition of the territory; and indeed the mode of acquisition is often, in this type of frontier dispute, irrelevant. On the other hand the problem of frontier delimitation may be raised in a broader form in the initial stages of an occupation of territory which has been *res nullius* and here geographical notions such as contiguity, or hinterland, or the area drained by a river system, have been pressed into service for the better definition of the area subject to occupation.

There is no time to dwell upon these frontier questions, which are a subject of study in themselves.¹ Nevertheless, certain general observations may assist an appreciation of the relevance of the frontier problem to the larger one of the acquisition of territorial sovereignty in general.

Firstly, this is a matter which is perhaps particularly suitable for the settlement of disputes by adjudication or arbitration; and indeed

¹ See in particular P. de Lapradelle, *La Frontière* (1928), and Boggs, *International Boundaries* (1940); Rousseau in *Revue générale de droit international public*, vol. 58 (1954), pp. 23–52.

it is noticeable that a very large part of the jurisprudence over territorial questions has been concerned with frontier questions.¹

Secondly, the frontier question is particularly one which, though obviously concerned with title in the fullest sense of the word, is normally one which for practical purposes arises only between neighbouring States. It is *par excellence* the type of case where a decision who has the better right of neighbouring claimants is a decision of title *erga omnes*. In the case where an arbitration is given power to determine frontiers, the decision may itself, perhaps, be a true mode of acquisition of territorial sovereignty.²

Finally, it may be worth noting that many frontier lines have long been fixed as the end product of political, historical and geographical pressures, and have therefore become relatively static; so that the frontiers of certain 'countries' may tend to persist even through changes of sovereignty, just as the paradigms of Whiteacre and Blackacre tend to remain whole even through changes of ownership. But this provokes two reflexions. Where the frontier is disputed or in motion this may be more than a mere matter of boundary law, for territorial frontiers may be frontiers of power. And there may sometimes be dangers in this tendency of frontiers to remain through radical political changes, as for example in the present tendency of the new States in Africa to be tailored to fit into old frontiers which crystallized from the struggles of colonial powers in the nineteenth century, which frontiers may possibly, therefore, not always be adequate to contain indigenous pressures or needs. Be that as it may, it is certain that even new States will tend in the nature of things to emerge within old countries and to inherit therefore old frontier lines, and this may raise difficult questions of identity or succession, as, for example, the question of membership of the United Nations that arose when India and Pakistan emerged without the old frontiers of British India; or, to take another example, the present claim of Morocco to the territory of Mauretania on the historical ground Mauretania allegedly formed a province of the old Morocco in days gone by.

CONCLUSIONS

So, when we turn, as we shall in the next lecture, to take a closer

¹ See e.g. *Case concerning sovereignty over certain frontier land*, between Belgium and the Netherlands, *I.C.J. Reports*, 1959, p. 209. Also the *Temple* case between Cambodia and Thailand, *I.C.J. Reports*, 1962, p. 8.

² Hence, the inclusion by some authorities of 'adjudication' as a mode of acquisition of territorial sovereignty.

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look at certain particular aspects of the law governing territorial changes, we shall do well to bear in mind these important features of the law as a whole, namely:

(a) What we are dealing with here is not mere changes in the occupation of territory but changes in the right to territorial sovereignty. Therefore the persistent analogy with the beneficial enjoyment of land in private law, important as it is in the shaping of international law, is also misleading unless this vital difference is kept constantly in mind.

(b) The so-called 'modes' for the acquisition of territorial titles are directly relevant to only a part of the problem; and that not perhaps the most important part at the present juncture of history. For the territorial changes wrought by the emergence of new States into the family of nations have always been treated by the law as a problem of recognition, rather than of 'conveyance' of title. But recognition is essentially a procedure by which the law accommodates itself to accomplished fact. So here there is much room for changes that are at least in part screened from the operation of the traditional law on territorial title. This is an aspect of the problem that merits much more study, especially in the light of the rich array of precedents to be found in the history of our own times. But it is an aspect that involves the law that goes under the heading of State succession as well as that which traditionally goes under the heading of territorial title.

(c) It is not surprising that we find, therefore, that a large part of the considerable jurisprudence on the subject of territory is about frontier or boundary questions; and though these clearly involve title yet it is also a problem on its own, with its own special rules and conventions. In private law everybody readily recognizes the difference between the type of case where X and Y are in dispute over the ownership of Whiteacre, and the type of dispute where the undoubted owner of Whiteacre is in dispute with the undoubted owner of Blackacre over the line of the boundary between them. But in International law the distinction has not always been so clear, though as early as the *Mosul Boundary* case, the P.C.I.J. showed that a principal title may be determined even before the territorial boundaries are precisely established.¹

¹ See *P.C.I.J. Reports*, Series B, No. 12 (1925), at p. 21: 'The fact that, in a treaty certain territories are indicated as ceded, or that rights and titles to these territories are renounced even though the frontiers of them are not yet determined, has nothing exceptional about it. . . . The same applies to treaties which entrust the determination of certain frontiers to an international commission or

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the decision of a third Party. In such cases the renunciation of rights and title is suspended until the frontier has been determined, but it will become effective, in the absence of some other solution, in virtue of the binding decision.'

The disputed questions of the rules governing the delimitation of maritime and air frontiers are, of course, the most important of these frontier problems and are particularly instructive in that they concern the boundaries not of alienable territory but of inalienable appurtenances of territory. Moreover they each march with a *res communis*. But, as already indicated, these problems are reserved for a later course of lectures.

Chapter II

THE MODES OF ACQUISITION

WE may now turn our attention to the modes of acquisition of territorial sovereignty between existing States, and it will be convenient first to consider some problems arising from the *cession* of territory.

CESSION

Cession is the transfer of territorial sovereignty by one State to another State. 'The "cession" of a territory', it was said in one case,¹ 'means the renunciation made by one State in favour of another of the rights and title which the former may have to the territory in question.' This is effected by a treaty of cession expressing the agreement to the transfer.² It is a bilateral mode of acquisition in that it requires the co-operation of the two States concerned, whereas all the other modes are unilateral. The title it confers is derivative in the sense that its validity is dependent upon the validity of the title of the ceding State³—*nemo plus juris transferre potest quam ipse habet*—whereas the other modes create an original title; i.e. one that does not depend for its validity on the title of the former occupant. For this proposition we need go no further than the *Island of Palmas* case, where the United States based its claim partly on the Treaty of Paris of 1898, which transferred to the United States all rights of sovereignty which Spain might have possessed in a certain region said to include the disputed island. The arbitrator held that the treaty could not be regarded as conclusive, for 'it is evident that Spain could not transfer more rights than she herself possessed'.⁴

¹ *Reparation Commission v. German Government*, 1924, *Annual Digest of International Law Cases* (hereafter *A.D.*), 1923-4, Case No. 199.

² It must be clear that transfer of actual sovereignty is intended. For a doubtful case see *I.C.J. Reports*, 1960, at p. 38.

³ *Quaere* whether a 'protecting' State may alienate protected territory; see D. J. L. Brown, *I.C.L.Q.* (1956), p. 245, for case of the Somalis.

⁴ *American Journal of International Law*, vol. 22 (1928), p. 879; see also *Appendix* to these lectures. It should be noted that there is not universal agreement on which modes are derivative and which are original; see Johnson, *Cambridge Law Journal*, 1955, p. 217 n. 13. See, however, Cavaglieri, *Recueil des Cours de la*

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In the normal cession there are two elements, the agreement to cede embodied in the treaty, and the actual handing over, or tradition, of the territory—though in some cases the cessionary State may already be in occupation when the treaty is made. It is sometimes argued whether either of these two elements may be dispensed with or whether both are essential to the effective conveyance of the rights. The point arose in a practical form in an Indian case, *Union of India v. Maumull Jain*.¹ The respondents had brought an action to obtain relief against the imposition of certain duties upon the consumption of petrol, levied by the Municipal Assembly of Chandernagore. Chandernagore, which was previously French territory, was ceded to India by the Indo-French Treaty of February 2, 1951. By Section 7 of the Treaty, all rights, liabilities and obligations of the Government of the French Republic or the Municipal Assembly or the Administrative Council in relation to Chandernagore became the rights, liabilities and obligations of the Government of India. The question was whether the Union of India (the petitioner in the case) could, by virtue of the provisions of the Treaty of Cession, carry on in its own name the litigation to which the *Percepteur* and Municipal *Reserveur* of Chandernagore was a party, and whether it could present appeals in his place against the respondents. India clearly could do so if the cession had been effective, but the case of the respondents was that the Treaty of Cession had no legal validity in the absence of parliamentary legislation putting it into effect in the municipal law.

The Court held that the Union of India did have the right to prefer the appeals in its own name; and, having dealt with the constitutional law point concerning the alleged need for legislation to give effectiveness to treaties, said this:

Even if it were assumed that this Treaty was not legally valid without parliamentary legislation, the transfer of the territory to India remains an accomplished fact which is accepted as such by both the interested parties, namely, the French Republic and the Union of India. Consequently, it would be territory comprised within the territory of India, whether or not the Treaty was legally valid.

Haye, 1929—I, p. 402: 'Une acquisition a lieu par un mode originaire lorsqu'elle a pour objet un territoire qui, ou bien n'a jamais appartenu, ou bien n'appartient plus, en ce moment, à aucun État. L'acquisition a lieu donc par un rapport immédiat, direct, avec le territoire. Il y a au contraire un mode dérivé lorsque cette acquisition suppose un rapport juridique entre l'État qui acquiert la souveraineté et l'État auquel celle-ci appartenait auparavant.'

¹ (1954) I.R.A., Calcutta, p. 615; also *A.D.*, 1954, p. 256.

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The 'legal validity' here referred to, however, is presumably the validity of the treaty in constitutional law and perhaps does no more than to suggest that this consideration is irrelevant to the efficacy of the cession in international law, at any rate where there has been actual tradition of the territory. The case will not serve without straining its meaning as the basis for an argument that once the occupation contemplated by the treaty has been effected, the occupying State's title subsists without the treaty. For it is the treaty alone which gives legal meaning to the occupation by the cessionary State, and would seem therefore to be a necessary element in an effective cession.

This conclusion is confirmed by the *Iloilo Claims* case.¹ By the Treaty of Paris of 1898 Spain ceded the Philippines to the United States. The treaty provided that on the exchange of ratifications Spain should evacuate the Islands. In the event Spanish troops were compelled by local insurgents to withdraw from the town of Iloilo before the ratifications were exchanged. One day after American forces had entered, the insurgents succeeded in burning the town and the property of some British subjects was lost. The question was whether the United States was responsible, the British alleging culpable negligence on the part of the United States in delaying the occupation of the town. The claim was rejected on the ground that in the case of cession the sovereignty *de jure*, and the obligations resulting from it, did not begin before the treaty of cession was ratified.

There is certainly authority for holding that no particular form of tradition of the territory is required, and that the cessionary State is entitled to occupy the territory at any time after the treaty comes into force.² Indeed it would seem that, once the treaty has operated the cessionary State may cede the territory to a third power without himself having taken possession of it.³

On the other hand, it was held in the case of *Reparation Commission v. German Government* that there may be a valid 'cession' of territory

¹ British-American Tribunal (1910), November 19, 1925. See *A.D.*, 1925-6, Case No. 254.

² See *Colombia v. Venezuela*, an arbitration by the Swiss Federal Council, March 24, 1922; *A.D.*, 1919-22, Case No. 54. But see *P.C.I.J.*, Series A, No. 7, for the case where the cession is subject to a plebiscite.

³ See Oppenheim, *International Law*, vol. 1, 8th ed., by H. Lauterpacht (1955), p. 550, where the example is cited of Lombardy which was ceded to France by Austria in 1859 and France ceded it to Sardinia without having herself taken possession of it.

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even after the territory has been occupied by a new State and its existence and occupation recognized.¹

A treaty of cession may or may not be made in return for some consideration; unlike English law, international law is indifferent as to whether there is a *quid pro quo* or not. More importantly, a treaty of cession might, at least in the traditional law, be imposed by force of arms, and we know of course that the treaty of cession is as a matter of history the normal way in which the victor would, at the peace, impose his will in respect of territorial changes upon the vanquished. A principal question today must be therefore whether, in the light of the Charter of the United Nations and the like, a treaty of cession imposed as a result of illegal force is still to be regarded as carrying the sanction of the law. But this is only one part of a larger question and must await treatment in a later lecture. Leaving aside, therefore, for the moment, the principal question of the present-day validity of some enforced cessions, we may nevertheless pose another problem concerning the enforced cession. In traditional law the conqueror makes himself an original title to territorial sovereignty, but if he prefers, for reasons of his own, to compel the vanquished State to cede the territory he apparently gets a derivative title. Yet it is difficult to believe that the employment of the treaty form in these circumstances weakens the title. Possibly the answer is that in this case cession and conquest co-exist as alternative titles. In any case the question is almost entirely theoretical—rights attaching to the territory will continue to bind the holder whether his title be original or derivative.

But now we must pass on to consider the original modes of acquisition other than *subjugation*. *Accretion* (or *Accession*)—augmentation or loss of territory by the processes of nature—is of little practical importance and need not detain us.² *Occupation* and *Prescription*, however, raise several important problems and may for our purposes be considered together.

¹ *Special Arbitral Tribunal*, September 3, 1924, A.D., 1923-4, Case No. 199, where it was held that the fact that the States of Czechoslovakia and Serb-Croat-Slovene Kingdom existed in fact and were recognized by the Principal Allied and Associated Powers at the date of signature of the Treaties of Versailles, St. Germain and Trianon, did not prevent there being a 'cession' of the territories in question in those treaties. The fact that the cessionary State was already in unopposed possession with the consent of the population did not prevent this result.

² See however *San Lorenzo Title & Improvement Co. v. City Mortgage Co.* (1932), A.D., 1931-2, Case No. 55.

OCCUPATION AND PRESCRIPTION

The mode called *occupation* corresponds very closely to the *occupatio* of Roman Law. It is the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State. This is not to say, of course, that the territory need be uninhabited. Natives living under a tribal organization were not regarded as a State for this purpose, and though force, even considerable force, might be used for the establishment of the settlement, the result in law was not conquest but occupation. This somewhat lofty attitude towards peoples who did not enjoy 'civilization' in the sense of living under a State organized after the manner of the States of Europe seemed natural enough in the late nineteenth century, though its survival in the term 'civilized states' may cause some embarrassment now. Today, however, when almost the whole, if not the whole, of the Earth's temperate land is subject to the sovereignty of some State, occupation is obsolescent except in relation to the Polar regions; though of course it continues to be relevant in the proof of historic titles.

The main legal problem with regard to occupation has been to define the degree and kind of possession effective to create a title and to define the area of territory to which such a possession might be said from time to time to apply. This question is one upon which we must not enter, partly because it would take more time than we can spare and partly because there is no point in adding to the already adequate literature on the subject.¹

Prescription as a concept of the law is a little more difficult and complicated because it covers several different notions. Basically I suppose it indicates the acquisition of title by a long-continued and undisturbed possession. Although some such principle is to be found in every system of municipal law its acceptance into international law has been controverted by writers from time to time:² State practice, however, clearly endorses the validity of the institution.

First it is necessary to distinguish some quite different meanings

¹ The student should consult the *Island of Palmas*, *loc. cit.*, case, the *Clipperton Island* case, 2 R.I.A.A., p. 1105, and the *Eastern Greenland* case, *loc. cit.* Also, Waldock in *British Year Book of International Law*, vol. 25 (1948), pp. 311 ff.

² See Oppenheim, *op. cit.*, p. 575 n. 4: in the *Right of Passage* case, Judge Moreno Quintana referred to prescription as 'a private law institution which I consider finds no place in international law' (*loc. cit.*, p. 88).

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of the term 'prescription' in international law.¹ The primary distinction is between extinctive prescription and acquisitive prescription. In all systems of law a failure to present a claim within a reasonable time may result in the loss of the competence to enforce it though not in the loss of the right. In English law this is covered by such notions as 'limitation' and 'laches'. In international law this is true also and may conveniently be referred to as 'extinctive prescription'; but this has nothing to do with title and we need not mention it again. More to our purpose is the notion of 'acquisitive' prescription by which a substantive right may be created and acquired, whilst at the same time the right of the former owner of title is extinguished. International law lays down no specific time for the accomplishment of this process; nor should we expect it to do so, for it must vary according to a number of different circumstances.²

But the notion of acquisitive prescription itself has to comprehend certainly two, and possibly more, quite different concepts. First there is a possession which has been so long established that its origins are not only now beyond question but also unknown. It must therefore be presumed that the possessor is entitled *Omnia praesumuntur rite esse acta*. This corresponds to the 'immemorial possession' of private law; though, as Professor Johnson has pointed out, the actual idea of immemorial origin may on occasion seem anachronistic in the context of the history of relations between modern States.³ On the other hand there is what might be called prescription strictly so-called, where the actual exercise of sovereign rights over a period of time is allowed to cure a defect in title; the case, that is to say, where the exercise of sovereign rights either rests upon a demonstrably defective title or is even in origin wrongful. In this kind of case, therefore, the title is acquired by means of an 'adverse' possession. In regard to this kind of prescription—which is of great importance in international law—that greatest of English writers on international law, W. E. Hall, has a forthright but illuminating observation: 'while under the conditions of civil life it is possible so to regulate its operation as to render it the handmaid of justice, it must be frankly recognized that internationally it 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

¹ On this question see especially the illuminating article by Professor Johnson in *British Year Book of International Law*, vol. 27 (1950), pp. 332 ff.

² On this point see Johnson, *op. cit.*, at p. 334.

³ See *Cambridge Law Journal*, 1955, at p. 219.

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enough not only to triumph for a moment, but to establish itself permanently and solidly.¹

But it will easily be seen that, since the result of either kind of prescription is the same—the acquisition of a good title—and since the origins of a possession may in any case be one of the matters of dispute, there is inevitably a tendency to lump them together so that the difference between them becomes one of degree rather than of kind. ‘In other words there is really only one kind of “acquisitive prescription” in international law, the precise application of the doctrine varying in different circumstances.’² Prescription as a whole may therefore perhaps be defined in the careful terms we find in Lauterpacht’s *Oppenheim*:³ ‘the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.’⁴

The efficacy of this mode is strikingly illustrated in the Award of Max Huber in the *Island of Palmas*, where the finding in favour of Dutch sovereignty over the island was founded upon ‘continuous and peaceful display of territorial sovereignty’. Even supposing, said the arbitrator, that the Spanish had a title to the island by discovery and that this ‘must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another; for such display may prevail even over a prior, definitive title put forward by another State’. For this to happen, however, there must be present both acts attributable only to sovereignty and the will to act as sovereign: ‘A claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon the continued display of authority, involves two elements each of which must be shown to exist: the intention and the will to act as sovereign, and some actual exercise or display of such authority.’⁵ Furthermore,

¹ *A Treatise on International Law*, 8th ed., by Pearce Higgins (1924), p. 143; also cited by Johnson, *loc. cit.*

² Johnson, *loc. cit.*, p. 339; Professor Johnson, however, partly repents of this in his later article in the *Cambridge Law Journal*, *loc. cit.*

³ *Op. cit.*, p. 576.

⁴ See also W. E. Hall, *op. cit.*, p. 143: ‘Title by prescription arises out of long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.’

⁵ *Legal States of Eastern Greenland case*, Series A/B, No. 53, pp. 45–6.

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where the possession is adverse, it is not sufficient that the claimant State display acts of sovereignty; there must also be an acquiescence on the part of the original sovereign. If the latter keeps its claim alive by protest or the bringing of an action, there will not be that undisturbed or 'peaceable' possession which alone enables a State to prescribe a title.¹

That there are important differences between occupation and prescription is clear enough. Occupation can only apply to territory that is *res nullius*; it is in all cases lawful in origin, and the mere passage of time has no place in it, provided only that the apprehension of the territorial sovereignty be effective. Prescription, on the other hand, is a portmanteau concept that comprehends both a possession of which the origin is unclear or disputed, and an adverse possession which is in origin demonstrably unlawful. For prescription, therefore, the possession must be long-continued, undisturbed, and it must be unambiguously attributable to a claim to act as sovereign. It depends as much on the quiescence of the former sovereignty as on the consolidation through time of the new. It follows also that the acquisition of a title to parts of the high seas must always be a prescription and not an occupation, for the high seas are not *res nullius*.

But it is also true that occupation and prescription have much in common. They are both ultimate rationalizations of an existing effective possession and control. Moreover, the differences between them must frequently be blurred when they are seen in the context of the facts or allegations of a particular case, and for the purposes of decisions in a particular case, the result may be the same whether an existing and established sovereignty was originally grounded in an occupation, or has developed by reason of immemorial possession or an adverse possession. It is not surprising, therefore, if tribunals do not always indicate very clearly on what ground they are proceeding.

HISTORICAL CONSOLIDATION OF TITLE

This ambiguity in actual cases based essentially on effective possession suggests the question whether the various factors contributing to building a title cannot usefully and instructively be subsumed under the one heading of a process of 'consolidation', and regarded as being for essential purposes all part of one legal process,

¹ See *Frontier Land case*, *I.C.J. Reports*, 1959, p. 209, at p. 227.

or 'mode' of acquisition of territorial sovereignty. This possibility has been advocated by Professor Charles de Visscher,¹ elaborating a formula used in the *Norwegian Fisheries* case,² in which he was a Judge. The passage is of such importance that it may be useful to cite it at some length:

4. *Consolidation by Historic Titles.* The fundamental interest of the stability of territorial situations from the point of view of order and peace explains the place that consolidation by historic titles holds in international law and the suppleness with which the principle is applied. It is for these situations, especially, that arbitral decisions have sanctioned the principle *quieta non movere*, as much out of consideration for the importance of these situations in themselves in the relations of States as for the political gravity of disputes concerning them. This consolidation, which may have practical importance for territories not yet finally organized under a State regime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, 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. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles.

In this respect such consolidation differs from acquisitive prescription properly so-called, as also in the fact that it can apply to territories that could not be proved to have belonged formerly to another State. It differs from occupation in that it can be admitted in relation to certain parts of the sea as well as on land. Finally, it is distinguished from international recognition—and this is the point of most practical importance—by the fact that it can be held to be accomplished not only by acquiescence properly so called, acquiescence in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition either, in the case of land, on the part of States interested in disputing possession or, in maritime waters, on the part of the generality of States.

Thus, as Professor Johnson says,³ Professor de Visscher has 'em-

¹ See *Théories et Réalités en Droit International Public* (1953), pp. 244-5, 2nd ed. (1960), pp. 255-6; English translation by Corbett (1957), pp. 200-3. There is also a very clear summary of the argument in Professor Johnson's article in the *Cambridge Law Journal* cited above.

² *I.C.J. Reports*, 1951, at p. 130: 'Norway has been in a position to argue without any 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. Since, moreover, these decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable against all States. . . .'

³ *Op. cit.*, p. 233.

braced under a single heading the notion of straightforward possession on the one hand and of adverse possession on the other hand. . . . Under the single heading of "consolidation" it is now possible . . . to include both "straightforward possession" and "adverse possession" . . .¹

But the idea of historical consolidation is something more than a terminological reform. It opens the door to a mode of acquiring title that is, or at least may become, subtly different from what is found in the old learning about occupation and prescription. Prescription, as we have seen, is based upon a peaceable, effective possession—a possession as of a sovereign extending over a considerable period. But such a possession may not be self-evident in a disputed case. It must, therefore, be proved, and for the purpose of this demonstration, a great variety of evidences may be relevant—particularly the attitude of third States, because repute is always an important factor in any question concerning rights over land. But the notion of consolidation introduces something over and above the notion of *evidences* of sovereign possession; for these factors of repute, acknowledgment and so on then become, if I have understood this aright, not merely *evidences* of a situation apt for prescription but become *themselves* decisive ingredients in the process of creating title. Let me remind you again of the words of Professor de Visscher. Proven use 'is its foundation', but this 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*' (italics supplied).² And again, 'it is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles'.³

¹ Of course the two notions have always, as we have just seen, been embraced in the heading 'acquisitive prescription' but Professor de Visscher prefers the term consolidation 'pour éviter des discussions inutiles, on préférera le terme consolidation à celui de prescription acquisitive': *op. cit.*, 2nd ed., p. 255 n. 1.

² 'Le long usage établi, qui en est le fondement, ne fait que traduire un ensemble d'intérêts et de relations qui tendent par eux-mêmes à rattacher un territoire ou un espace maritime à un État déterminé' (p. 256 of 2nd ed.).

³ 'Enfin, elle se distingue de la reconnaissance internationale—et c'est là le point pratiquement le plus important—par la circonstance qu'elle peut être réputée acquise non pas seulement par acquiescement proprement dit, acquiescement dans lequel le facteur temps peut ne jouer aucun rôle, mais plus aisément par une absence d'opposition suffisamment prolongée, soit pour le domaine terrestre de la part des États intéressés à contester la possession, soit pour les espaces maritimes de la part de la généralité des États' (*ibid.*).

Now it must be acknowledged at once that this passage from Professor de Visscher's analysis is not just a suggestion *de lege ferenda*; it is a penetrating and illuminating observation of the way Courts actually tackle questions of title to territorial sovereignty. Thus it makes clear how recognition in varying forms, and acquiescence, and estoppels perhaps¹ are given an important place in this scheme of things; and this is no doubt right. On the other hand one should perhaps approach with some caution any suggestion in general terms that the 'interests', including the 'interests' of the claimant, should be allowed to sway the decision of a question of title; certainly the decision of the International Court of Justice in the *Norwegian Fisheries* case provides a precedent for doing precisely this, but within rather strict limitations. Further, it must be emphasized that however important all these various consolidating factors may be, it is still the fact of possession that is the foundation and the *sine qua non* of this process of consolidation. The process cannot, therefore, begin to operate until actual possession is first enjoyed. It is necessary to emphasize what may at first sight seem an obvious point because, as we shall see later in this course, in matters so imprecise as *repute*, it may not always be easy to distinguish between evidence of a true legal title and evidence of an alleged political right or claim to have the title transferred. There may be some danger, therefore, that a skilfully directed campaign of propaganda might seem to lay some apparently legal foundation for a forcible seizure of territory on the ground of an already existing embryo title in process of consolidation. It should be made quite clear, therefore, that the process of consolidation cannot begin unless and until actual possession is already an accomplished fact and that, although no time is laid down, it remains true that it cannot be completed until after a considerable period of possession as of a sovereign.

Indeed, it must be admitted that this idea of historical consolidation—albeit a realistic and serviceable sublimation of an awkward corner of international law that has tended hitherto perhaps to remain too near to its private law origins—has its dangers, and these we ought to try to guard against. In the first place one may perhaps somewhat regret the coalescence of different notions of acquisition by holding, under one amorphous portmanteau idea. This no doubt, as Professor Johnson says, 'has simplified the problem considerably'. But it is elaboration that international law needs rather than simplification. And it must be confessed that this 'simplification'

¹ For all these see pp. 36 ff. below.

makes it the more difficult to keep separate and to treat differently the case where possession is first obtained by unlawful means. Indeed the whole tendency of consolidation is to make the origin of the possession of ever-diminishing importance. No doubt this is in a sense realistic. But it may have unexpected results at a time when the law in another department is trying to define and sanction the use of unlawful force or threat of force in international relations. On the other hand the strength of consolidation is that, giving new prominence to repute and the attitude of third States generally, it may serve to keep the law in closer touch with the current opinion of the international community. The name *historical* consolidation is indeed in some measure a misnomer, for the tendency of consolidation is rather to augment the significance of relatively recent possession. There is something a little ironic in the frequent citation of the *Minquiers and Ecrehos* case as an illustration of the importance of historical consolidation; for this was the case where pleadings of unparalleled learning demonstrating the effect of titles established in feudal times were almost brushed aside with the observation that, 'What is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.'¹

Historical consolidation is also a voracious concept, and should be kept within bounds. Otherwise we may see the classical scheme of modes of acquisition of title precipitated into a general concept of cumulative estoppels.² Moreover, it must be remembered that it is based upon the merest hint in the case reports. It has never been as it were spelled out as a doctrine by any court, and there may be some

¹ *I.C.J. Reports*, 1953, p. 57.

² See e.g. Dr. Schwarzenberger's suggestion that 'Titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith. Initially, as, for instance, in the case of the transfer by way of cession of a territory from one State to another, the validity of a title to territory is likely to be relative. If, however, other States recognize such a bilateral treaty, incorporate it into a multilateral treaty or estop themselves in other ways from contesting the transfer, the operational scope of the treaty tends increasingly to become more absolute. The more absolute a title becomes, the more apparent becomes the multiplicity of its roots. In its movement from relativity to absolute validity, it undergoes a process of historical consolidation.' *A Manual of International Law*, 4th ed. (1960), vol. 1, p. 118. Cf. Vali, *Servitudes of International Law*, 2nd ed. (1958), p. 29: 'If a State cedes part of its territory to another State, the treaty relative to the cession once legally concluded and executed, no other State can deny the legal validity of the cession or the lawfulness of the exercise of territorial rights on the part of the new sovereign.'

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danger in allowing what is basically a simple, and indeed obvious, idea to develop into a somewhat doctrinaire principle.

We must now turn, however, to two concepts which are closely related to occupation, prescription and all kinds of consolidation: the principle of the intertemporal law and the doctrine of the critical date.

INTERTEMPORAL LAW

The rule that the effect of an act is to be determined by the law of the time when it was done, not of the law of the time when the claim is made, is elementary and important. It is merely an aspect of the rule against retroactive laws, and to that extent may be regarded as a general principle of law. It is especially important in international law because of the length of the life of states. It is peculiarly apt to questions of title; though by no means confined to questions of title.¹

The authority for the rule most frequently quoted is the Award of Max Huber in the *Island of Palmas* case; but this award also contains an important and by no means entirely clear gloss on the basic rule; and the consideration of this gloss must detain us for a few minutes.

It will be remembered that the United States claimed title to the Island because of a cession to her from Spain; Spain having, it was said, discovered the Island in the early 16th century. The principle of the intertemporal law was therefore an essential ingredient of the American case, for it enabled her to argue that a mere discovery, *at that time*, gave title; though mere discovery without occupation could not be said to give title at the time the action was brought. The Netherlands in reply did not deny the validity of the rule of the intertemporal law, but they countered with the argument that 'a title to a territory is not a legal relation in international law whose existence and elements are a matter of one single moment . . . the changed conditions of law developing in later times cannot be ignored in judging the continued legal value of relations which, instead of being consummated and terminated at one single moment, are of a permanent character'.² Huber seems to have accepted this

¹ For its application, e.g., to a question of the validity and effect of a 'treaty', see *Right of Passage* case, *op. cit.*, 3rd ed., p. 255 n. 1. For its application to a question of title see the *Grisbadarna* case (1915).

² From the Dutch memorandum. It is conveniently cited in Jessup, *American Journal of International Law*, vol. 22 (1928), pp. 735 ff., where the author makes some important criticisms of the Award in the *Island of Palmas* case.

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argument, at any rate in some sense, and we may now look at the well-known passage of the Award in which he describes the principle of intertemporal law.

It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th 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 16th century—or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their first appearance in the Sea of Celebes. . . .

As regards the question which of different legal systems prevailing at successive periods is to be applied to 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.

Thus, the rule is stated as having two aspects: First that acts must be assessed against the law of the time they were performed; but secondly that the claimant must, if one may so express it, keep up with the law, in order to maintain his title. The second aspect is a serious modification of the rule and has not escaped criticism.¹

But what does it mean? In the first place, it may be important to read this passage of the Award in the whole context of the argument. There had been considerable discussion whether discovery, even in that early period, gave title or merely an inchoate title. An inchoate title is obviously of no avail unless it is eventually consolidated into a full title. It is, therefore, conceivable that the Award means no more than this, being directed to the specific question at issue between the two States: but the very general language of the Award makes it difficult to be satisfied with this solution.

Moreover, great emphasis is laid throughout the Award on the importance of maintaining title. Thus, it is said: 'The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the

¹ See Jessup, *loc. cit.*

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act of acquisition and not equally for the maintenance of the right.'
And again:

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

This is reasonable; for it must be remembered again that what is in question is not ownership of land but the exercise of territorial sovereignty, which carries with it responsibility as well as rights. It may be right therefore that an absence of the manifestations of sovereignty should prejudice the continuance of the right to exercise it, at any rate where there is an active rival claim. A failure to maintain a minimum degree of sovereign activity appropriate to the nature of the territory may therefore be regarded as an abandonment of title. But if title is to have any meaning at all it should be clear that such an abandonment in the face of rival activity is the *conditio sine qua non* for a new prescription. For the rule requiring the maintenance of the title ought not to be interpreted to mean that the State with title necessarily loses it if it fails to maintain a *degree* of activity at least equal to that of a rival claimant. The State with title is only required to show that there has been no tacit abandonment of its right or acquiescence in the rival claim. Fitzmaurice puts it very clearly when he says:

No amount of activity on the part of the 'prescribing' State would avail, without the passivity and inaction of the original sovereign. It is this, amounting in the end to tacit abandonment, surrender, or acquiescence, that constitutes the operative factor in the acquisition of a title by prescription.¹

If indeed the second branch of the rule of intertemporal law is allowed to mean more than this, the result is not only that title ceases to have significance, it also means that the first part of the rule is itself virtually cancelled of its effect. It means that title has so to speak to be earned again at every moment of time. Under these conditions no title would be secure and the supposed aim of the law

¹ *Op. cit.*, p. 31 n. 1, but cf. de Visscher, p. 201.

—stability—would be utterly defeated. Recent attempts to evade the main principle of the rule of the intertemporal law have not been too happy; for example, the suggestion made by India at one time that the Portuguese title to Goa being based upon conquest could, for all its antiquity, no longer be regarded as valid.¹ In the light of subsequent events this argument proved to have an embarrassing boomerang effect which it would be a work of supererogation to elaborate.²

But it is time to turn to another matter that has a considerable importance in litigation concerning effective possession of territory: the so-called critical date.

THE CRITICAL DATE

In many of the leading cases on territorial sovereignty, the tribunal has had occasion to observe—and this will surprise no one—that on the facts of the particular case a certain date appeared to be ‘critical’, in the sense that the decision one way or the other would largely turn upon what was found to be the position at that date. On this idea of a critical date there has been built in recent years a sophisticated and technical doctrine, which, perhaps not altogether unwisely, gets hardly a mention in the elementary textbooks on international law.

Basically the idea is simple, if not indeed obvious, as a few illustrations will show. The term seems first to have been used by Max Huber in the *Island of Palmas* case where, it will be remembered, the United States claimed title from a cession of the Island by Spain in the Treaty of Paris of December 10, 1898. Obviously the validity of this claim depended upon whether Spain did herself enjoy sovereignty at the moment of the purported cession; and Huber therefore quite naturally referred to the date of the treaty as ‘the critical moment’.³

¹ See e.g., Chowdhury, *Portuguese Territories in India* (1956), p. 2.

² Yet the argument was used by India in the Security Council even after India had annexed Goa. See Mr. Jha’s speech on December 18, 1961 (see Council Verbatim Records, S/PV. 987, at p. 26): ‘If any narrow-minded, legalistic considerations—considerations arising from international law as written by European writers—should arise, those writers were, after all, brought up in an atmosphere of colonialism. I pay all respect due to Grotius, who is supposed to be the father of international law, and we accept many tenets of international law. They are certainly regulating international life today. But the tenet which says, and is quoted in support of colonial powers having sovereign rights over territories which they won by conquest in Asia and Africa is no longer acceptable. It is a European concept and it must die.’

³ See Appendix at p. 97.

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In the *Eastern Greenland* case the decisive question was whether Denmark already had sovereignty over the territory at the moment when Norway claimed to have occupied it, namely July 10, 1931; and this therefore was the critical date in the case and naturally referred to as such by the Court.¹

But there is not always an obvious critical date of this kind. In some cases it may only be possible to point to the date on which the question was submitted for arbitration, or the date on which one of the parties first made a claim, as the critical date or, as it is sometimes expressed, the 'date by reference to which a territorial dispute must be deemed to have crystallized'.² Whatever be the critical date, the point of it is, according to the doctrine that has been built round it, that it is a date after which any actions of the parties can no longer affect the issue. Thus, Sir Gerald Fitzmaurice³ says,

Such a date must obviously exist in all litigated disputes, if only for the reason that it can never be later than the date on which legal proceedings are commenced. The actions of the parties after that date cannot affect their legal positions or rights as they then stood. In the case of disputed claims to territory the question of the critical date tends to assume special prominence, both because so much may turn on that date, and because the question of what it should be, may itself be one of the principal issues in the case. The point was put on behalf of the United Kingdom in the *Minquiers* case as follows:⁴

'... the theory of the critical date involves . . . that, whatever was the position at the date determined to be the critical date, such is still the position now. Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them then had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now. . . . 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 as it then existed. Whatever that situation was, it is deemed in law still to exist; and the rights of the parties are governed by it.'

Now the establishment of the critical date in this sense may be a delicate matter. It is no longer an obvious choice but a question for

¹ *P.C.I.J.*, Series A/B No. 53, at p. 45.

² Sir H. Lauterpacht, *The Development of International Law by the International Court* (1956), p. 242.

³ For analysis of this whole question reference should be made to Sir Gerald Fitzmaurice's article in *British Year Book of International Law*, vol. 32 (1955-6), pp. 20 ff. This article is also a mine of valuable material on many aspects of the acquisition of territorial sovereignty.

⁴ In the speech of Sir Gerald, who was counsel for the United Kingdom—*I.C.J. Pleadings*, vol. 2, p. 64.

careful decision, and may be a matter of contention between the parties; as indeed it was in the *Minquiers and Ecrehos* case. It will be remembered that the French, relying upon a Fisheries Agreement of 1839, tried to establish that it was only necessary for them to show a French title at that date in order to exclude the relevance of evidence of acts of sovereignty by either party subsequent to 1839. It would have been a great advantage to the French if this had been accepted by the Court as the critical date, because the bulk of acts of sovereignty since 1839 greatly favoured the British case. The British argument naturally favoured a more recent critical date. The significance of the nice adjustment of the critical date in a case of this kind was explained by the United Kingdom counsel, Sir Gerald Fitzmaurice:¹

. . . 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 in principle be the date on which they agreed to submit the dispute to a tribunal. However, there may be cases where the critical date should nevertheless be some other date . . . one object of the critical date is to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined, as when the party in question is rejecting or evading a settlement, for instance, refusing to go to arbitration. . . .

So much for not putting the critical date too late. But equally, if not more important, is it not to put the critical date too *early*, thereby shutting out acts of the parties that were carried out at a time when each of them was perfectly entitled to take any legitimate steps in the assertion or prosecution of its claim. . . . To put the critical date too early would be to place a premium on the making of paper claims which the country concerned need not then follow up or insist upon, because it would be secure in the knowledge that the mere making of the claim would operate to freeze the legal position and to shut out or nullify the value of all subsequent acts of the other party.

In the event the Court in effect avoided giving a ruling on what was the critical date. They noted that no claim to sovereignty had in fact been made by France till 1886 in the case of the *Ecrehos* and 1888 in the case of the *Minquiers*. They held that in the special circumstances of the case, acts subsequent to those dates should be considered by the Court unless any such act had been taken by a party deliberately for the purpose of improving its legal position. Thus, in effect, the Court rejected the French argument as to the critical date; but neither did they, expressly at least, rule in favour of the British case that the critical date was 1950, i.e. the date of the *compromis*.

¹ *Loc. cit.*, pp. 68-9.

Perhaps the Court was wise not to attempt a more exact pronouncement, and it may be thought not without significance that they were seemingly able to decide the case by a unanimous verdict without precisely indicating what they regarded as the critical date. It is of course true that cases of this kind will usually involve one or more dates or periods that are critical for the decision of the issue; just as it is also obvious that the choice of date may favour one party or the other, with the result that this concept of the critical date has already become an important and subtle tool of the pleader's art. There may be some danger, however, in allowing what is basically no more than a descriptive term, or at most a technique of analysis or exposition, to develop into a doctrine or even into a 'rule'. For the term seems to be used in several quite different senses.

It is no doubt true, for instance, that, looking at the whole course of a dispute, it may be said to have 'crystallized' at a certain moment (though the term is hardly one with a very certain content, and indeed may often beg the question at issue), and that justice may require that some actions by a party subsequent to this moment should not be permitted to improve his legal position in the forthcoming litigation of the dispute. But a critical date in this sense can only be decided by looking at the quality of the actions in question and making the decision as to what may be genuine evidence of the exercise of sovereignty and what must be rejected as mere manœuvre for position. It is this consideration that tells the Court the critical date: not a critical date, discoverable by some a priori method, which, having been established, automatically sheds the genuine evidence to one side and the irrelevant to the other. To speak and think of a critical date in this sense is no doubt convenient; but if inflated into a doctrine, there may be some danger that attention is diverted from the substance of the matter to an accident of timing.

But the 'critical date' spoken of in, for example, the *Island of Palmas* case is quite different from the use of the term in relation to the crystallizing of a dispute. Whenever a party claims title through a cession the state of affairs at the date of the treaty of cession must be critical, for it remains his root of title. This is so entirely irrespective of whether a dispute involving that title should reach a stage of 'crystallization'; and indeed, the date of cession is critical to the establishment of that title even if no dispute arises. Now suppose, for example, in the *Island of Palmas* case it had been found that the United States did derive a complete title to the island from the cession. There might still have remained the question whether this

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sovereignty was maintained, so that a subsequent occupation by another party would precipitate another critical date. And even then there might still remain the question of critical date for the crystallization of a dispute arising thereupon. But once it becomes apparent that a simple dispute may involve two or more critical dates, the definition of the critical date, as a date after which any actions of the parties are ineffective to change the position, becomes impossible to maintain and the dates become thereupon only relatively critical. Moreover, one date may be relevant to title in an absolute sense; another may be relevant to *proof* of it in a particular litigation.

It may be open to some question, therefore, how far it is useful to press these many and varied considerations of substantive law into the one mould, simply because they all may involve situations where a particular date is critical.

CONCLUSIONS

If we may now glance back briefly over this discussion as a whole, I think perhaps we may say this by way of summary. The idea of the actual exercise of effective sovereign control as a source of title has been undergoing considerable reform and elaboration. The rule of the intertemporal law still insists that an act must be characterized in accordance with the law in force at the time it was done, but the other branch of the rule also insists upon the importance of a continued display of sovereignty, so that international law in this respect looks, so to speak, not only to a good root of title but also requires an actual vigorous plant. The rule of the critical date, however, modifies this somewhat by providing in effect a technique by which consideration may be focused on that moment in the course of the continuity of display which most aptly enables justice to be done in a situation of rival claims. At the same time the notion of consolidation illuminates the true nature of the process of constructing a legal title and enables the law to begin to move away from its constraining private law analogies and perhaps closer towards the climate of the practice of States. It does, however, raise some new problems in relation to the place of Recognition, acquiescence and estoppel in this process; and these problems we must look at more closely on the next occasion.

Chapter III

RECOGNITION, ACQUIESCENCE AND ESTOPPEL

IN this lecture I want to consider the place of recognition, acquiescence and estoppel in questions of title to territorial sovereignty.

Obviously there is an important difference between recognition and acquiescence, even though it may not always be easy in practical situations to distinguish the one from the other especially where an implied or tacit recognition is in point. Whereas recognition, even though it be tacit, is the adoption of a positive acknowledgment on the part of a State, acquiescence may arise from a mere omission to protest against a situation where a right to protest existed and its exercise was called for.¹ Both recognition and acquiescence, however, are manifestations of a legally operative consent on the part of a State. In what ways, then, are these different forms of acknowledgment by States relevant to the acquisition of a title to territorial sovereignty?

One does not need to look very far before discovering that both in the practice of States and the jurisprudence of international tribunals, these manifestations of consent have been regarded as important elements in the make-up of territorial titles. But it is by no means a simple matter. In order to understand it we must first attempt to classify the different situations where consent of third States may be relevant. It may be useful to think of the problem as being partly at least one of the relativity of rights: how far is the consent of a State necessary in order that a right may be available in international law against that State; how far is the consent of one or more States required to constitute a title enforceable *erga omnes*?²

The situation where a new State has arisen on territory formerly

¹ 'Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection': see MacGibbon, *British Year Book of International Law*, vol. 31 (1954), p. 143.

² This aspect of the problem is very helpfully discussed in Charpentier, *La Reconnaissance internationale et l'Evolution du Droit des Gens* (1956), chap. II.

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subject to another sovereignty is one to which we have already had occasion to refer in the first lecture. It is a situation where recognition plays a primary and perhaps decisive role in the constitution of a territorial title. In such a situation it is ordinarily impracticable to separate out from the process of the creation of the new State the single element of title to sovereignty over its territory; for each is a constituent of the other.

How far in this situation the function of recognition may be constitutive of the title depends obviously upon one's view of the nature of recognition; a question which would require too great a digression to enter upon here. But in so far as the new State's title to its territory may be regarded as a product of the mere fact of its existence in the territory, there is clearly an affinity with those modes by which title may be changed from one existing State to another by reason of the fact of its apprehension and exercise. There is this difference, however: in the case of a new State there is no room for lapse of time as an element in title. However gradual may be the development of an entity to the full stature of Statehood there must be some moment of time at which that full personality is judged to have been attained, and this moment of time at which independent Statehood is attained is unavoidably to be regarded as a root of title to territory. It is true that the operation of this regime may depend upon a series of recognitions which occur at different times and this, even in spite of the retroactivity of recognition, must result in a fragmentation of title which seems foreign to the very notion of title. There is in fact room for a process of consolidation, but one in which the mere passage of time plays no part. This fragmentation of the elements of title is no doubt inelegant but unavoidable so long as recognition lacks any collective machinery.

It is to be observed, however, that even where a new person of the law is created—a new sovereign State—international law does not allow that it begins its legal life with a *tabula rasa*. International law has established a principle of State succession and to this principle of succession the succession to territory is obviously a key. Thus we are told that even a new State will inherit real rights or obligations attaching to the territory even if its title to the territory may in one sense be a new and an original one. And by the same token it would seem to follow that, if it inherits a parcel of territory the frontiers of which are themselves controversial, it inherits subject so to speak to the dispute: in other words that a third State's claim to a part of the territory is not defeated merely because the territory passes to a

new State; for a title to sovereignty—if the claim be a valid one—is the ‘real’ right *par excellence*. This is assuming, of course, that the claimant State has not itself recognized the title of the new State to the territory. Yet this can presumably apply only to questions of the relatively minor frontier class. For if the new State, to take the case at the other extreme, is established with the disputed territory as its sole territory, and its Statehood is recognized, it would seem that another claim to sovereignty over the territory is defeated. In short it is only where there is room for doubt or ambiguity in the definition of the new State’s territory that a claim against the territory will survive. A sufficient number of recognitions of the new State clearly implying recognition of its title to the disputed territory would presumably destroy the claim.

Leaving aside now the question of the emergence of a new State, the question remains what part recognition may play in the acquisition of territorial sovereignty by an already existing State?

In the first place it is, of course, obvious that all forms of acknowledgment of a legal or factual position may be of great probative or evidentiary value even when not themselves an element in the substantive law of title. Recognition—and also acquiescence—is likely, therefore, for that reason alone, to have a prominent place in territorial questions. That it does do so is clear enough. One need look no further than the *Eastern Greenland* case to see both the anxiety of Denmark to collect recognitions from third States of her pretensions over Greenland, and the importance which the Court was willing to attach to them. The question remains how far if at all it is itself a root of title or at least an ingredient in a root of title and not merely evidence. Admittedly the distinction may be a nice one but it is nevertheless important. First, let us consider this question in relation to what may be called the orthodox modes of acquisition.

If occupation, or cession, for example, are indeed modes by which the law allows territorial sovereignty can be acquired, the presumption is that they are in themselves sufficient for that purpose; that whatever assistance recognitions may be in proving title by occupation—or cession—recognition is not a *condition* for the acquisition of title. And this is surely the true position. If a State effectively occupies a territory which is *res nullius*, it acquires an immediate title opposable to the whole world. In so far as recognition of that title may be required it is able legally to demand it. To say that recognition constitutes the title is to put the cart before the horse.

Indeed, in the case of occupation it is doubtful whether even pub-

lication of the claim is required, let alone its recognition. There is, it is true, some authority for the view that publicity of an alleged occupation is a requirement of international law;¹ and the analogy of municipal laws, which have tended always to require publicity of conveyances of land, argues to the same effect. But the major opinion seems to be that publicity is not a requirement of international law.² The conclusion seems to be, therefore, that recognition and questions of acquiescence are strictly irrelevant to title by occupation.³

When we turn to consider any form of prescription, however, we find quite another situation. In prescription proceeding from an adverse possession at least, an acquiescence on the part of the State prescribed against is of the essence of the process. And as far as recognition goes, if that State were to recognize the claimant's title then *cadit quaestio*. Recognition or acquiescence on the part of third States, however, must strictly be irrelevant in this situation. They cannot have any *locus standi* in the matter, except perhaps in so far as recognition by third States may be relevant evidence showing that the State prescribed against must have been aware of the prescribing State's claim: for some measure of publicity is here an essential ingredient, since the holding must be *nec vi, nec clam, nec precario*.

But there are two situations in which the attitude of States generally—and not merely of a particular claimant State—is more directly relevant to an issue of title. Firstly, where the question at issue is not title to a parcel of land territory but to a portion of what is alternatively claimed to be high seas, the attitude of all States, whether demonstrated in recognition or forms of acquiescence, is certainly relevant. For here the object of the prescription is not one State's territory but a *res communis*. It is in this situation therefore that the

¹ See e.g. Westlake, *International Law*, Part I (1904), pp. 100–1, who also cites Lord Stowell in *The Fama*, 5 C. Rob., at p. 115.

² See the categorical statements in Oppenheim, *International Law*, vol. 1, 8th ed., by Lauterpacht (1955), p. 559: 'No rule of the Law of Nations exists which makes notification of occupation to other States a necessary condition of its validity. As regards all future occupations on the African coast the parties to the General Act of the Berlin Congo Conference of 1885 stipulated that occupation should be notified to one another. But this Act has been abrogated so far as the signatories of the Convention of St. Germain of September 10, 1919, are concerned.'

³ To the same effect, see Charpentier, *op. cit.*, pp. 70–4, where he examines the precedents and concludes: 'Toute cette pratique peut être résumée en une phrase: *l'exercice effectif des compétences gouvernementales sur un territoire sans maître est immédiatement opposable aux États tiers sans leur assentiment*' (original italics).

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notion of a consolidation of a historic title is peculiarly apposite—and it is in this situation be it noted that the idea was articulated in the *Norwegian Fisheries* case.

Secondly, the attitude of third States is directly relevant, even in an issue strictly between two claimant States, and where there is no question of prescription against a *res communis*, if the process involved is of what may be called the immemorial possession rather than the adverse possession kind. For here obviously general 'repute' is indeed of the essence of the process of acquisition.

Now of course it must immediately be added that although we can for the purposes of a theoretical discussion draw a distinction between occupation, prescription and historic title, a moment's reflection shows that this distinction may well be blurred in any actual case: not only the legal interpretation of the facts but the facts themselves may be both disputed and unclear; in many actual cases, occupation, prescription or historic title may be alternative and even complementary legal interpretations of the same facts. For our present purposes it is enough to note that it means that in a real situation, recognition and also indeed acquiescence are almost always *prima facie* relevant considerations, and factors to be taken into consideration by any international tribunal faced with a dispute over territorial sovereignty of this kind;¹ and we must therefore always be on guard against thinking as if international law has ever known anything having the remotest resemblance to forms of action. It is this situation that the notion of a historic consolidation goes some way to explaining; though, as we have seen, some of its implications are still far from clear.

It must be emphasized again, however, that it is only in a context of effective possession that recognition of a situation by third States can be a mode of consolidation of title.² It may, so to speak, assist

¹ See MacGibbon, *loc. cit.*, p. 143: 'Rights which have been acquired in clear conformity with existing law have no need of the doctrine of acquiescence to confirm their validity. However, the line which divides conduct which international law permits from that which it prohibits is in many cases not susceptible of precise delimitation. A course of action which in one period may have been expressly prohibited may, by dint of its continued repetition coupled with the consent of other States, be acceptable under rules obtaining in a later period. It is not surprising that, in a system of law which is not fully developed, the extent to which a novel practice may be regarded as being in conformity with existing law should be unpredictable. In the absence of a satisfactory compulsory procedure for authoritative judicial ascertainment the legality of such practices may depend upon the measure in which they enjoy the express approval of other States, or, in the course of time, their acquiescence.' For an application of this idea see p. 62 below.

² See above at p. 26.

and accelerate a process for which the condition *sine qua non* is an existing effective possession; there is no evidence from practice to suggest that recognition by third States can by itself operate to create a title to territory not in possession.¹

ESTOPPEL

It is tempting to express these effects of recognition and even of acquiescence in terms of estoppel or, if you prefer, the principle of preclusion. That such a principle is accepted in international law is surely now beyond doubt: as McNair puts it, 'It is reasonable to expect that any legal system should possess a rule designed to prevent a person who makes or concurs in a statement upon which another person in privity with him relies to the extent of changing his position, from later asserting a different state of affairs.'²

The first thing to be said is that the principle of estoppel in international law must be approached with some caution; for once loosed from the many technical shackles that severely limit its operation in the common law, from which it is after all by analogy derived, it is in danger of seeming to be applicable to almost any situation in which a State has expressly or tacitly adopted some attitude towards a legal question. This tends only to obscure the actual legal questions and principles involved. An impressive warning against the temptation to put more weight upon estoppel than it can rightly bear is to be found in the separate opinion of Judge Sir Gerald Fitzmaurice in the *Temple* case.³ This is so important that I shall beg your leave to quote an extensive passage in full.

¹ See Dr. Schwarzenberger, in *American Journal of International Law*, vol. 51 (1957), at p. 317: 'Subject to one reservation, recognition of the territorial claims of another State cannot affect adversely the legal position of the effective occupant [here there is a reference to 2 Int. Arb. Awards 829 at 846 *et. seq.* Also *ibid.*, 868]. The proviso which must be made is that such a recognition of the claims of another State deprives the State which is in actual control of the territory of the chance of obtaining recognition of its own rights.'

² *The Law of Treaties* (1961), p. 485.

³ *I.C.J. Reports*, 1962, at p. 63. See also the neat definition of this aspect of estoppel in M. Paul Reuter's argument in the oral hearings of the same case (4/5 March, 1962): 'On peut définir l'estoppel tel qu'il semble reçu en droit international comme une exception, opposée à une allégation qui, bien que conforme peut-être à la réalité des faits, est contraire à une attitude antérieure d'une des parties. Sans avoir à entrer ici dans toutes les finesses, qui sont grandes, de l'analyse juridique anglo-saxonne, il faut simplement relever que dans les relations internationales la doctrine fait de l'estoppel un mécanisme répondant au principe général de la bonne foi et au besoin de sécurité qui régit les sociétés humaines.'

However, in those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel, although the language of that rule is, in practice, often employed to describe the situation. Thus it may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel. Such a plea is essentially a means of excluding a denial that might be *correct*—irrespective of its correctness. It prevents the assertion of what might in fact be *true*. Its use must in consequence be subject to certain limitations. The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.

Now it is, of course, true that the precise limits of estoppel in international law are and must remain a question of some doubt until at least there has developed a much more considerable jurisprudence on the subject; but this fact merely emphasizes the importance of proceeding cautiously, especially in questions of title. It is doubtful whether estoppel or preclusion can ever be itself a root of title to sovereignty. It may assist in the determination of a title based on some other ground but there probably is no such thing as a title by estoppel.¹

ESTOPPEL AND RECOGNITION

Let us consider first how far an estoppel worked by recognition may affect a question of territorial title. Dr. Schwarzenberger, in an important article on the subject, puts the matter in a striking way. The pliability of recognition as a general device of international law makes recognition an eminently suitable means for the purpose of establishing the validity of a territorial claim in relation to other States. However weak a title may be, and irrespective of any other criterion, recognition estops the State which has recognized the title from contesting its validity at any future time.²

Subject possibly to a qualification which will be indicated in a moment, this statement is, with respect, unexceptionable. The estoppel, if it operates at all, will operate irrespective of any actual weak-

¹ Cf. however n. 3 on p. 50 below.

² *American Journal of International Law* (1957), p. 316.

ness, or even the existence, of the title recognized for, as we have just learned from Judge Fitzmaurice, an estoppel 'is essentially a means of excluding a denial that might be *correct*—irrespective of its correctness'.

But before we can understand the relevance of this statement we have to ask the further question how far the opinion of the State subject to the estoppel may or may not be relevant to the establishment of a particular title. If the recognizing State be the only other possible claimant, the recognition may be decisive. One need seek no further than the *Eastern Greenland* case for authority. It will be remembered that the Court attached great weight to certain treaties between Norway and Denmark containing exclusion clauses by which Norway had in effect recognized the Danish claim over Eastern Greenland. The court said:

In accepting these bilateral and multilateral agreements as binding upon herself, 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, and, in consequence, from proceeding to occupy it.¹

And, as Lord McNair says of this passage: 'If you are not going to call that estoppel, you must find another name for it.'²

¹ *P.C.I.J. Reports*, Series A, No. 53, at p. 68.

² *The Law of Treaties* (1962), p. 487. Lord McNair is here discussing the question how far the conception of estoppel on being admitted into international law must be the same as the common law conception. 'In particular,' he continues, 'it is questionable whether the common law requirement of action by one party to his detriment on the faith of a statement made by the other party will or should be regarded by international law as a necessary element. No such factor can be said to be present—except by somewhat strained reasoning—in the illustration cited above by the *Eastern Greenland* judgment. Yet can it be doubted that the Court was entitled to hold that the two treaties which described "Greenland" as Danish territory *debarred* Norway from making an assertion to the contrary, in spite of the fact that it is difficult to say that Denmark acted upon these statements to her detriment?'

On this particular question, however, see now Judge Sir Gerald Fitzmaurice in the *Temple* case, *loc. cit.*, at p. 63 where he says the following: 'The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have "relied upon" the statements or conduct of the other party, either to its own detriment or to the other's advantage. The often invoked necessity for a consequent "change of position" on the part of the party invoking preclusion or estoppel is implied in this. A frequent source of misapprehension in this connection is the assumption that change of position means that the party invoking preclusion or estoppel must have been led to change its own position, by action it has itself taken consequent on the statements or conduct of the other party. It certainly includes that: but what it really means is that these statements, or this conduct, must have brought about a change in the *relative* positions of the parties, worsening that of the one, or improving that of the other, or both.'

See also Bowett, *British Year Book of International Law*, vol. 33, 1957, p. 193.

On the other hand, where the recognition in question is on the part of a third State having itself no possible title to the territory, the position, as we have already seen, is quite different. The recognition of the third State cannot affect the title unless perhaps when a considerable number of other States have likewise recognized title, in which case the cumulative effect of the recognitions may presumably form an ingredient of a process of consolidation. What is in question, perhaps, is whether any useful purpose is served by regarding this process as estoppel.¹ A series of recognitions of an alleged title has certainly some probative value,² and a refusal of recognition on the other hand may seriously jeopardize a claim. It may be the case, as Dr. Schwarzenberger asserts, that 'the device of recognition can be employed as an independent root of title'.³ What is open to doubt, however, is how far it is useful or even accurate to think of the function of recognition in this regard as an estoppel. For it is the actual recognition of an alleged title by a third State that is the operative factor; not the further and independent proposition that in certain circumstances the recognizing State may later find itself estopped from denying the validity of the title. The question of estoppel is indeed only a way of asking how far and in what circumstances a recognition can be denied or withdrawn. It does not describe its effect.

Moreover, it is by no means clear that Recognition always does work an estoppel. There is a view which, whilst not uncontroverted, has strong authority to support it, that a *de facto* recognition is by its very nature tentative, certainly less committal than a *de jure* recognition, and therefore that it may at any rate in certain circumstances be withdrawn.⁴ This is as much as to say that in these cir-

¹ For the proposition that an estoppel will normally only have effect as such between parties to the statement and their privies, see Bowett, *op. cit.*, p. 182.

² A true estoppel, however, is to be distinguished from admissions, representations and so on that merely have *some* probative value. An estoppel, if it operates at all, is peremptory. See Bowett, *British Year Book of International Law*, vol. 33 (1957), at p. 195. For an example of such an admission see *Minquiers and Ecrehos* case, *I.C.J. Reports*, 1953, at p. 71.

³ *Loc. cit.*, p. 318.

⁴ Lauterpacht, *Recognition in International Law* (1947), pp. 349-57, where it is also suggested indeed that, within limits, *de jure* recognition may also be withdrawn.

There is in fact a case of the withdrawal of a *de jure* recognition of an annexation of territory, when in 1940 it was stated that the '*de jure* recognition by His Majesty's Government of the Italian conquest of Ethiopia had been withdrawn'. See *Azash Kebbede Tesema v. Italian Government*, *Annual Digest*, 1938-40, Case No. 36. It is also cited and commented upon in Lauterpacht, *op. cit.*, p. 356, where he says: 'In so far as the recognition of new titles has, in contradistinction

cumstances a recognition *de facto* does not work an estoppel in any case.¹

ESTOPPEL AND ACQUIESCENCE

That there may be a certain relationship between an acquiescence that operates in law and an estoppel is apparent,² though the two are nevertheless quite distinct concepts. Thus, Sir Gerald Fitzmaurice, in the *Temple* case,³ says: '[the principle of preclusion] is quite distinct theoretically from the notion of acquiescence. But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect.' An apt illustration of this position is to be found in a territorial claim: the *Costa Rica—Nicaragua Boundary* case,⁴ where Nicaragua argued that a treaty of 1858 which defined the frontier was not binding because a third State, San Salvador, had not ratified it in its capacity of guarantor. The arbitrator rejected this contention, pointing out that Nicaragua had in fact acquiesced in the validity of the treaty for ten or twelve years. He said:

But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. . . . Neither may now be heard to allege, as reasons for rescinding this treaty, any facts which existed and were known at the time of its consummation.

An estoppel of this kind may then, in certain circumstances, proceed from acquiescence and may therefore affect a question of territorial title depending for example on the interpretation of a treaty⁵ fixing a boundary, or a treaty of cession, or depending upon prescription of whichever kind. As with recognition, much depends upon the nature of the right claimed. In a frontier dispute involving two States

to other forms of recognition, the character of a contractual arrangement, the British action cannot be regarded as arbitrary.'

¹ Cf. also the *Tinoco* case where it was held that *non*-recognition of a government did not necessarily work an estoppel. See *American Journal of International Law*, vol. 18 (1924), p. 147.

² On this subject see especially Dr. Bowett's illuminating article cited above.

³ *I.C.J. Reports*, 1962, p. 62.

⁴ Cited by Bowett, *loc. cit.* See also Moore's *International Arbitrations*, vol. 2, p. 1945.

⁵ See the *Temple* case, *loc. cit.*, for example.

an estoppel to which they are both parties may be decisive; on the other hand if the claim is, as in the *Norwegian Fisheries* case, a claim to sovereignty over what must alternatively be *res communis*, an estoppel against one State cannot be conclusive, for it is the acquiescence of States generally that is here in point. For this reason the notions of estoppel and acquiescence ought perhaps to be kept distinct, as also the concept of prescription. As Dr. Bowett says of the distinction between acquiescence and estoppel: 'The confusion of these two notions will only serve to lessen the burden of proving the acquisition of title by prescription and, since no requirement of good faith demands such result, it would seem that the use of the doctrine of estoppel in circumstances where prescription ought to be relied on is inadmissible in international law.'¹

Yet this is something of a counsel of perfection and it may be doubted how far it is very likely to be realized in practice; for this is not the way the judicial mind works when presented with the need for decision in a particular case. It is possible, indeed, that the general idea of consolidation—vague as it is—with estoppels making a weighty contribution to the process, will tend to become more attractive to Courts than prescription properly so-called. There is a suggestive passage from the argument of M. Reuter before the Court in the *Temple* case:

. . . it is our firm conviction that, in a general way, international case law has not thought it necessary to describe the formal processes which confirm the consolidating effect of lapse of time. It is certain that arbitrators

¹ See also Sir Percy Spender's dissenting opinion in the *Temple* case, *I.C.J. Reports*, 1962, p. 131:

'There is a close affinity between prescription, preclusion, recognition, acquiescence and absence of protest. The principle of preclusion is, however, in my view, quite distinct from the concept of recognition (or acquiescence), though the latter may, as any conduct may, go to establish either prescription or preclusion.

'To accord to the concept of recognition by a State of any fact or situation, without more, the legal consequence of a preclusion, not only finds, in my opinion, despite the views of certain writers, no authority as a principle of international law under Article 38 of the Statute of the Court, but provides an invitation to apply to the determination of a case in which recognition of a fact or of a situation is relied upon, considerations which are scarcely distinguishable from considerations *ex aequo et bono*.

'The concepts of recognition and acquiescence are important elements of international law. They are not likely to add to their usefulness if pushed beyond their proper content.

'In the present case any recognition by Siam of Annex I and the line of frontier shown thereon, or any acquiescence by Siam therein, is in my view of evidentiary value only.'

have hesitated to apply in international law any theory of acquisitive prescription and have raised the question, for instance, whether, in certain cases, the theory of estoppel would not provide some factors that could be of use in a territorial litigation [*des éléments utilisables dans un litige territorial*]. The lamented Sir Hersch Lauterpacht pointed this out in his work *Private Law Sources and Analogies of International Law*. He showed how, in the *Alaska Boundary Dispute* in 1903 (p. 235), estoppel had seemed to be an alternative or a substitute for prescription. The same remark was true to a lesser degree in regard to the *Behring Sea Arbitration* (p. 224). It could be shown without difficulty and without labouring the point that though international case law has always attached much weight to facts showing the effective exercise of sovereignty, it does not readily resort to the vocabulary of prescription.¹

THE TEMPLE CASE

Finally, we may not leave estoppel without a rather closer look at the decision of the International Court of Justice in the *Temple* case: a decision on a question of territorial title in which estoppel, acquiescence and recognition all played a prominent role. It will be remembered that the dispute was one between Cambodia and Thailand, each claiming to be sovereign over a small area of frontier territory containing the ruins of an ancient sanctuary and shrine called the Temple of Vihear, situated on an escarpment rising in high cliffs above the Cambodian plain. A treaty of 1904 between Siam (now Thailand) and France (Cambodia having been at that time French Indo-China) provided for the delimitation of the frontier in this area by a frontier commission. A frontier was, it seems, surveyed and fixed, but the evidence was inconclusive as to the question of the line of the frontier at Preah Vihear. Cambodia relied, however, and in the event relied successfully, on the production of a map of 1907, produced by the French authorities at the request of the Siamese, which clearly showed the Temple area as a part of French Indo-China, now Cambodia. It was strenuously and indeed persuasively argued by Thailand that the map was in error with respect to this part of the frontier, because it was not, they said, consonant with the method of fixing the frontier laid down for the commission in the 1904 Treaty. The point, however, on which the Court seized, was that this map, mistaken or no, was accepted by the Thailand Government without protest or even comment. Indeed, the Siamese Prince Damrong thanked the French for the maps and requested another fifteen copies.

¹ *Distr.* 62/50, p. 73.

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It was said for Thailand that there was no requirement upon her to protest the error in the map and that a failure to do so could not affect a change of sovereignty. But to this the Court said:

It is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*¹

And again some importance was attached to what is in effect another series of incidents of which the most important was in 1930 when Prince Damrong paid a state visit to the Temple, where he was received officially by the French Resident for the adjoining Cambodian Province, and with the French flag flying.

The Prince [said the Court] could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction. Thailand did nothing. Furthermore, when Prince Damrong on his return to Bangkok sent the French Resident some photographs of the occasion, he used language that seems to admit that France, through her Resident, had acted as the host country. . . . Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve a title in the face of an obvious rival claim.²

There was much else in the facts of what was indeed a very intricate case. But it was essentially on the considerations of fact that we have just been considering that the Court built its decision. The decision rested squarely on the ground of preclusion, or estoppel, coupled with recognition. Thus:

The Court will now state the conclusions it draws from the facts as above set out.

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a

¹ *I.C.J. Reports*, 1962, p. 23.

² *Ibid.*, pp. 30-1.

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belief that the map was correct. It is now not open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.

The Court however considers that Thailand in 1908–1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory.¹

This was not all, however. There was another clear, and indeed extremely neat, example of an estoppel found by the Court. One of Thailand's contentions was that she had since the promulgation of the map in 1908, and at any rate up to the time she made her own survey in 1934–5, believed that the line on the map and the watershed line laid down in the 1904 Treaty, coincided. Consequently, if she accepted the map line, she had only done so in the mistaken belief that the map line was the line of the watershed. But she also pleaded that the Temple area was Thailand territory as a result of acts of sovereignty that she had performed in the area. The two arguments were evidently inconsistent. If she had really believed that the map indicated the watershed line she must really have believed that the area was Cambodian, in which case her acts on the ground could only be regarded as attempted violations of Cambodian sovereignty. 'The conclusion is,' said the Court, 'that Thailand cannot allege that she was under any misapprehension in accepting the Annex I line, for this is wholly inconsistent with the reason she gives for her acts on the ground, namely that she believed herself to possess sovereignty in this area.'² This is a very neat example of the rule that a party may not blow hot and cold in the same case, thus operating an estoppel by conduct to prevent Thailand from profiting from an allegation irrespective of whether it represented the truth of the matter or not.

It is evident that principles of estoppel or preclusion weighed heavily with the Court. What is not clear from the judgment is whether preclusion was regarded as one among other self-sufficient reasons for decision; or whether it was merely an adjunct of a kind of process of prescription (and certainly considerable weight was attached to the length of time during which Thailand failed to object to the map line); or whether it was regarded as being merely of assistance in a question basically one of treaty interpretation.³

¹ *Ibid.*, p. 32.

² *Ibid.*, p. 33.

³ The latter, for example, is suggested by this passage (p. 35): 'The indication of the line of the watershed in Article I of the 1904 Treaty was itself no more than an obvious and convenient way of describing a frontier line objectively,

Indeed, looking simply to the majority judgment one is hard put to it not to lump all together in an omnibus concept of 'consolidation of title by lapse of time'.¹ What is immediately striking about the case is the exiguous assistance that the Court derived from acts of either party on the ground—acts which indeed by themselves merely indicated a situation of ambiguity.

There is a further question concerning estoppel on which the *Temple* case sheds some new light. Is the rule of estoppel a rule of procedure or evidence merely, or is it a rule of substance? And I take it that the purport of the question is this: if estoppel is an adjectival rule, relevant only to questions of proof, it can only affect an issue of title in the context of a particular dispute before a competent tribunal; but if it be a rule of substance then it will presumably affect title in an absolute sense, irrespective indeed of whether any issue is formulated before a tribunal or not. This is a question, clearly of the first importance, but on which, in the past, different opinions have been expressed.² Little help is to be derived on this point from the Judgment of the Court in the *Temple* case; but in the separate opinions there is formidable authority for the view that it is clearly a rule of substantive law.³ And if this view is correct it is clear that estoppel, where it does operate, can in effect operate itself to shift a title. Indeed this possibility is expressed with some acidity by Sir

though in general terms. There is, however, no reason to think that the Parties attached any special importance to the line of the watershed as such, as compared with the overriding importance, in the interests of finality, of adhering to the map line as eventually delimited and accepted by them. The Court, therefore, feels bound, as a matter of treaty interpretation, to pronounce in favour of the line as mapped in the disputed area.'

¹ The actual phrase is culled from M. Reuter's pleading, though here it was suggested as an alternative to both estoppel and prescription: 'On pourrait aussi, en dehors de l'estoppel et de la prescription acquisitive, se placer sur un autre plan et parler de consolidation d'un titre par le temps; il s'agirait alors d'un mécanisme que l'on serait tenté de qualifier de coutumier.' See *loc. cit.*, p. 73.

² For references see Bowett, *loc. cit.*, p. 176, notes 1 and 2.

³ See Vice-President Alfaro, p. 41: 'In my judgment, the principle is substantive in character. It constitutes a presumption *juris et de jure* in virtue of which a State is held to have abandoned its right if it ever had it, or else that such a State never felt that it had a clear legal title on which it could base opposition to the right asserted or claimed by another State. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its infraction cannot be looked upon as a mere incident of the proceedings.'

'The primary foundation of this principle is the good faith that must prevail in international relations . . .'

Also Judge Fitzmaurice at p. 62 and Sir Percy Spender at p. 143.

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Percy Spender in his weighty dissent in this case, when he concludes as follows:

With profound respect for the Court, I am obliged to say that in my judgment as a result of misapplication of these concepts and an inadmissible extension of them, territory, the sovereignty in which, both by treaty and by the decision of the body appointed under treaty to determine the frontier line, is Thailand's, now becomes vested in Cambodia.¹

This is indeed an impressive warning of the dangers of too facile an acceptance of estoppel as a device for the determination of title. But it is fair to add that, in the passage just cited, Sir Percy is assuming the correctness of his own interpretation of the facts and documents, and that in this interpretation he is at variance with his colleagues who voted the other way. If it were indeed clear that this disputed territory was on the Thai side of the frontier, it would unquestionably be a new and surprising departure if that sovereignty could then be shifted by an estoppel. As the Court saw the facts and documents, however—and a perusal of the pleadings lends weight to their view—the situation was one of considerable dubiety, in that the treaty of 1904 and the records of the boundary commission gave no certain answer to suggest the precise run of this part of the frontier. And it is surely in precisely this kind of dubious situation that there is room for estoppel to work. Thus, as it seems to me, although the case confirms that estoppel may assist, and even assist with decisive effect, in the interpretation of facts, and instruments and acknowledgments relative to the vesting of a title, it still remains true to say that estoppel is not itself a root of title.

¹ *I.C.J. Reports*, 1962, p. 146.

Chapter IV

TITLE AND UNLAWFUL FORCE

WE have already noticed the anomaly that the traditional modes of acquisition of territorial sovereignty include *subjugation*, or *conquest*, as a means of acquiring title; anomalous, because it is at this point that the plan departs somewhat absurdly from the scheme of private law analogies on which it is otherwise based; a departure that must cast doubt upon the validity of the scheme as a whole to be a true law governing the acquisition of title;¹ though it must also be remembered that this latter doubt ultimately relates not to this part of the law alone but to the whole system of the traditional law, for given a system in which war is no illegality it ineluctably follows that victorious war must be allowed to change rights. The question we now have to ask is how far this position may have changed in the modern law? But before turning to this question, let us glance briefly at the meaning of subjugation in the traditional law.

Subjugation (or 'conquest', or 'completed conquest'—the terms are used indifferently), even in the traditional law, required something more than mere seizure of territory by force of arms. Firstly—and this is most important—there is a long-established and firm rule that the military occupant cannot acquire sovereignty at all *durante bello*. Secondly, as with all the other modes, there must be present both the elements of *corpus* and *animus*; in other words, there must be not only the physical apprehension of territory, but also the intention to annex it. Thus, for example, when the Allies occupied Germany after the German unconditional surrender at the close of the Second World War, they specifically disclaimed any intention to annex, although they assumed the 'supreme governmental authority'. Accordingly, the German State continued to exist though temporarily governed by the occupying powers.²

Where one State already administers the territory of another by a lease or other grant of governmental powers, a purported 'annexation' by the occupier obviously should not be regarded as creating a

¹ See Schwarzenberger, *International Law*, 3rd ed. (1957), p. 302.

² See the *Berlin Declaration* of 1945. See Oppenheim, *op. cit.*, p. 568.

title.¹ On the other hand there may presumably be a title by subjugation or conquest, even where there has been no war or even hostilities in the technical sense, where the territory has nevertheless been seized by a display of armed force, as for example in the entry of German forces into Austria in 1938.²

Where, then, stands this law of conquest today? The first observation to be made is that, unless the rule of the intertemporal law is to be totally rejected—and there is neither authority nor reason to do this—old titles by conquest must still remain valid. There may or may not be, in particular cases, *political* reasons why such or such title originating in conquest might now be changed, but this is a different question which we may look at later; what we are thinking about at the moment is not a legislative or quasi-legislative procedure for change but the question of title simply. And if old roots of title are to be dug up and examined against the contemporary rather than the intertemporal law there can be few titles that will escape without question.

But having said that, the question remains: Can conquest create a title today? In the last half century the law concerning the use of force in international relations has undergone a revolutionary change. Beginning with the relatively modest Porter Convention of 1907 forbidding the use of force for the collection of contract debts, and progressing through the provisions of the Covenant of the League of Nations and the Kellogg-Briand Pact of 1928, the new law is finally stated in Article 2(4) of the Charter of the United Nations forbidding the use of force or threat of force in international relations against the territorial integrity or political independence of any State. Moreover, this is not just a question of treaty provisions, for it cannot reasonably be supposed that the customary international law has remained completely static in this considerable period of time and has been uninfluenced by the new attitude towards force.³

¹ E.g. the 'annexation' of Cyprus by Great Britain in 1914 when war broke out between Great Britain and Turkey. The Island had been under British administration since 1878 by virtue of a grant by Turkey. However, by the Treaty of Lausanne of 1923, Art. 20, Turkey recognized the annexation. See *Oppenheim, op. cit.*, p. 567 n. 3.

² See Rousseau, *op. cit.*, p. 422. Cf. Tenancy by attornment in English law: see L.R. [1888] 21 Q.B.D. 384, 394.

³ See Brownlie, *British Year Book of International Law*, vol. 37 (1961), pp. 183 ff. See also Lauterpacht's *Report on the Law of Treaties, Year Book of the International Law Commission, 1953*, vol. 2, p. 150, section 10, where the Reporter explains why he has taken these principles of the Charter 'as expressive of international law in general'. 'The prohibition of force and threats of force,'

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Is it possible in the light of these developments to hold that not merely territory, but the legal right to it, may still be acquired by military conquest? ;

This question has been the subject of some debate; but reason suggests only one answer. To brand as illegal the use of force against the 'territorial integrity' of a State, and yet at the same time to recognize a rape of another's territory by illegal force as being itself a root of legal title to the sovereignty over it, is surely to risk bringing the law into contempt. For it is not simply a question whether it is possible to allow a title which cannot be pleaded without incidentally exhibiting the illegality. Nor is it merely a question of the limits of the maxim *ex injuria jus non oritur*. The question is whether an international crime of the first order can *itself* be pleaded as title because its perpetration has been attended with success. It is not, so to speak, a question whether the thief is to be allowed, as indeed he is allowed in English law at least, to have some sort of possession recognized by the law; the question is whether he is to be permitted to plead the very fact of violent rapine as being itself a root of title *erga omnes*. A wrong may frequently result in a change of title: it can hardly be itself a title.

But we have been assuming that the use of force underlying the conquest was an unlawful use of force. Not every use of force, however, is illegal. It would be altogether too great a digression here to attempt to ascertain the exact limits of the prohibition contained in Article 2(4) of the Charter; but the obvious qualification of its operation is the 'inherent right of self-defence' saved in Article 51. Therefore, it is argued, conquest must remain even today a valid title in those cases where the resort to force is not unlawful. Thus, we find this statement in *Oppenheim*:

On the other hand, the title by conquest remains a valid title in those cases in which the conquering State is not bound by the Charter of the United Nations or by the General Treaty for the Renunciation of War or when, although so bound, the resort to war on its part is not, in the particular case, unlawful.¹

I suggest, with great respect, that this is a misapprehension. First consider the suggestion that a State not a party to the charter or the General Treaty may still acquire territory by conquest. This assumes

he says, must be 'regarded as permanent and, in the case of the substitution of the United Nations by any other general organization of States, as necessarily forming part of the constitution of that organization.'

¹ *Op. cit.*, pp. 574-5.

that the *customary* law concerning the use of force in international relations has unaccountably remained static during the last 50 years. It fails to take account of Article 2(b) of the Charter which provides that

The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

And it also fails to take account of realities, for it is inconceivable that 104 members of the family of nations would be prepared to renounce force, in the sense of Article 2(4) of the Charter, for themselves, and yet recognize such force as a title to sovereignty for one of the very few States not so bound.

More difficult, perhaps, is the suggestion that the State that does not resort to force unlawfully, e.g. resorts to war in self-defence, may still acquire a title by conquest. This idea, though not infrequently heard, is to be regarded with some suspicion. It seems to be based upon a curious assumption that, provided a war is lawful in origin, it goes on being lawful to whatever lengths it may afterwards be pursued.¹ The grave dangers of abuse inherent in any such notion are obvious. Furthermore, the idea rests upon a mistaken understanding of the limits of self-defence. Force used in self-defence—whatever that may mean—is undoubtedly lawful. But it must be proportionate to the threat of immediate danger, and when the threat has been averted the plea of self-defence can no longer be available.² It is true that it may not be easy to say when this point is reached and that to some extent at least it is a matter for the judgment of the actor. But when all allowance has been made for the requirements of the 'rough jurisprudence of nations', it must still be said that it would be a curious law of self-defence that permitted the defender in the course of his defence to seize and keep the resources and territory of the attacker. In any case, it is submitted that any attempt to draw a legal distinction between situations where conquest can nowadays confer a title and those where it cannot is unrealistic and unworkable in a society where there are as yet no courts with compulsory jurisdiction to decide so nice an issue. One need only

¹ Cf. Sir Hersch Lauterpacht in the work cited below at p. 57, dealing with force in connection with treaties, where he says (p. 150): 'For unless force is exercised, even against the aggressor, in accordance with, on behalf of, and within the limits of the law, the fact of aggression is irrelevant—except to the extent that provision against future aggression and just reparation for damage resulting from aggression may legitimately form an element of the treaty.'

² See Brownlie, *loc. cit.*

consider the futility of all efforts recently made to get even the most modest agreement about the meaning of aggression, to realize the dangers of attempting to save certain kinds of 'conquest' as lawful. The lawfulness or otherwise of the use of force may depend upon such matters as the interpretation of ambiguous Resolutions of organs of the United Nations. The limits and meaning of self-defence are in any case questions of great controversy. Questions of title ought not to depend upon the resolution of questions of such dubiety, and which moreover have a large political content. For all these reasons it seems to me that one is driven to accept the position that conquest as a title to territorial sovereignty has ceased to be a part of the law: though, of course, as we have already noticed, the principle of the intertemporal law means that this change cannot be regarded as being retroactive to titles made by conquest in an earlier period.

There is a further point. It may well be true that, in a war which originates in self-defence, it may be impolitic, or even impossible, merely to repel the immediate danger of aggression; and it may be that the situation can only be satisfactorily resolved on the basis of territorial changes. The legal sanction for such changes is, I suggest, found not in an anachronistic appeal to the traditional notion of conquest but rather in an exercise of the will of the international community exercising in this respect a legislative or quasi-legislative role: to this we shall return later.¹

But even if we agree that conquest no longer is of itself a title to territorial sovereignty, we have only dealt with a part—possibly not the most important and certainly not the most difficult part—of the problem of force in relation to title to territorial sovereignty. There remains the case of the treaty of cession forced upon the vanquished State after war. Treaties of cession in the past have probably more often embodied a settlement dictated by force of arms than not. This is, in effect, a conquest under the guise of an ostensibly pacific mode of acquisition. Yet it is a more intractable problem than that of conquest, for here the radical solution is not possible: there can be no question of the complete abolition of cession as a mode of transfer of title, for many cessions clearly are not vitiated by the employment of unlawful armed force. Yet unless we can find that a treaty of cession imposed by illegal force may be vitiated thereby, we shall be forced to reconsider our conclusion regarding straightforward conquest. For otherwise we would be left with an absurd position. The conqueror's legal title could be saved by the device of

¹ See below, p. 60. Also p. 61 n. 1.

imposing a treaty of cession on the defeated State instead of a mere seizure of the territory. There are other difficult questions involved. For instance, if a treaty of cession is, or may be, vitiated because it was imposed as a result of illegal force, does this mean that the treaty is void *ab initio* or merely voidable? Are any parts of the treaty severable? Does it make any difference that there has already been a physical handing over of sovereignty? And so on. All these questions may affect title. But first let us look at the question of general principle.

One of the most thorough-going treatments of this question is to be found in the late Sir Hersch Lauterpacht's Report on the law of treaties made in 1953 for the International Law Commission when he was their special rapporteur on that subject.¹ After describing the changes that have taken place in international law in regard to the use of force, and the effect of such instruments as the Kellogg Pact and the Charter,² he continues:

3. It follows that a treaty imposed by or as the result of force or threats of force resorted to in violation of the principles of these instruments of a fundamental character is invalid by virtue of the operation of the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings. The reasons which in the past have rendered that principle inoperative in the international sphere have now disappeared. Moreover, in so far as war or force or threats of force constitute an internationally illegal act, the results of that illegality—namely, a treaty imposed in connexion with or in consequence thereof—are governed by the principle that an illegal act cannot produce legal rights for the benefit of the law-breaker. That principle—*ex injuria jus non oritur*—recognized by the doctrine of international law and by international tribunals, including the highest international tribunal, is in itself a general principle of law.³

This argument from general principle Sir Hersch Lauterpacht then reinforces by reference to various declarations of State policy and practice: the well-known Stimson doctrine of 1932 of the non-recognition of 'any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928'; the resolution of the Assembly of the League of Nations of 1932 expressing the Stimson doctrine as a legal obligation; the Lima Declaration of 1938 on non-recognition of the acquisition of territory by force, there stated 'as a

¹ U.N. Document A/CN.4/63. It may most conveniently be consulted in *Yearbook of the International Law Commission*, 1953, vol. 2, pp. 90-166, at p. 147, where the heading is *Reality of Consent*.

² See p. 55 n. 1 above.

³ *Ibid.*, p. 148.

fundamental principle of the Public Law of America'; and the draft Declaration of Rights and Duties of States prepared by the International Law Commission in 1949, which laid down in Article 11 that 'every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation' of the obligation to refrain from resorting to war as an instrument of national policy or from the threat or use of force. This 'practice' of non-recognition of the validity of treaties, and especially treaties of cession of territory, imposed by force, constitutes, therefore, an impressive reinforcement of the arguments from principle.¹

The reasons for regarding illegal force as vitiating treaties imposed as a result of it are then summarized by Lauterpacht as follows:

(a) the general principle of law avoiding consensual transactions brought about by duress; (b) the obsolescence of the rule of international law permitting resort to or threats of war or force as a means of redress or of altering rights recognized by international law; (c) the general principle of law denying any law-creating effect, in favour of the law-breaker, to acts which the law stigmatizes as illegal; (d) the practice and the principle of non-recognition.

It is, however, immediately added by way of qualification that 'force ceases to have the character of mere coercion if it is exercised in execution of the law . . . For this reason a treaty or other undertaking imposed by the United Nations, in the course of its enforcement action, upon a State does not invalidate the treaty or undertaking. It must be assumed that force exercised by the collective action of the United Nations is exercised in accordance with its principles.' And indeed, Lauterpacht is also prepared to go on to say that 'the character of legal sanction may occasionally be attributed to the action of one or more States acting for the enforcement of peace or repulsion of aggression'.

Assuming for the moment that these arguments are valid, what is the purport of the statement that a treaty imposed by illegal force is 'vitiating'? For this is an ambiguous term which begs the important

¹ See also Kunz, *American Journal of International Law*, vol. 39, p. 185, where he points out that, 'Juristic doctrine and, to a certain extent, the practice of States in the inter-war period have shown a tendency to hold treaties voidable on account of duress,' and cites the Russian-Turkish Treaty of March 16, 1921, Art. I: 'Neither Contracting Party will recognize treaties which are imposed by force on the other party.' Nevertheless, Professor Kunz concludes that 'as a matter of positive international law, the norm of the validity of treaties imposed by force stands'.

For a different solution of this problem see Scelle, *Recueil des Cours de l'Académie de Droit International*, 1933, vol. 4, p. 675.

question whether the treaty is to be regarded as void *ab initio*—a complete nullity—or voidable. On this point Lauterpacht's reasoning in favour of the view that the treaty is void is convincing.¹ Voidability gives the innocent party an option either to approbate or renounce. This is ludicrously inappropriate in a situation where the innocent party's will has, *ex hypothesi*, been overborne by the deployment of superior force for that very purpose, and on this there seems nothing more that can usefully be said.

It must be emphasized that this thesis that a treaty is vitiated if imposed as a result of unlawful force is put forward by Lauterpacht not as a proposal—not *de lege ferenda*—but as a codification strictly so-called of presently existing law, *de lege lata*. What can be said against this?

The arguments on the other side mainly rely upon the undoubted difficulties of enforcing such a law in the present state of international society. It is sometimes urged, therefore, that it is the sanctions restraining the use of illegal force that must first be looked to; and that it is doubtful wisdom to deny title even to an aggressor as long as there is only inadequate machinery for actually stopping aggression and almost none for reversing its results once it is successfully embarked upon. These arguments are nowhere more convincingly stated than in the Report on the law of treaties made to the International Law Commission by Sir Gerald Fitzmaurice, who succeeded Sir Hersch Lauterpacht as the special rapporteur on this subject. He says this:²

If, however, the case [for regarding treaties made under force or threat of force a nullity] is confined (as it obviously must be) to the use or threat of physical force, what follows? Either the demand for the treaty in question is acceded to, or it is not. If it is not, then *cadit quaestio*. If, *per contra*, it is, then the same compulsion or threat that procured the conclusion of the treaty will ensure its execution; and by the time, if ever, that circumstances permit of its repudiation, it will have been carried out, and many steps taken under it will be irreversible or reversible, if at all, only by further acts of violence. It is this type of consideration, and not indifference to the moral aspects of the question, which has led almost every authority thus far to take the view that it is not practicable to postulate the invalidity of this type of treaty, and that if peace is a paramount consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice—*magna est iustitia et praevalerebit* but *magna est pax: perstat si praestat*.

¹ *Op. cit.*, at p. 151.

² See *Third Report on the Law of Treaties*, Doc. A/CN.4/115 of March 18, 1958, at para. 62.

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This is indeed a formidable difficulty which must be faced squarely.¹ To put it in the form of a crude analogy: Is there any point in denying title to the thief if there is little hope of being able to deny to him the thing itself?

This argument, however, is based frankly upon reasons of expediency. This is not to deny its cogency. But it is to deny its essential relevance when attempting to establish, not what the law ought to be, but what it is. It cannot be denied that the law now stigmatizes as unlawful certain uses of force or threat of force in international relations. This is a revolutionary change—far and away the most important change that has ever been brought about in international law. It is not a paper change imagined by text writers and commentators. It is one, as we have seen, wrought in the changing

¹ This argument had of course been anticipated by Sir Hersch Lauterpacht in his own report. Concerning it he said the following:

'6. It is arguable—and there is some apparent cogency in the argument—that the practical importance of formally sanctioning the invalidity of treaties imposed by force may be inconsiderable. For, it may be said, if international society organized in the United Nations is unable to prevent unlawful recourse to force, it may not be in the position to assert, against the victorious aggressor, the principle sanctioning the invalidity of treaties imposed by force. Moreover, it is arguable that as soon as changed conditions of power permit to challenge the efficacy of treaties imposed by force such change can be effected by a political decision supported by public opinion of the world rather than by reliance on a principle of law. However, the force of these and similar arguments is more apparent than real. A general international organization such as the United Nations may not, on account of the operation of the rule of unanimity or for other reasons, be in a position to prevent aggression, or threats of aggression, or treaties imposed in consequence thereof. However, the circumstances need not necessarily signify the total breakdown either of the international organization or of the rule of law. On the contrary, the prospect that the advantages gained by an imposed treaty may prove illusory, in addition to other reasons, because of the invalidity of the settlement thus imposed—an invalidity to be formally affirmed by international tribunals, by third states and, when conditions permit, by the victim of violence himself—may in itself act as a brake upon designs of unlawful use of force. However that may be, it seems imperative that a codification of the law of treaties under the auspices of the United Nations should elevate to the dignity of a clear rule of international law a general principle of law recognized by all civilized States, namely, that freedom of consent—i.e. absence of constraint exercised otherwise than by law—is an essential condition of the validity of treaties conceived as contractual agreements. In fact, there is room for the view that if the codification of the law of treaties were to achieve no other result than to declare formally the elimination from the body of international law of the traditional rule which disregarded the vitiating effect of duress, a rule which is offensive to accepted notions of law and morality and which is therefore a serious reflection upon the authority of international law—such codification would be desirable for the sake of some such article. At the same time it is of importance to ensure that the principle thus formally incorporated should not be revoked—and abused in a manner inconsistent with the authority and the effectiveness of treaties.'

practice of States over half a century and now solemnly stated in a Charter subscribed by 104 States—almost the whole international community. The principle of effectiveness requires that force thus proscribed should no longer be regarded either as being itself a title or as ousting the general principle of law that a genuine consent is required to create an obligation ostensibly based upon agreement. At a time when States have themselves made this wholly desirable change in the law it may be doubted whether it is open to us virtually to deny efficacy to that change by a process of interpretation based not upon the terms of the law but upon nothing more than a pessimistic view of the chances of enforcing the law in practice. It may well be—and to this we shall turn in a moment—that the law may for some time to come be too weak to prevent the illegal use of force and must therefore find a way of accommodating itself to the resultant situation; but there may be ways of doing this short of acknowledging force to create a title or an imposed treaty to be valid. Various forms of prescription immediately come to mind as the traditional mode by which all laws accommodate themselves to facts without directly compromising principle.

So perhaps we have properly no alternative but to begin from the premise that neither conquest nor a cession imposed by illegal force of themselves confer title.¹

But we cannot leave it there. We still have to face this question, what, given this assumption, is the legal position where a conqueror having no *title* by conquest, is nevertheless in full possession of the territorial power and not apparently to be ousted? If, in fact, the position cannot be reversed—whether because the procedures of the law are not powerful enough or, as is not unlikely, it would in the

¹ Apparently Lord McNair also is of opinion that treaties imposed by illegal force may be vitiated. In his *Law of Treaties* (1961), p. 210, he says:

‘. . . it would now be the duty of an international tribunal to scrutinize closely the circumstances in which a treaty or other international engagement was concluded and to decline to uphold it in favour of a party which had secured another party’s consent by means of the illegal use or threat of force. If the treaty in question before the tribunal was a peace treaty, it would be necessary to examine the question whether the outbreak of the war involved a breach of the Kellogg-Briand Pact or the Charter on the part of the party invoking the peace treaty. Two qualifications must, however, be made: (a) a treaty which is induced by collective armed force exercised on behalf of the international community differs from a treaty induced by coercion for the purpose of securing some national objective, and requires the application of different principles; and (b) the change of attitude referred to above in no way impairs the validity of treaties concluded as the result, say, of economic or financial necessity without any use or threat of force; nearly every treaty contains some provisions which represent hard bargaining and which one of the parties would much like to have avoided.’

new circumstances be politically unwise or even impossible to do so—can title be acquired by the occupier in some other way? The traditional procedure by which the law is adjusted to fact—by which indeed, the law when occasion requires may seem to embrace illegality—is the procedure of recognition. In the present context recognition is apt not only because title is *ex hypothesi* a matter that concerns States in general, but also because the principal effect of the change in the law concerning force, is to make the use of force itself a matter of concern to States generally and not only to the States immediately involved. This is a reversal of the previous position in regard to the use of force, when it could be said that ‘the validity of the title of the subjugating State does not depend upon recognition on the part of other States. Nor is a mere protest of a third State of any legal weight.’¹

Further, we have seen that Sir Hersch Lauterpacht used the evidence of the practice of non-recognition of titles acquired by force as a reinforcement of the argument that such titles are vitiated in the modern law. It seems a reasonable corollary to hold that the international community may, in the alternative, eventually signify assent to the new position and thus by recognition create a title. This possibility in no way contradicts the main proposition that force does not of itself create a title, because the international community would from this point of view be exercising a quasi-legislative function.²

Now it may be objected that where this happens the eventual

¹ Oppenheim, *op. cit.*, p. 573. See also Charpentier, *loc. cit.*, p. 70: ‘L’opposabilité des *cessions territoriales* devait être notée en premier lieu; on s’en tiendra cependant pour le moment à cette mention; en effet, la plupart des traités de cession sont conclus à la suite d’une épreuve de force ou d’une menace de force; or, depuis la fin de la première guerre mondiale, se sont développées les dispositions conventionnelles tendant à interdire le recours à la force, de sorte que la plupart des cessions, maintenant illégales, doivent être tenues pour inopposables. Le principe est donc renversé, et cela à la suite d’un renversement de la norme fondamentale. Le critère de l’opposabilité apparaît donc ici pour ainsi dire expérimentalement; c’est pourquoi le problème de l’opposabilité de l’extension territoriale des compétences par le recours à la force sera étudié dans son ensemble à propos du critère de l’opposabilité. Le principe de l’opposabilité des cessions pacifiques (échange, vente. . .) demeure cependant valable.’

² Cf. also the suggestion by Lauterpacht in *Oppenheim (op. cit.)*, p. 892 n. 2), with regard to the rather difficult question of a peace treaty—difficult because, if the defeated nation cannot give an effective consent to a treaty imposed by force, it is not easy to see how the state of war can in law be terminated. This position, suggests Lauterpacht, ‘can, it would appear, be remedied in such cases only by a quasi-legislative act of third States expressly recognizing the situation created by the treaty . . .’

practical result is little different from that of allowing the aggressor State immediate title in the first place; and that in any case the distinction between recognition as a procedure of acknowledgment of a title and recognition as a quasi-legislative procedure for the creation of a title is a nice one and may depend to some extent on whether recognition is regarded as constitutive or declaratory. It may even be said that for practical purposes in any event this is a distinction without a difference. This may be so. Nevertheless, there is, as it seems to me, a difference of real substance and importance between the automatic acceptance of title created by illegal force as a matter of law, and a procedure for recognition of title in these cases where the acknowledgment of title is left to what is in effect a determination in each case by the international community. And the several instances of non-recognition show in any case that the decision to accord recognition is by no means automatic and may be refused.¹

We must not, of course, fall into the error of supposing that non-recognition alone is ever likely to be an effective sanction of the law. Experience hitherto amply demonstrates that non-recognition alone is an attitude which in any case is often maintainable only for a limited period. And it is obviously true that the effectiveness of this law against force will depend in the long run not upon the denial of title to an aggressor but upon the effectiveness of procedures for stopping the aggression before it produces its fruits. Nevertheless, there may be value in the meantime in an appraisal of the legal situation which avoids the need to make an anticipatory surrender in theory, even before events demand it. It is of course important that the law should not attempt to range too far in the van of practice; but there is no conceivable reason why the law should drag along in the rear of

¹ If this thesis is accepted there remains the further question of the relevance of the distinction, whatever this may amount to, between *de jure* and *de facto* recognition. It will be remembered that in the Manchurian case some States conceived that a recognition *de facto* was compatible with the obligation of non-recognition. Any difference between *de facto* and *de jure* recognition, however, is a question on which there may be several opinions. The practical results, however, are very much the same in either case. Thus, in either case the municipal courts of the recognizing State will assume that recognized State's law is properly in force in the territory concerned, that its decrees or legislation in the territory must be regarded as effective, that the inhabitants have acquired the nationality of the recognized State, and so forth. These are more than mere indicia of title; they are, for the recognized State, the very essence of title; for it already has possession. In short, *quoad* the recognizing State, the margin that remains for discussion has become of a highly theoretical character; and there seems little point in denying the validity of the title when the legal consequences that flow from title have been granted.

practice. It seems reasonable, therefore, to suggest that in this matter the international community should be left freedom to employ the traditional, delicate and highly flexible machinery of recognition; the next stop along this road of advance would be some sort of collectivization of the process, possibly through the United Nations itself which would, one must presume, have been involved already in dealing with the illegal resort to force.

We have thought so far in terms of recognition pure and simple; but it is not to be expected that anything in the nature of a formal recognition of a title to territory will necessarily be thought appropriate by governments in this kind of case.¹ What is rather in point is the various factors of approbation and acceptance that go to make a consolidation of title. Consolidation is an appropriate concept here, because what is required is not only, or even mainly, the acquiescence of the victim of the aggression²—for an apparent acquiescence is the likely result of the use of force anyway—what is in point is the acquiescence and approbation of third States generally. If, on the other hand, States generally make it clear by non-recognition that the position is not considered acceptable, it would seem that the conditions for ordinary prescription are not fulfilled.

There is another reason which seems to me to commend the leaving of this question of title in these cases to await the recognition or non-recognition, as the case may be, of the international community. It must be borne in mind that in a concrete case it could be far from clear whether a cession was in fact imposed as a result of the use either of unlawful force or of the threat of it. The precise limits of Article 2(4) of the Charter are far from being free from doubt. The facts may be ambiguous or dubious. There may be political claims that are not easy to disentangle from the purely legal issues. Moreover, there may be a temptation to a government to make an unfounded allegation of the use of illegal force by another merely as a move in a political game. Ideally issues of this sort could always be tested before a Court of law,³ but we have to fashion a

¹ Though of course this is sometimes done. See e.g. the Exchange of Notes in 1930 between Canada and Norway in which the latter recognized British sovereignty over the Otto Sverdrup Islands (Cmd. 3875).

² It is clear that in these circumstances the idea of estoppel should ordinarily be eschewed. A failure to protest against the breach of a fundamental norm of international law can never work an estoppel; more especially since the deployment of force may itself be the reason for the failure to protest.

³ Lauterpacht's proposal to the I.L.C. (*loc. cit.*) proposed, *de lege ferenda*, that the International Court of Justice be given a jurisdiction, at the request of any State, to declare as invalid treaties vitiated by force.

law which will operate in a society where as yet there is no system of compulsory jurisdiction. Admittedly the International Court of Justice has an appropriate jurisdiction if the parties are prepared to submit to it; but it is unlikely that a government prepared to use illegal force will have left itself open to attack in the International Court. In the absence of jurisdiction enabling a judicial determination there is no alternative but to leave the determination of the issues to states working through to the long-standing, traditional procedures of recognition.

Indeed there may be another reason for this. Although in a well-ordered society a question of title must be subject to determination by a court of law, it must be remembered that in a well-ordered society a title may also, for good political reasons, be changed by legislation. It is well to bear in mind that the international society lacks not only a court of law with compulsory jurisdiction but also lacks any legislature at all. But the working of the general opinion of international society through recognition or non-recognition can at least in some measure take account of political issues as well as purely legal ones. For a court is not necessarily the best kind of body to decide issues of this kind. It is true that a situation in which abstract title may mean so little in terms of beneficial enjoyment and where the law is easily bent by the facts, is not without danger both to the eventual further development of the law and to the respect which ought to be due to it; and it is tempting, therefore, to look forward to a stage when, through an International Court enjoying general compulsory jurisdiction, the illegal seizure of territory may be remedied by an enforceable order for restitution, instead of the present situation where the aggressor may perhaps with some confidence await the adjustment of the law to accommodate his wrongful act. But here again the seductive private law analogy may be very misleading. For what is in question is not the only possession of an area territory but the exercise of powers of government over a people; whether one legal order be substituted for another, and whether the entire way of life of a people shall be changed. Thus considered, it becomes clear that anything like an action for ejectment, however good the title, must be approached at least with great caution. It is not difficult to imagine situations in which the position of an international court, faced with the task of deciding, perhaps over a period of a year or more, on the basis of legal title, the destiny of a vigorous people with a will of its own, might become quite untenable.

FORCIBLE SELF-HELP

It must be borne in mind that although the use of illegal force and the question of title are very closely linked they are nonetheless distinct questions. Most discussions of the effect of the use of illegal force on title assume the case where the aggressor forcibly seized territory to which he had no existing title. But there is also the case where the user of force is merely seeking to recover that to which he believes he already has title. And it must be borne in mind that, whether or not the aggressor is indeed entitled, most aggressors either believe that they are, or allege that they are, in some way entitled to sovereignty over the territory they seek to take by force.

For the lack of compulsory jurisdiction works both ways. It not only means that the aggressor is probably under no legal obligation to appear to a summons before the court to answer the charge of the victim: it means also that a State that has a well-founded legal claim may also be without remedy against a State that refuses both redress and judicial determination. In these circumstances there is always a danger that a State that has what it believes to be a legitimate claim may be tempted, if it has the power, to resort to self-help. The case is conceivable, therefore—though unlikely because of the close link between title and consolidated possession—where the State that has seized territory from another by the use of apparently illegal force is found to have the better title. What then is the legal position?

In such a position a Court faced with an action on the question of title would clearly have no alternative, supposing its jurisdiction could be invoked, but to confirm the title of the alleged aggressor. If international law had developed possessory remedies as such, no doubt the plaintiff might ask successfully for the restoration of the possession of which it has been newly deprived, leaving the aggressor to bring another action to prove his superior title to sovereignty over the territory. But the case only needs to be put to show how completely inappropriate to the international scene is any sophisticated distinction between possession and title. A people cannot be handed over to another State as part of an interlocutory process.

Although the Court would in this case be under the necessity of declaring that the forceful occupier had title, it would of course be some title other than, and prior to, the conquest or forced cession. And furthermore, by the same token, the use of force would be found to be justified, because international law in no wise prohibits the use of force by a State within its own territory. Thus we have

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here an instance where a user of force would have done no more than to repossess his own; though this is also no more than what he would have been able to achieve through the courts if the international court enjoyed a compulsory jurisdiction. This is clearly a situation of some danger because of course the question of title may be dubious and there is therefore a temptation perhaps to dress up a trumpety claim as thus justifying the use of force: but this is a question we shall be looking at more closely in the next lecture. In any case it is unavoidable in a society which seeks to make self-help illegal whilst at the same time failing to make the alternative judicial remedy compulsory.

CONCLUSIONS

If one may now attempt to draw together some conclusions on this admittedly difficult and controversial aspect of the law of territorial sovereignty, they might perhaps be as follows.

√(a) The prohibition of the use of force or threat of force in international relations rests not only upon the Charter of the United Nations and its antecedent instruments but has probably also become a part of the general customary international law. It seems therefore impossible any longer to concede that the successful seizure of another's territory by force, i.e. conquest, or subjugation, may be itself a lawful title to the territory.

(b) This carries with it the further conclusion that a cession imposed by illegal force is void, for otherwise a conquest could be saved from the sanction of the law by the mere artifice of changing the mode of transfer of sovereignty. The general principles of law that consensual obligations cannot be founded in force, and that *ex injuria jus non oritur* lead to the same conclusion.

(c) Nevertheless, until the sanctions against the use of force are made more effective, and also until some general form of compulsory jurisdiction over disputes is realized, it is necessary to consider the legal position, in regard to title, of the State that has successfully seized possession of territory by illegal force and seems likely to stay. It is suggested that in these circumstances it may eventually come about that a title by consolidation is acquired through recognitions or other forms of acknowledgment of the position expressive of the will of the international community. On the other hand the general reaction of third States may be to adopt an attitude of non-recognition; and in these circumstances it seems illogical to suppose that

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any form of prescription even by adverse possession could begin to run.

(d) It must be remembered that, although closely linked in a number of ways, title and the use of illegal force are distinct questions: as is at once apparent when it is remembered that the putative aggressor may be in fact the one who is entitled.

Note: the thesis that a cession imposed by unlawful force is invalid is supported in two Dutch municipal court decisions. See *Amato Narodni Podnik v. Julius Kleinwerth Musikinstrumentenfabrik*, I.L.R. 1957, p. 435; and *Ratz-Lienert and Klein v. Nederlands Beheers-Institut*, I.L.R. 1957, p. 536.

Chapter V

LEGAL CLAIMS AND POLITICAL CLAIMS

WE noticed at the outset of these lectures that the orthodox rules governing the acquisition of territorial sovereignty seem to have played a relatively minor role in actual territorial changes. The reason is not far to seek. This traditional law is, as it were, a system of conveyancing law. It is almost exclusively concerned with the 'modes' by which territorial sovereignty is transferred from one State to another. It has little or nothing to do with the much more important policy question whether territory should be conveyed at all, and to whom. On the contrary, it assumes the old individualistic international society in which these questions of policy were determined by the outcome of struggles for power between sovereign States. The great historical redistributions of territory have resulted from the resolutions of peace conferences in which the victor's will has been applied by constraint. To interpret these important changes in the balance of power simply in terms of the legal techniques of cession or subjugation is to take a view of the situation that is so narrow and partial as almost to border on the irrelevant; yet this does no more than reflect accurately the minute part that law has been allowed to play in these great historical movements crystallized in the shifts of territorial sovereignty.

It is against this background that we must view the supremely important change in the law which has resulted in making unlawful the use of force or threat of force in international relations. For, whether or not we believe that this new law may be taken so far as actually to vitiate a title gained by force, the inescapable effect of this change in the law is that the traditional mode of bringing about territorial change is largely forbidden. Obviously the next question, therefore, is to ask what constitutional procedures of change are going to take the place of the old law of self-help. We have already noticed that there is a weakness in any system that forbids self-help but does not insist on the recourse to courts for the definition and enforcement of rights; it is equally true that it may not be possible

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for more than a temporary period to maintain a system that forbids self-help but fails to provide a satisfactory legal machinery for effecting a change in the ownership of rights. For although the determination of policy is not a legal matter, the question of the procedures for the determination of policy clearly is a legal matter. As we shall see in a moment, some beginning has indeed been made in the constitution of some such machinery; but first a brief word in general about this problem of change in relation to territorial sovereignty.

We have discovered, I think, that the bias of the existing law is towards stability, the *status quo*, and the present effective possession; the tendency of international courts is to let sleeping dogs lie. This is right, for the stability of territorial boundaries must always be the ultimate aim. Some other kinds of legal ordering need to be capable of constant change to meet new needs of a developing society; but in a properly ordered society, territorial boundaries will be among the most stable of all institutions. Over considerable areas the aim has been already achieved; frontiers like that between the United States and Canada—a paradigm of stability and order—are not really uncommon. On the other hand the map of the world is constantly changing. There are the relatively few, but perhaps more significant, uneasy and disputed frontiers—frontiers not only of disputed territory but also frontiers of power—which are the focus of world political tensions, and the symptoms of the failure as yet to achieve a properly ordered society of States.¹ It is in these places that international law needs to extend its influence and sway, and in order to do that it will be necessary to devise legal regimes sufficiently flexible to permit of the adjustments to shifting patterns of international power that may be needed for a long time to come. A law which, within narrow limits, seems to sanction only the maintenance of the *status quo*, is not likely to survive without serious modification in a still rapidly developing society of States. There ought to be some machinery of change which is apt to reflect the sentiment of States generally; for the traditional mode of change—the peace settlement imposed after victory in war and reflecting a momentary predominance of the victorious allies—necessarily tended to perpetuate a pendulum pattern of instability.

Once we begin to look further than a mere conveyancing law in the matter of territorial sovereignty, we find I think that there are broadly two developments that can, at any rate for purposes of exposition, be distinguished. First there are certain questions—

¹ See J. E. S. Faucett, *Hague Recueil*, 103 (1961—II), p. 348.

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questions as it were of international constitutional law—concerning institutions and procedures for the making of what are essentially political decisions regarding changes in territorial sovereignty. Secondly, there are some very general conventions or standards, rather than principles of law, that seem to be emerging for the guidance of decision in these matters and pertinent therefore to considerations of justice rather than title; these conventions or standards are perhaps political rather than legal, but since they all have either a legal element or at least appear in the guise of legal principle they demand some mention here, if only to emphasize the need always to attempt to maintain the distinction between questions of legal title and questions analogous to what in the municipal sphere would be called the art of legislation. It will be convenient to deal with this latter question first. It is, if you like, a variant of the constant theme of the importance and difficulty of the distinction *de lege lata* and *de lege ferenda*.

POLITICAL CLAIM OR LEGAL TITLE?

In this connection it is most important to bear constantly in mind the distinction between the question who presently has title and the question whether there ought for this or that reason to be a transfer of title to another. The first question is purely legal and requires a legal answer: the second is essentially a political question—though it may involve a number of ancillary legal questions concerning procedures, the status of certain decisions and so on.

Consider the typical case where State X lays claim to a parcel of territory over which State Y is in fact exercising territorial sovereignty. This may be a claim that the title to exercise territorial sovereignty in the disputed land is presently vested in law in State X. This is a purely legal claim. Or it may be a claim that, although the legal title to territorial sovereignty is admittedly presently vested in Y, there are good reasons why the legal position ought to be changed in favour of X. This is a political claim. Or, more commonly the claim may comprise undifferentiated arguments or allegations of both kinds: undifferentiated because it is not usually in the interest of the claimant, at any rate in the initial stages of a dispute, to specify whether he is in effect claiming on a ground apt to a judicial decision or on a ground apt to a legislative decision, or to both in the alternative; particularly is this so, of course, in the context of a legal order in which the jurisdiction of the court is not

compulsory and where the legislative function is either non-existent or embryonic.

The importance of the distinction between the two kinds of claim becomes clearer if we consider again¹ the case where a State claims legal title to territory actually in the possession of another State, and proceeds to use force in order to recover its possession. If in fact its claim is justified, that is to say if it does indeed have the legal title to the sovereignty, then it would seem that this is not an employment of force contrary to the provisions of Article 2(4) of the Charter. It cannot be force used against the territorial integrity or political independence of another State because the actor State is merely occupying its own territory. The matter is one within its domestic jurisdiction.²

But on the other hand all this is only true if the claim to possess title is indeed well founded. And since the establishment of a valid title is, as is easily appreciated from the cases, by no means a simple matter, it is not to be expected that a particular issue of title will usually be so very clear as to justify forcible action by a claimant State on the mere strength of its own case. Yet what is the claimant State to do, in view of the fact that it is probably unlikely that the possessing State will consent to submit to the jurisdiction of the International Court of Justice for a proper determination of the question of title? This would seem to be the kind of case where a unilateral application to the Court, even though there is *prima facie* no jurisdiction in the Court, is amply justified. And it would seem reasonable to suggest that where a State does believe that it has a good legal title to territory presently in the possession of another State, it ought to challenge the latter State by making a unilateral

¹ See above at p. 66.

² See e.g. the Indian argument over Goa, Security Council *verbatim records*, S/PV.987, December 18, 1961, p. 83: 'The action taken by India is not action taken against another State for territorial aggrandizement, such as was envisaged in the Charter. It is not an invasion of a Portuguese population, for neither the land nor the people of Goa is Portuguese by any stretch of the imagination. India's action is to liberate Indian national territory.' Of course it must be immediately added that in this particular case the argument fails to take account of the fact that India had herself recognized Portuguese title in 1950, 1953, and again in the *Right of Passage* case.

Of course the converse argument may also be found. British operations in Oman in 1955, which the United Kingdom regarded as domestic, were in some quarters described as an invasion of an independent State. By a note dated September 29, 1960, 10 Arab States demanded that the question be placed upon the agenda of the 15th session of the General Assembly (Doc. A/4521). The question was eventually adjourned. The matter had also been before the Security Council, though without result, in 1957.

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application to the Court, before it can feel justified in taking forcible action even though, *if* its case is justified, the action may be domestic action and no breach of the Charter. And certainly also it ought, if it has repossessed the territory by force, to be willing even thereafter to submit the question of title to the Court at the suit of the newly dispossessed State; although strictly of course there is no legal obligation to submit to the Court either way. Even so, where force is alleged to be justified on the ground of an existing legal title, and can in the nature of things only be justified on that ground, there must be a strong presumption against the validity of such an alleged title where the claimant is not willing to have that claim properly determined in a Court of law. And it is submitted that the political organs of the United Nations, if faced with the question whether the use of force was or was not lawful, would be justified in acting on the basis of a presumption that it is unlawful as long as the unwillingness to submit the case to the Court is present. Such a presumption would go some way towards mitigating what is potentially a highly dangerous situation, where a right of recaption may be alleged, yet coupled with the right to maintain a refusal to have the existence of the right challenged in a court of law.

In actual cases the issue is seldom as simple as the case which rests upon strictly legal arguments relative to the existence in law of a present title. Almost invariably the case will be mixed, including legal arguments to establish a present title, and political arguments, i.e. arguments the true tendency of which is that even if the present title is in another it ought to be shifted to the claimant. Now it is perfectly clear that the latter class of argument, be it never so strong and persuasive, cannot, if standing alone, justify in law the use of force to repossess. On the contrary, it is tantamount to an admission that the present legal title is elsewhere; and if that is the position an attempt at self-help must be forbidden by the law.

Thus, although the distinction between the effects of legal claims and political claims is so obviously of primary importance, it must be confessed that the distinction is an elusive one when applied to concrete cases. And of course it is at once apparent that the concept of a consolidation of historic title, valuable as it is in many respects, does not make this particular problem any easier, for its very nature is to allow scope for many indicia of approbation, primarily political in origin, as elements in the build-up of legal title. Nor is the situation made any the easier by the fact that, until very recently at any rate, the basic distinction between the conveyance of a title and the mere

taking of the land was imperfectly realized in international law. Furthermore, it must be remembered that political arguments and claims feature principally in political organs, such as the Security Council or General Assembly of the United Nations, where both the nature and relevance of the distinction between legal and political claims are not appreciated, or even noticed, as much as one might wish.

It may be useful to look very briefly at some points where the political and legal approaches to a question of title come so very close together as to be distinguishable only with difficulty.

GEOGRAPHICAL CONSIDERATIONS

Take, for example, geographical considerations. It is well known that claims to territory have frequently imported geographical arguments; and in particular the notion of contiguity, or continuity, has gained considerable respectability. The discussion of contiguity usually begins from what was said about it in the *Island of Palmas* case. The gist of the orthodox appreciation of the place of contiguity in the law is expressed thus by Professor Waldock:¹

The hinterland and contiguity doctrines as well as other geographical doctrines were much in vogue in the nineteenth century. They were invoked primarily to mark out areas claimed for future occupation. But, by the end of the century, international law had decisively rejected geographical doctrines as distinct legal roots of title and had made effective occupation the sole test of establishment of title to new lands. Geographical proximity, together with other geographical considerations, is certainly relevant, but as a fact assisting the determination of the limits of an effective occupation, not as an independent source of title.

In one sense, the proposition that contiguity is not an independent root of title is self-evident, for it is by definition relative and immediately raises the question, contiguous to what? A claim based on contiguity cannot in fact be other than an assertion concerning the definition or extent of a sovereignty the existence of which is accepted *ex hypothesi*. Contiguity is an aspect of possession. It cannot be a root of title independent of possession.

Thus, assuming that a certain parcel of territory is 'contiguous' in a geographical sense to a certain sovereignty, this can never mean that

¹ *British Year Book of International Law*, vol. 25 (1948), p. 342. See also pp. 342 ff. for an important discussion of this subject.

the same sovereign has title over that parcel of territory without more ado. It does not constitute, like the territorial sea, an inalienable appurtenance, in the sense that it could not in law belong to any other State than that which is sovereign over the principal territory; for State practice provides no evidence whatever that would warrant such a proposition. Contiguity is no more than evidence raising some sort of presumption of effective occupation; a presumption that may be rebutted by better evidence of sovereign possession by a rival claimant. If this were not so, a State might be able to argue that it had legal title over a 'contiguous' territory over which another State already enjoys a title coupled with possession. It might mean, to take an obvious example, that Spain might assert not merely a claim to Gibraltar but a presently existing title. The reason which negatives this possibility in law is the very existence of another title over the 'contiguous' territory, supported by possession. In the *Island of Palmas* case the consideration of contiguity might have been decisive had it not been that the Island was found to be in the actual and not merely the notional possession of a rival sovereign. As the court pointed out in the *Eastern Greenland* case, the question of possession, where there are rival claims to be decided, is a relative one.¹ Contiguity as a factor in legal title is only relevant to certain presumptions concerning the definition of the area of an existing occupation; its strength depends upon the presence and relative strength of any rival occupation.

Yet if we go on to ask why contiguity may, subject to these limitations, create a presumption that a sovereign possession of one area of territory includes another, the answer must be that it appears reasonable—for reasons other than purely legal ones—that the one territory should be held in the same sovereignty as the other. These are the very considerations, however, which underlie the plea when it is used as a basis for what is essentially a political claim to territory presently subject to the sovereignty of another State which has the legal title. It may, therefore, be far from easy to keep the two kinds of claim distinct; and obviously a State making a political claim has no interest in ensuring that the ambiguity of the term 'claim' is resolved, but rather the contrary. If a political argument can be made to possess legal overtones, and the legal distinction between *meum* and *tuum* blurred, the claimant may be enabled to convey the impression to others and, perhaps more importantly, to himself that he already possesses a claim in the sense of a legal title. But it is a distinction the

¹ See above at p. 6.

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lawyer must keep clear, because of the vital relationship of title to the use of force, that we have already noted.

HISTORICAL CONTINUITY

It may be convenient here to make a brief reference to a notion not far removed from contiguity, which is sometimes made the basis of claims for a change of title and which may perhaps be called the principle of historical continuity. Mention has already been made in an earlier lecture of a kind of principle of inertia by which the frontiers of territorial units tend—except in those few areas where world tensions focus—to persist even through changes of sovereignty. The argument that what has at some time in the past been a territorial unit of nationhood, or even a territorial unit of administration by a colonial power, should persist under a new sovereignty, may run directly counter to the direction of the principle of self-determination. This is, therefore, a claim which seems to some extent to be characteristic of the neo-imperialism of some of the newly independent ex-colonial territories.

An example is the Indonesian claim to West New Guinea.¹ This rests, of course, on a number of arguments. To some extent it is a question of interpretation of agreements. But certainly one aspect of the claim is, to quote from an Explanatory Memorandum² sent by Indonesia to the Secretary General of the United Nations, that 'West Irian [*viz*: West New Guinea] is and always has been—historically as well as constitutionally (legally)—an integral part of the territory of Indonesia; that is to say, also, of the former Netherlands East Indies'.³ A case which likewise proceeds in part on similar lines is the claim of Morocco to be entitled to incorporate the newly-indepen-

¹ It is interesting to note that when the Netherlands representative in the General Assembly, on September 26, 1961, made his remarkable offer to hand over West New Guinea to the United Nations jurisdiction for the purpose of consulting the wishes of the people by plebiscite, the proposal was strongly and even bitterly opposed by Indonesia; nor did it gain any remarkable degree of support in the General Assembly. An agreement was, however, signed on August 15, 1962, by which the U.N. was to administer the territory from October 1, 1962 to May 1, 1963, when it would be handed over to Indonesia. A plebiscite was then to be held in 1969.

² August 18, 1954. U.N. Doc. A/2694.

³ Cf. also Mr. Barrington (Burma), speaking in the General Assembly's First Committee, 9th Sess., 1954, Doc. A/C.I./SR.725: 'It had been claimed during the debate that logically New Guinea was not part of Indonesia. That belated discovery did not bear scrutiny, since for more than a century the Dutch had treated West Irian as a part of Indonesia.'

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dent territory of Mauretania;¹ and also the claim of Iraq to Kuwait.² The limitations of this kind of argument were made apparent by the reply of the Netherlands delegate in the debate on West New Guinea in the General Assembly's First Committee.³ After describing how, before Dutch influence was gradually extended outwards from Java and Sumatra, 'the population [of the Dutch East Indies] had not formed one nation, but had been divided into a large number of small sultanates living in a state of almost perpetual warfare with each other', he went on to say that,

other speakers had not ventured so far back in history but had simply contended that, as Netherlands New Guinea was part of the former Netherlands East Indies, it was therefore now legally part of Indonesia. He wondered whether they realized, for example, that Ceylon had also formed part of the Netherlands East Indies until the Treaty of Amiens in 1802. A logical consequence of their argument would be that Ceylon should also be incorporated in Indonesia.

It is not one of our purposes, however, to attempt to assess the merits or demerits in relation to particular claims of these essentially political arguments, but to recognize them as such and to differentiate them if we can from strictly legal arguments touching title.⁴

¹ See U.N. Doc. A/4445/Add 1, September 14, 1960: '1. As the Government of Morocco sees it, the dispute is essentially of a territorial nature; that is to say, Mauretania, within the borders at present assigned to it by France, has always been an integral part of national territory.'

The Government of Morocco attempted without success to have this question placed upon the agenda of the 15th General Assembly. The Soviet, however, vetoed Mauretania's application for admission to the U.N. (Doc. S/PV.911) at a Security Council meeting on December 3, 1960.

² Iraq's activities were brought to the notice of the Security Council, for its meeting on July 2, 1961, by Kuwait, acting under Article 35(2) of the Charter (Doc. S/PV.957). Iraq denied that Kuwait was a State, and therefore, it was argued, she could not make any representation under Article 35(2). Kuwait for her part was able to point to her membership of a number of international organizations and to Iraqi acknowledgments of the status of Kuwait. In the result no member of the Security Council, other than the Soviet Union, contested the independent Statehood of Kuwait.

³ *Loc. cit.*, p. 249.

⁴ This difference was virtually admitted by the Indonesian Government in relation to the dispute over West New Guinea when, in 1951, the Netherlands proposed that the question be submitted to the International Court of Justice, and this proposal was rejected by Indonesia on the ground that she considered the problem, in substance, to be one of a political nature and not of a juridical nature: see para. 13 of the Indonesian Explanatory Memorandum of August 18, 1954.

See the very instructive speech by Mr. Rocha of Colombia, in the 12th Session of the First Committee, November 20-25, 1957, at p. 202, where he put a series of questions to the Netherlands and Indonesian delegates with a view to separating

But certainly one of the touchstones of this type of essentially political argument, though with legal elements, is that it is inconclusive in the sense that it may usefully be applied to some situations though not to others. It calls for a political decision whether to apply it in a given case or not.

SELF-DETERMINATION

Another, and perhaps the most generally recognized, of these guiding principles for the determination of the proper destiny of territories is the principle of self-determination. This has not only a long and respectable tradition but is also sanctioned by Article 1 of the United Nations Charter, which makes one of the purposes of the Organization 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.¹ It must be emphasized, however, that this again, though it has legal overtones, is essentially a political principle which may be a useful guide in the making of political decisions. It is not capable of sufficiently exact definition in relation to particular situations to amount to a legal doctrine; and it is therefore inexact to speak of a 'right' of self-determination if by that is meant a legal right.² We have already noticed that self-determination may pull in the opposite direction from both geographical and historical factors.

Self-determination is frequently coupled with the technique of plebiscite to give it practical realization; though it is clearly a technique suited only to particular kinds of situations, needs careful international control if it is not to be abused, and usually depends in any case upon the initial agreement of the parties concerned.³ It seems likely that the plebiscite still has a part to play in certain kinds of situation for resolving the question of the proper destina-

the legal from the political issues, since the Committee was essentially a political and not a legal body.

Cf. also the position of the Guatemalan claim to Belize (British Honduras) and the Guatemalan refusal to act upon the United Kingdom's specific acceptance of the compulsory jurisdiction of the I.C.J. for this dispute. See Waddell in *American Journal of International Law*, vol. 55 (1961), p. 464.

¹ See also Art. 55.

² See Schwarzenberger, *A Manual of International Law*, 4th ed., 1960, p. 67: 'The principle of national self-determination is a formative principle of great potency, but not part and parcel of international customary law.'

³ See, however, *Oppenheim-Lauterpacht, op. cit.*, p. 551, for a discussion of the view sometimes held that a treaty of cession is invalid unless sanctioned by a plebiscite.

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tion of certain kinds of territory; and indeed the United Nations has already organized plebiscites on a number of occasions.¹

So, to sum up thus far, we find a number of these quasi-legal ideas—and there are others we have no time to pause over—that may appear in several different contexts: they may be used to support claims of States to territory presently in the hands of others; they may appear as ancillary arguments in such claims primarily based upon an allegation of present *title* to territory occupied by another State; they may appear in judgments of tribunals as lending weight to a decision arrived at on more strictly legal reasoning; and finally they may be employed in the actual making of political decisions concerning the destination of particular territories. This latter consideration immediately raises the further question how far there are any established international procedures for making decisions of this kind; i.e. not judicial determinations of existing title on the basis of law but decisions concerning changes in title; or, if you like, a process of quasi-legislation in the matter of sovereignty over territory. And to this question we must now turn.

PROCEDURES FOR POLITICAL DECISIONS RESPECTING TERRITORY

Clearly, wherever there arises a dispute over territory this may in one way or another come within the jurisdiction of the United Nations, particularly under chapters VI or VII of the Charter; and decisions or recommendations of the Security Council, or recommendations of the General Assembly may become relevant to the resolving of the dispute. The United Nations has been involved, for example, in what have been, at least in part, mixed political and legal disputes over territorial sovereignty in respect of Kashmir, Israel, Indonesia, West Irian, Kuwait, the Congo, and South-West Africa, to name only the ones that come obviously to mind. To pursue this general jurisdiction further would be to embark upon an investigation of United Nations jurisdiction generally; nor is there opportunity in the space of one lecture to attempt a case history of the

¹ For Togo, under British administration, on November 7, 1959; in British North Cameroons on November 7, 1959; for both parts of the British Cameroons on February 11–12, 1961; for West Samoa on May 9, 1961. For the U.N. experience with plebiscites see Marcel Merle in *Annuaire Français de Droit International*, 1961, pp. 425 ff. Merle would add to the four examples of plebiscites proper indicated above, the U.N. supervision of the legislative election in French Togoland in April, 1958, and the referendum in Belgian Ruanda-Urundi in September, 1961. See also Agreement of 1962 over West New Guinea, p. 76 n. 1 above.

territorial aspects of these and similar disputes. It must suffice to observe that the organs of the United Nations may become involved in one way or another in disputes concerning not only legal title to territorial sovereignty but also in policy decisions concerning change in territorial sovereignty. But there is one aspect of United Nations jurisdiction in this regard that merits closer examination.

We have already had occasion to notice that a major factor in territorial change has always been, at any rate in recent years, not the adjustment of frontiers between old States but the emergence of new ones carved out from the colonial or metropolitan territory of the old. In its initial stages this process is screened from the operation of traditional international law because it begins, whether as a contention or an evolution, within the sphere of domestic jurisdiction. Even when force is used in the civil struggle this may still be a domestic matter. So that here we have an area where force may still be employed for the purpose virtually of bringing about a change in territorial sovereignty, without necessarily impinging upon the prohibitions on the use of force laid down by international law. The only point, according to the traditional law, where international law impinged upon this process, was at the moment of recognition by third powers of the new State which was by this process accepted into the community of nations and its title to territory accepted and acknowledged as a fact.

An important variation on this theme was the League of Nations mandate system and then the United Nations trusteeship system, by which the international community has been involved at a much earlier stage in the evolution of colonial peoples towards separate nationhood. It is interesting to recall the curious and significantly inconclusive controversy that arose from the attempt to trace the vesting of territorial sovereignty in mandated territory by reference to the traditional formulae. The truth of the matter was stated by Lord McNair in the *International Status of South-West Africa* case:¹

Upon sovereignty a very few words will suffice. The Mandates System (and the 'corresponding principles' of the International Trusteeship system) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system . . .

It is true that the provisions of the United Nations Charter do not

¹ *I.C.J. Reports*, 1950, p. 150.

contain any clear procedures for ending the status of a trusteeship territory, though Article 76 shows that the regime of trusteeship is intended to be temporary and that the goal is independence.¹ But it is a reasonable inference from Article 85 that the termination of a trusteeship status is a matter within the jurisdiction of the General Assembly.²

Perhaps in some ways even more significant is the jurisdiction the United Nations has taken to itself under chapter XI of the Charter, the so-called *Declaration regarding Non-self-governing territories*; more significant because this declaration is not limited to certain designated territories but applies generally to territories 'whose peoples have not yet attained a full measure of self-government'. The system, for political and historical reasons that need not concern us, is limited in its application to what may be called 'colonial' territories. It does not apply to other national groups who may have some moral right to independence yet have been annexed by force of arms, e.g. the Baltic States, or Hungary.³

It will be recalled that one of the obligations of the administering State is, according to Article 73(b), 'to develop self-government'. This, however, is a cautiously drafted provision which falls short of establishing a clear obligation to develop self-government to the point of a separate independence.⁴ The degree of self-government to be attained at any particular time in this 'progressive development' is left to vary 'according to the particular circumstances of each territory and its peoples and their varying stages of development'.⁵

¹ See Article 76(b): '... to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement; . . .'

² See Marcel Merle, *op. cit.*, at p. 427.

³ Cf. Ross, *Constitution of the United Nations* (1950), 180: 'By the words "not yet" (cf. the expressions "progressive development" and "degree of development" later on in [Art. 73]) . . . it is indicated that the article refers exclusively to peoples in colonial territories whose lack of political independence is due historically to their lower political and cultural level, and not to nationality problems and claims for self-government concerning territories which are administered as an integral part of the mother country. Thus chap. XI will not apply, for instance, to the Faroe Islands or to the Baltic States.'

⁴ Indeed, a proposal at San Francisco to include a definite obligation in those terms was rejected. See Goodrich and Hambro, *Charter of the United Nations*, 2nd ed. (1949), p. 410.

⁵ There has been an interesting conflict of views on the question whether the administering power or the United Nations is competent to determine when a territory ceases to be non-self-governing. See Toussaint, *The Trusteeship System*

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The General Assembly however was perhaps less cautious in its Resolution 1514 of December 14, 1960, known as the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. This recognizes 'the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence', considers 'the important role of the United Nations in assisting the movement for independence in trust and non-self-governing territories' and 'recognizes' that 'the peoples of the world ardently desire the end of colonialism in all its manifestations'; and expresses the conviction 'that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory'. It goes on to declare that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation'; and it declares that

immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained independence, to trans-

of the United Nations (1960), p. 135. It is interesting to note that the obligation under Article 73(e) to transmit information to the Secretary-General was from the beginning treated almost as one of the indicia of sovereignty for the purpose of consolidating claims to territories: thus the Argentine protested at the United Kingdom making reports on the Falkland Islands, Guatemala objected to British Reports on British Honduras, and Indonesia at one time protested against Netherlands reports on the Netherlands East Indies.

Portugal regarded the non-self-governing 'colonial territories' subject to her administration as part of the metropolitan territory and therefore not subject to any duty to report under chapter XI. See the Resolution of the Trusteeship Committee of November 13, 1961, and of the General Assembly of December 15, 1960, calling nevertheless for the reports.

This plea on the part of Portugal of course immediately raises the further question of the ambit of Article 2(7) of the Charter forbidding U.N. intervention in matters 'essentially within the domestic jurisdiction'. See in particular the debates in the Security Council in 1961 relative to the situation in Angola. See a useful summary in *Annuaire Français de Droit International*, 1961, at pp. 388 and 391.

At the 14th General Assembly a committee was set up to report on the principles which should guide States in deciding whether a Report under Article 73 of the Charter was appropriate in respect of a particular territory or not. This committee presented its report at the 15th Session of the General Assembly. The committee unanimously adopted 12 principles, among which the most interesting were, that there was an obligation to report on territories which were geographically separated, or ethnically or culturally distinct; that complete autonomy might be achieved by independence or by free association with, or integration with, an independent State. The Report was adopted, with a few changes, by the General Assembly (A/Res/1541/XV of December 15, 1960).

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for all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

Thus the Resolution assumes that self-determination is one of the 'fundamental human rights'; it posits the concept of a 'people' as the unit qualifying for the right to independent nationhood, and furthermore suggests that such a 'people' has a present right to the 'integrity' of its 'national territory'.

Resolution 1514 is essentially a political document, and with its political wisdom or otherwise we are not here concerned. Nor are the 'rights' of which it speaks legal rights of the kind that could be vindicated before a court. Yet the resolution does call for action¹ on the part of administering States; and although its assertions are both political and very general, the question suggests itself how far Resolutions of this sort may be, or become, relevant to questions of legal title to territorial sovereignty; more particularly perhaps in the case where a specific recommendation is addressed to a particular party.²

The legal effect of recommendations of the General Assembly addressed to Member States is a large and difficult matter on which there is room for many opinions, and it is clearly not possible to enter upon it in any detail here.³ It is obvious that the recommendations of the General Assembly are only recommendations and are certainly not legally binding upon Member States in the sense that full effect must be given to them. Yet, as Judge Lauterpacht pointed out in the *Voting Procedure Case*,⁴ where he examined this question

¹ The General Assembly at its next, i.e. its sixteenth, session, noted that for the most part the Declaration had not been carried out, and on November 27, 1961, passed another Resolution setting up a special committee to ensure the implementation of Resolution 1514 and calling upon the States concerned 'to take action without further delay' to implement the Resolution. This Resolution was passed by 97 votes to 0 with 4 abstentions. Nevertheless, the General Assembly has been chary of setting any actual dates for the implementation of these aims, and a mischievous Soviet proposal to proclaim 1962 as 'the year for the elimination of colonialism', was defeated.

² The U.N. has not, of course, hesitated to interpose its authority even in respect of particular countries not subject to trusteeship agreements; see e.g. the setting up of a committee on February 22, 1962, 'to consider whether Southern Rhodesia has attained a full measure of self-government'.

³ See the important article by Professor D. H. N. Johnson, *British Year Book of International Law*, vol. 32 (1955-6), pp. 97 ff.; also F. S. Northedge, *International Relations*, vol. 1, No. 8 (October, 1957).

⁴ *I.C.J. Reports*, 1955, p. 67.

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with great care, it does not follow that the recommendations 'have no force at all whether legal or other', for, he said,

A Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation.

Then, he added,

an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the organization, in particular as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.

Now, of course, it would be wrong to apply this formula, as it stands, to General Assembly Resolutions in general terms. Judge Lauterpacht was dealing primarily at least with a question of the *quantum* of supervision of Trust Territories. Moreover, this was an individual opinion of Sir Hersch Lauterpacht and cannot therefore be taken as bearing the *imprimatur* of a dictum of the Court.¹ Nevertheless, when all allowances have been made, it remains true that there is weighty authority for the view that Resolutions of the General Assembly may have some sort of legal effect, even if it amounts to little more than an obligation to consider the Resolution in good faith.²

But the question we have to ask ourselves is not so much what kind

¹ For the opinions of writers generally on this question see Johnson, *op. cit.*

² Notice, however, the important distinction made by Johnson, *op. cit.*, p. 117: 'But here it is necessary to distinguish. It may be that the course which the General Assembly is recommending is already clearly obligatory under international law. In that event it would not be strictly true to ascribe to the Resolution of the General Assembly a "legal effect", even though the Member concerned might be legally obliged to comply with the terms of the Resolution. If, however, the course which the General Assembly is "recommending" is not already clearly obligatory under international law, then the vital question which arises is whether a Resolution, or a succession of Resolutions, by the General Assembly can render it so.'

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of legal or quasi-legal obligation the Resolutions of the General Assembly concerning territory lay upon the Member to whom they are directly or indirectly addressed, but what effect, if any, they could have upon the question of title. At first sight it would seem they could have none, for even if a Resolution might impose some kind of obligation upon a Member to consider in good faith a programme for the granting of eventual independence to a dependent territory by a particular time, this personal obligation, even if it were a more perfect one, could not of itself effect any change in sovereignty.¹

Yet there are two respects in which even so very imperfect an obligation might be considered to have *some* relevance even to a question of title. Firstly, where force or threat of force is employed to effect a change of sovereignty, but the change is in accord with the requirement of a General Assembly Resolution, it is at least arguable that this latter circumstance should be taken into account in the question whether the use of force has a vitiating effect on a subsequent claim to title. This may not in practice be a very important point because, as we have already noticed, force in the domestic sphere where new sovereignties usually have their beginning is not necessarily a matter governed by the international law prohibitions, and in any case the emergence of the new State tends to be accepted as a fact at recognition. But there are circumstances in which a Resolution of the General Assembly might be relevant to title, where, for example, the pattern is like that of the Portuguese colonies in India, in that the aim of the change is not independence but transfer of territory from one sovereignty to another.²

Secondly, it seems undeniable that a series of Resolutions of the General Assembly, especially if they represent the opinion of a large part of the international community, may be relevant to questions of title to territories already in possession at least in the sense of forming an ingredient in a process of consolidation of title. If it be true that recognition or acquiescence may be important elements of a consolidated title, it seems hardly possible to dismiss as irrelevant a General Assembly Resolution like No. 1514 which was adopted by

¹ Cf., however, the late Judge Alvarez who expressed the opinion that 'the Assembly of the United Nations is tending to become an actual legislative power'; see *I.C.J. Reports*, 1951, p. 52.

² Goa is here suggested as a pattern situation, to illustrate the particular problem under discussion. It is not suggested that this represents the solution of the problem of Goa which, of course, involves many other issues, not least the express recognition of Portuguese sovereignty by India on several occasions in years immediately preceding the take-over.

89 votes to 0, with only 9 abstentions.¹ The representative opinion of the international community, expressed through constitutional procedures,² must, therefore, be relevant not only to assessing the strength of a political claim to a change of sovereignty, but also to a question of entitlement at any rate when the territory has been reduced to possession.

For whatever weight may or may not be given to such general expressions of the opinion of States when assessing a *political* claim to territory, it seems that actual possession is still the main catalyst for building a legal title. It is possession that turns the scales and puts the claimant for the first time in a position to benefit from various elements that may assist to complete a title by a process of consolidation. Physical possession is the foundation on which alone such a construction can be built and without it the rest remains on the merest political level. Without this actual change of possession these elements can, it is apprehended, have in present law no legal effect—though of course they may have some political effect—on the title of the existing sovereign. Thus in the present stage of development the law must still be content in the main to follow the facts. Even so seemingly radical a step as Resolution 1514 is, after all, hardly in the van of the ‘irresistible and irreversible’ movement it registers, for this was put in motion by some of the colonial powers themselves before the United Nations was thought of. The hope of immediate progress, therefore, lies not so much in finding new procedures for initiating new policies as for institutionalizing the procedures for coping with those that are already with us.

Thus the conclusion we are driven to, I think, is this. Whatever weight may be given to decisions or recommendations of organs of the United Nations in the consolidation of new titles where there has in fact been a change of possession, it is still not possible to suggest that there is even the beginnings of any procedure of legislation or even quasi-legislation in the matter of actual title. Nor will it be possible to say that any beginning has been made on this problem until the law has reached the stage of development where the expression of the will of the international community through constitu-

¹ The abstaining States were Australia, Belgium, the Dominican Republic, France, Portugal, Spain, the United Kingdom and the United States. The sponsors were 43 Afro-Asian States.

² Cf. on this point the *dictum* of the late Judge Alvarez: ‘For the principles of law resulting from the juridical conscience of peoples to have any value, they must have a tangible manifestation, that is to say, they must be expressed by authorized bodies’—*I.C.J. Reports*, 1951, p. 148.

tional procedures is relevant not only to the building of new titles on a foundation of actual possession but may also act, where appropriate, as a solvent of old titles in possession. The treatment of this problem of title to territorial sovereignty in all the books is invariably concentrated on the acquisition of title. But as soon as one begins to think in terms of legislation, the modes of loss of title become at least equally important: these modes of loss of territory all depend upon either a voluntary cession or abandonment by the former sovereign or a forceful deprivation. Only when we can see the beginnings of a constitutional machinery for deprivation of title of territory in possession we can begin to think in terms of legislation in the matter of title.

In conclusion, a word of warning must be added. This problem of the relationship of the old law and new policies in a new and developing society of States is one of great complexity as well as difficulty and importance. It will be evident to you, I hope, that, in the time at our disposal in this lecture, we have been able to do little more than to glance at a few selected aspects of it. But obviously there is already a great mass of practice and other material that needs to be investigated, analysed and appraised; and I believe it is here that the immediate tasks of international lawyers in this field lie. There can be few tasks more important, for we must end, as we began, by observing that this problem of the legal ordering of territorial stability and territorial change lies at the heart of the whole problem of the legal ordering of international society.

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PERMANENT COURT OF ARBITRATION

ARBITRAL AWARD

Rendered

*In Conformity with the Special Agreement concluded on January 23rd,
1925*

Between

THE UNITED STATES OF AMERICA

AND

THE NETHERLANDS

*Relating to the Arbitration of differences respecting Sovereignty over
the Island of Palmas (or Miangas).*

APRIL 4th, 1928

(Formal parts omitted)

II

The *subject of the dispute* is the sovereignty over the Island of Palmas (or Miangas). The Island in question is indicated with precision in the preamble to the Special Agreement, its latitude and longitude being specified. The fact that in the diplomatic correspondence prior to the conclusion of the Special Agreement, and in the documents of the arbitration proceedings, the United States refer to the 'Island of Palmas' and the Netherlands to the 'Island of Miangas', does not therefore concern the identity of the subject of the dispute. Such difference concerns only the question whether certain assertions made by the Netherlands Government really relate to the island described in the Special Agreement or another island or group of islands which might be designated by the name of Miangas or a similar name.

It results from the evidence produced by either side that Palmas (or Miangas) is a single, isolated island, not one of several islands clustered together. It lies about half way between Cape San Augustin (Mindanao,

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Philippine Islands) and the most northerly island of the Nanusa (Nanoesa) group (Netherlands East Indies).

*

The origin of the dispute is to be found in the visit paid to the Island of Palmas (or Miangas) on January 21st, 1906, by General LEONARD WOOD, who was then Governor of the Province of Moro. It is true that according to information contained in the Counter-Memorandum of the United States the same General WOOD had already visited the island 'about the year 1903', but as this previous visit appears to have had no results, and it seems even doubtful whether it took place, that of January 21st, 1906 is to be regarded as the first entry into contact by the American authorities with the island. The report of General WOOD to the Military Secretary, United States Army, dated January 26th, 1906, and the certificate delivered on January 21st by First Lieutenant GORDON JOHNSTON to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaus) Islands clearly show that the visit of January 21st relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Miangas), undoubtedly included in the 'archipelago known as the Philippine Islands', as delimited by Article III of the Treaty of Peace between the United States and Spain, dated December 10th, 1898 (hereinafter also called 'Treaty of Paris') and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31st, 1906, and leading up to the conclusion of the Special Agreement of January 23rd, 1925.

*

Before beginning to consider the arguments of the Parties, we may at the outset take as established certain *facts which, according to the pleadings, are not contested.*

1. The Treaty of Peace of December 10th, 1898 and the Special Agreement of January 23rd, 1925, are the only international instruments laid before the Arbitrator which refer precisely, that is, by mathematical location or by express and unequivocal mention, to the island in dispute, or include it in or exclude it from a zone delimited by a geographical frontier-line. The scope of the international treaties which relate to the 'Philippines' and of conventions entered into with native Princes will be considered in connection with the arguments of the Party relying on a particular act.

2. Before 1906 no dispute had arisen between the United States or Spain, on the one hand, and the Netherlands, on the other, in regard specifically to the Island of Palmas (or Miangas), on the ground that these Powers put forward conflicting claims to sovereignty over the said island.

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3. The two Parties claim the island in question as a territory attached for a very long period to territories relatively close at hand which are incontestably under the sovereignty of the one or the other of them.

4. It results from the terms of the Special Agreement (Article I) that the Parties adopt the view that for the purposes of the present arbitration the island in question can belong only to one or the other of them. Rights of third Powers only come into account in so far as the rights of the Parties to the dispute may be derived from them.

* * *

The dispute having been submitted to arbitration by Special Agreement, each Party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute. As regards the *order in which the Parties' arguments should be considered*, it appears right to examine first the title put forward by the United States, arising out of a treaty and itself derived, according to the American arguments, from an original title which would date back to a period prior to the birth of the title put forward by the Netherlands; in the second place, the arguments invoked by the Netherlands in favour of their title to sovereignty will be considered; finally the result of the examination of the titles alleged by the two Parties must be judged in the light of the mandate conferred on the Arbitrator by Article I, paragraph 2, of the Special Agreement.

*

In the absence of an international instrument recognized by both Parties and explicitly determining the legal position of the Island of Palmas (or Miangas), *the arguments of the Parties* may in a general way be summed up as follows:

The *United States*, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Münster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines.

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost. The principle of contiguity is contested.

The Netherlands Government's main argument endeavours to show that

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the Netherlands, represented for this purpose in the first period of colonization by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with native princes of the Island of Sangi (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas (or Miangas). The state of affairs thus set up is claimed to be validated by international treaties.

The facts alleged in support of the Netherlands arguments are, in the United States Government's view, not proved, and, even if they were proved, they would not create a title of sovereignty, or would not concern the Island of Palmas.

* * *

Before considering the Parties' arguments, two points of a general character are to be dealt with, one relating to the substantive law to be applied, namely the rules on territorial sovereignty which underlie the present case, and the other relating to the rules of procedure, namely the conditions under which the Parties may, under the Special Agreement, substantiate their claims.

*

In the first place the Arbitrator deems it necessary to make some general remarks on *sovereignty in its relation to territory*.

The Arbitrator will as far as possible keep to the terminology employed in the Special Agreement. The preamble refers to 'sovereignty over the Island of Palmas (or Miangas)', and under Article I, paragraph 2, the Arbitrator's task is to 'determine whether the Island of Palmas (or Miangas) in its entirety forms a part of Netherlands territory or of territory belonging to the United States of America'. It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called 'territorial sovereignty'.

Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc. do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal

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situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.

Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognized by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries. If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title—cession, conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it. However, if the contestation 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 and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. The growing insistence with which international law, ever since the middle of the 18th 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. If the effectiveness has above all been insisted on 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. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war,

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together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members. This is the more significant, in that it might well be conceived that in a federal State possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non-dissimilar decisions of the Supreme Court of the United States of America that in the case of the State of Indiana v. State of Kentucky (136 U.S. 479) 1890, where the precedent of the case of Rhode Island v. Massachusetts (4 How. 591. 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

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

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If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterion of territorial sovereignty.

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The United States, in their Counter-Memorandum and their Rejoinder maintain the view that statements without *evidence* to support them cannot be taken into consideration in an international arbitration, and that evidence is not only to be referred to, but is to be laid before the tribunal. The United States further hold that, since the Memorandum is the only document necessarily to be filed by the Parties under the Special Agreement, evidence in support of the statements therein made should have been filed at the same time. The Netherlands Government, particularly in the Explanations furnished at the request of the Arbitrator, maintains that no formal rules of evidence exist in international arbitrations and that no rule limiting the freedom of the tribunal in forming its conclusions has been established by the Special Agreement of January 23rd, 1925. They hold further that statements made by a government in regard to its own acts are evidence in themselves and have no need of supplementary corroboration.

Since a divergence of view between the Parties as to the necessity and admissibility of evidence is a question of procedure, it is for the Arbitrator to decide it under Article V of the Special Agreement.

The provisions of Article II of the Special Agreement to the effect that documents in support of the Parties' arguments are to be annexed to the Memoranda and Counter-Memoranda, refers rather to the time and place at which each Party should inform the other of the evidence it is producing, but does not establish a necessary connection between any argument and a document or other piece of evidence corresponding therewith. However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude a *limine*, except under the explicit terms of a conventional rule, every allegation made by a Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure.

The provisions of the Hague Convention of 1907 for the peaceful settlement of international disputes are, under Article 51, to be applied, as the case may be, as subsidiary law in proceedings falling within the scope of that convention, or should serve at least to construe such arbitral agreements. Now, Articles 67, 68 and 69 of this convention admit the production of documents apart from that provided for in Article 63 in connection with the filing of cases, counter-cases and replies, with the consent or at the request of the tribunal. This liberty of accepting and collecting evidence guarantees to the tribunal the possibility of basing its decisions on the whole of the facts which are relevant in its opinion.

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The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written Explanations would be extraordinarily limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps. The limitation to written explanations excludes oral procedure; but it is not to be construed as excluding documentary evidence of any kind. It is for the Arbitrator to decide both whether allegations do or—as being within the knowledge of the tribunal—do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated.

Failing express provision, an arbitral tribunal must have entire freedom to estimate the value of assertions made by the Parties. For the same reason, it is entirely free to appreciate the value of assertions made during proceedings at law by a Government in regard to its own acts. Such assertions are not properly speaking legal instruments, as would be declarations creating rights; they are statements concerning historical facts. The value and the weight of any assertion can only be estimated in the light of all the evidence and all the assertions made on either side, and of facts which are notorious for the tribunal.

For the reasons stated above the Arbitrator is unable to construe the Special Agreement of January 23rd, 1925 as excluding the subsidiary application of the above mentioned articles of the Hague Convention or the taking into consideration of allegations not supported by evidence filed at the same time. No documents which are not on record have been relied upon, with the exception of the Treaty of Utrecht—invoked however in the Netherland Counter-Memorandum—the text of which is of public notoriety and accessible to the Parties, and no allegation not supported by evidence is taken as foundation for the award. The possibility to make Rejoinder to the Explanations furnished at the request of the Arbitrator on points contained in the Memoranda and Counter-Memoranda and the extension of the time limits for filing a Rejoinder has put both Parties in a position to state—under fair conditions—their point of view in regard to that evidence which came forth only at a subsequent stage of the proceedings.

III

The *title alleged by the United States of America* as constituting the immediate foundation of its claim is that of *cession*, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7th, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession. This letter, reproduced in the Explanations of the United States Government, contains the following passage: "The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States—no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter 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."

Whilst there existed a divergence of views as to the extension of the cession to certain Spanish islands outside the treaty limits, it would seem that the cessionary power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the Treaty. It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers.

One observation, however, is to be made. Article III of the Treaty of Paris, which is drafted differently from the preceding Article concerning Porto Rico, is so worded that it seems as though the Philippine Archipelago, within the limits fixed by that Article, was at the moment of cession under Spanish sovereignty. As already stated the Island of Palmas lies within the lines traced by the Treaty. Article III may therefore be considered as an affirmation of sovereignty on the part of Spain as regards the Island of Palmas (or Miangas), and this right or claim of right would have been ceded to the United States, though the negotiations of 1898, as far as they are on the record of the present case, do not disclose that the situation of Palmas had been specifically examined.

It is recognized that the United States communicated, on February 3rd, 1899, the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect to the delimitation of the Philippines in Article III. The question whether the silence of a third Power, in regard to a treaty notified to it, can exercise any influence on the rights of this Power, or on those of the Powers signatories of the treaty, is a question the answer to which may depend on the nature of such rights. Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an

inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

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. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. Only if the examination of the arguments of both Parties should lead to the conclusion that the Island of Palmas (or Miangas) was at the critical moment neither Spanish nor Netherlands territory, would the question arise whether—and, if so, how—the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute.

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As pointed out above, the United States bases its claim, as successor of Spain, in the first place on *discovery*. In this connection a distinction must be made between the discovery of the Island of Palmas (or Miangas) as such, or as a part of the Philippines, which, beyond doubt, were discovered and even occupied and colonized by the Spaniards. This latter point, however, will be considered with the argument relating to contiguity; the problem of discovery is considered only in relation to the island itself which forms the subject of the dispute.

The documents supplied to the Arbitrator with regard to the discovery of the island in question consist in the first place of a communication made by the Spanish Government to the United States Government as to researches in the archives concerning expeditions and discoveries in the Moluccas, the 'Talaos' Islands, the Palaos Islands and the Marianes. The United States Government, in its Rejoinder, however states that it does not specifically rely on the papers mentioned in the Spanish note.

It is probable that the island seen when the Palaos Islands were discovered, and reported as situated at latitude 5° 48' North, to the East of Sarangani and Cape San Augustin, was identical with the Island of Palmas (or Miangas). The Island 'Meanguis' mentioned by the Spanish Government and presumed by them to be identical with the Talaos—probably Talautse or Talauer Islands—seems in reality to be an island lying more to the south, to which, perhaps by error, the name of another island has been transferred or which may be identified with the island Tanguandang (Tagulanda or Tahoelandang) just south of Siau (Siaoe), the latter island being probably identical with 'Suar' mentioned in the same report as lying close by. Tanguandang is almost the southernmost of the islands situated between Celebes and Mindanao, whilst Palmas (or Miangas) is the northernmost. On Tanguandang there is a place called Minangan, the only name, as it would seem, to be found on maps of the region in question which is closely similar to Miangas and the different variations of this

word. The name of 'Mananga' appears as that of a place on 'Tagulanda' in official documents of 1678, 1779, 1896, and 1905, but is never applied to the island itself; it is therefore not probable that there exists a confusion between Palmas (Miangas) and Minangan (Manangan) in spite of the fact that both islands belonged to Tabukan. However there may exist some connection between Minangan and the island 'Meanguis', reported by the Spanish navigators.

The above mentioned communication of the Spanish Government does not give any details as to the date of the expedition, the navigators or the circumstances in which the observations were made; it is not supported by extracts from the original reports on which it is based, nor accompanied by reproductions of the maps therein mentioned.

In its Rejoinder the United States Government gives quotations (translations) from a report of the voyages of GARCIA DE LOAISA which point to the fact that the Spanish explorer saw the Island of Palmas (Miangas) in October 1526.

The fact that an island marked as 'I (Ilha) de (or das) Palmeiras', or by similar names (Polanas, Palmas) appears on maps at any rate as early as 1595 (or 1596) (the date of the earliest map filed in the dossier), approximately on the site of the Island of Palmas (or Miangas), shows that that island was known and therefore already discovered in the 16th century. According to the Netherland memorandum, the same indications are found already on maps of 1554, 1558 and 1590. The Portuguese name (Ilha das Palmeiras) could not in itself decide the question whether the discovery was made on behalf of Portugal or of Spain; LINSCHOTEN's map, on which the name 'I. das Palmeiras' appears, also employs Portuguese names for most of the Philippine Islands, which from the beginning were discovered and occupied by Spain.

It does not seem that the discovery of the Island of Palmas (or Miangas) would have been made on behalf of a Power other than Spain; or Portugal. In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain; for the relations between Spain and Portugal in the Celebes Sea during the first three-quarters of the 16th century may be disregarded for the following reasons: In 1581, i.e. prior to the appearance of the Dutch in the regions in question, the crowns of Spain and Portugal were united. Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet recognized the separation when it concluded in 1648 with the Netherlands the Treaty of Münster—the earliest Treaty, as will be seen hereafter, to define the relations between Spain and the Netherlands in the regions in question. This Treaty contains special provisions as to Portuguese possessions, but alone in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations *inter se* of the two signatories of the Treaty of Münster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese. This conclusion is corroborated by the wording of Article X of the Treaty of Utrecht of June 26th, 1714, which expressly maintains

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Article V of the Treaty of Münster, but only as far as Spain and the Netherlands are concerned. It is therefore not necessary to find out which of the two nations acquired the original title, nor what the possible effects of subsequent conquests and cessions may have been on such title before 1648.

The fact that the island was originally called, not, as customarily, by a native name, but by a name borrowed from a European language, and referring to the vegetation, serves perhaps to show that no landing was made or that the island was uninhabited at the time of discovery. Indeed, the reports on record which concern the discovery of the Island of Palmas state only that an island was 'seen', which island, according to the geographical data, is probably identical with that in dispute. No mention is made of landing or of contact with the natives. And in any case no signs of taking possession or of administration by Spain have been shown or even alleged to exist until the very recent date to which the reports of Captain MALONE and M. ALVAREZ, of 1919, contained in the United States Memorandum, relate.

It is admitted by both sides that international law underwent profound modifications between the end of the Middle Ages and the end of the 19th 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 16th century—or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.

If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an 'inchoate title' a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal 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. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation,

to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty 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 a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle 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). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared.

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In the second place the United States claim sovereignty over the Island of Palmas on the ground of recognition by Treaty. The Treaty of Peace of January 30th, 1648, called hereafter, in accordance with the practice of the Parties, the '*Treaty of Münster*', which established a state of peace between Spain and the States General of the United Provinces of the Netherlands, in Article V, deals with territorial relations between the two Powers as regards the East and West Indies (Article VI concerns solely the latter). The English translation given in the Memorandum of the United States runs as follows:

TREATY OF PEACE BETWEEN PHILIP IV, CATHOLIC KING OF SPAIN

AND

THEIR LORDSHIPS THE STATES GENERAL OF THE UNITED PROVINCES
OF THE NETHERLANDS

Anno 1648, January 30th

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Article V

The navigation and trade to the East and West Indies shall be kept up and conformably to the grants made or to be made for that effect; for the security whereof the present treaty shall serve, and the Ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potentates, nations, and people, with whom the said Lords the States, or members of the East and West India Companies in their name, within the limits of their said grants, are in friendship and alliance. And each one, that is to say, the said Lords the King and States, respectively, shall remain in possession of and enjoy such lordships, towns, castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa, and America, respectively, which the said Lords the King and States, respectively, hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641 have taken from the said Lords the States and occupied, comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess. And the directors of the East and West India Companies of the United Provinces, as also the servants and officers, high and low, the soldiers and seamen actually in the service of either of the said Companies, or such as have been in their service, as also such who in this country, or within the district of the said two companies, continue yet out of the service, but who may be employed afterwards, shall be and remain to be free and unmolested in all the countries under the obedience of the said Lord the King of Europe; and may sail, traffic and resort, like all the other inhabitants of the countries of the said Lord and States. Moreover it has been agreed and stipulated, that the Spaniards shall keep their navigation to the East Indies, in the same manner they hold it at present, without being at liberty to go further; and the inhabitants of those Low Countries shall not frequent the places which the Castilians have in the East Indies.

This article prescribes no frontiers and appoints no definite regions as belonging to one Power or the other. On the other hand, it establishes as a criterion the principle of possession (*'demeureront en possession et jouiront de telles seigneuries . . . que lesdits Seigneurs Roy et Estats tiennent et possèdent'*).

However liberal be the interpretation given, for the period in question, to the notions of *'tenir'* (hold) and *'posséder'* (possess), it is hardly possible to comprise within these terms the right arising out of mere discovery; i.e. out of the fact that the island had been sighted. If title arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the treaty, it would probably have been mentioned in express terms. The view here taken appears to be supported by other provisions in the same article. It is stipulated therein that *'les lieux et places qu'iceux Seigneurs Estats ci-après sans infraction du présent traité viendront à conquérir et posséder'* shall be placed on the same footing as those which they possessed at the moment the treaty was concluded. In view of the interpretation given by Spain and Portugal to the

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right of discovery, and to the Bull *Inter Caetera* of ALEXANDER VI, 1493, it seems that the regions which the Treaty of Münster does not consider as definitely acquired by the two Powers in the East and West Indies, and which may in certain circumstances be capable of subsequent acquisition by the Netherlands, cannot fail to include regions claimed as discovered, but not possessed. It must further be remembered that Article V provides not merely a solution of the territorial question on the basis of possession, but also a solution of the Spanish navigation question on the basis of the *status quo*. Whilst Spain may not extend the limits of her navigation in the East Indies, nationals of the Netherlands are only excluded from 'places' which the Spaniards hold in the East Indies. Without navigation there is no possibility of occupying and colonizing regions as yet only discovered; on the other hand, the exclusion from Spanish 'places' of Netherlands navigation and commerce does not admit of an extensive interpretation; a 'place', which moreover in the French of that period often means a fortified place, is in any case an actual settlement implying an actual radius of activity; Article VI, for instance, of the same treaty speaks of 'lieux et places garnies de Forts, Loges et Chasteaux' (barbours, places, forts, lodgements or castles). For these reasons a title based on mere discovery cannot apply to the situation considered in Article V as already established.

Since the Treaty of Münster does not divide up the territories by means of a geographical distribution, and since it indirectly refuses to recognize title based on discovery as such, the bearing of the treaty on the present case is to be determined by the proof of possession at the critical epoch.

In connection herewith no precise elements of proof based on historical facts as to the display or even the mere affirmation of sovereignty by Spain over the Island of Palmas have been put forward by the United States. There is, however, one point to be considered in connection with the Treaty of Münster. According to a report, reproduced in the United States Explanations and made on February 7th, 1927, by the Provincial Prelacy of the Franciscan Order of Minors of the Province of St. Gregory the Great of the Philippines, the 'Islands Miangis' ('Las Islas Miangis'), situated to the north east of the 'Island of Karekelang' (most likely identical with the Nanusa N.E. of Karakelang, one of the Talauer Islands), after having been first in Portuguese, and then in Dutch possession, were taken by the Spaniards in 1606. The Spanish rule under which the Spanish Franciscan Fathers of the Philippines exercised the spiritual administration in the said islands, ended in 1666, when the Captain general of the Spanish Royal Armada dismantled all the fortified places in the Moluccas, making however before the 'Dutch Governor of Malayo' a formal declaration as to the continuance of all the rights of the Spanish Crown over the places, forts and fortifications from which the Spaniards withdrew. There are further allegations as to historical facts in regard to the same region contained in a report of the Dutch Resident of Menado, dated August 12th, 1857, concerning the Talauer Islands (Talaud Islands). According to this report, in 1677 the Spaniards were driven by the Dutch from Tabukan, on the Talautse or Sangi Islands, and at that time—even 'long before the coming of the Dutch to the Archipelago of the Moluccas'—the Talauer Islands (Karakelang) had been conquered by the Radjas of Tabukan.

According to the Dutch argument, considered hereafter, the Island of Palmas (or Miangas) together with the Nanusa and Talauer Islands (Talaud Islands) belonged to Tabukan. If this be exact, it may be considered as not unlikely that Miangas, in consequence of its ancient connection with the native State of Tabukan, was in 1648 in at least indirect possession of Spain. However this point has not been established by any specific proof.

But the question whether the Dutch took possession of Tabukan in 1677 in conformity with or in violation of the Treaty of Münster can be disregarded, even if—in spite of the incompleteness of the evidence laid before the Arbitrator—it were admitted that the Talautse (Sangi) Islands with their dependencies in the Talauer and Nanusa Islands, Palmas (or Miangas) possibly included, were 'held and possessed' by Spain in 1648. For on June 26th, 1714, a new Treaty of Peace was concluded at Utrecht, which, in its Article X, stipulates that the Treaty of Münster is maintained as far as not modified and that the above quoted Article V remains in force as far as it concerns Spain and the Netherlands.

Art. X, quoted in the French text published in 'Actes, Mémoires et autres pièces authentiques concernant la Paix d'Utrecht', vol. 5, Utrecht 1715, runs as follows:

The Treaty of Münster of January 30th, 1648, concluded between the late King PHILIP IV and the States General, shall form the basis of the present Treaty and shall hold good in every respect in so far as it is not modified by the following articles, and in so far as it is applicable, and, as regards Articles 5 and 16 of the said Peace of Münster, these Articles shall only hold good in so far as concerns the aforesaid High Contracting Parties and their subjects.

If—quite apart from the influence of an intervening state of war on treaty rights—this clause had not simply meant the confirmation of the principle of actual possession—at the time of the conclusion of the Treaty of Utrecht—as regulating the territorial status of the Contracting Powers in the East and West Indies and if, on the contrary, a restitution of any territories acquired before the war in violation of the Treaty of Münster had been envisaged, specific provisions would no doubt have been inserted.

There is further no trace of evidence that Spain ever claimed at a later opportunity, for instance in connection with the territorial rearrangements at the end of the Napoleonic Wars, the restitution of territories taken or withheld from her in violation of the Treaties of Münster or Utrecht.

As it is not proved that Spain, at the beginning of 1648 or in June 1714, was in possession of the Island of Palmas (or Miangas), there is no proof that Spain acquired by the Treaty of Münster or the Treaty of Utrecht a title to sovereignty over the island which, in accordance with the said Treaties, and as long as they hold good, could have been modified by the Netherlands only in agreement with Spain.

It is, therefore, unnecessary to consider whether subsequently Spain by any express or conclusive action, abandoned the right, which the said Treaties may have conferred upon her in regard to Palmas (or Miangas). Moreover, even if she had acquired a title she never intended to abandon,

it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.

It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands and, as such Treaties do not mention the island in dispute, they are not available even as indirect evidence.

We thus come back to the question whether, failing any Treaty which, as between the States concerned, decides unequivocally what is the situation as regards the island, the existence of territorial sovereignty is established with sufficient soundness by other facts.

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Although the United States Government does not take up the position that Spanish sovereignty must be recognized because it was actually exercised, the American Counter-Case none the less states that 'there is at least some evidence of Spanish activities in the island'. In these circumstances it is necessary to consider *whether and to what extent the territorial sovereignty of Spain was manifested* in or in regard to the Island of Palmas (or Miangas). Here it may be well to refer to a passage taken from information supplied by the Spanish to the American Government and communicated by the latter to the Netherlands Legation at Washington, in a note dated April 25th, 1914. The passage in question is reproduced in the text and in the annex of the United States' Memorandum, and runs as follows:

'It appears, therefore, that this Island of Palmas (or Miangas), being within the limits marked by the bull of ALEXANDER the Sixth, and the agreement celebrated between Spain and Portugal regarding the possession of the Maluco, must have been seen by the Spaniards on the different voyages of discovery which were made in these parts, and that it belonged to Spain, at least by right, until the Philippine Archipelago was ceded by the Treaty of Paris; but precise data of acts of dominion which Spain may have exercised in this island have not been found.

This is the data and information which we have been able to find referring to said island, with which without doubt, because of the small importance it had, the discoverers did not occupy themselves, neither afterwards the governors of the Philippines, nor the historians and chroniclers, such as HERRERA and NAVARRETTE and the fathers COLIN and PASTELLE of the Society of Jesus, who refer in their works to the above mentioned data without detailing any information about the said island.'

It further results from the Explanations furnished by the Government of the United States at the request of the Arbitrator that an exhaustive examination of the records which were handed over to the American authorities under Art. VIII of the Treaty of Paris, namely such as pertain to judicial, notarial and administrative matters, has revealed nothing bearing on the allegations made by natives of Palmas in 1919 to Captain MALONE and Mr. ALVAREZ on the subject of regular visits of Spanish

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ships, even gunboats, and on the collection of the 'Cedula'-tax. This being so, no weight can be given to such allegations as to the exercise of Spanish sovereignty in recent times—quite apart from the fact that the evidence in question belongs to an epoch subsequent to the rise of the dispute.

Apart from the facts already referred to concerning the period of discovery, and the mention of a letter which was sent on July 31st, 1604, by the Spanish pilot BARTOLOME PÉREZ from the Island of Palmas and the contents of which are not known, and apart from certain allegations as to commercial relations between Palmas and Mindanao, the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas.

Neither is there any official document mentioning the Island of Palmas as belonging to an administrative or judicial district of the former Spanish Government in the Philippines. In a letter emanating from the Provincial Prelacy of the Franciscan order of Minors mentioned above, it is said that the Islands of 'Mata and Palmas should belong (deben pertenecer) to the group of Islands of Sarangani and consequently to the District of Dávao in the Island of Mindanao'. It is further said in this letter that 'the Island of Palmas, as it was near to Mindanao, must have been administered (debió ser administrada) spiritually in the last years of Spanish dominion by the fathers who resided in the District of Dávao'. It results from the very terms of this letter, which places the 'Islands Miangis' to the north east of the Island Karakelang ('Karekelan'), that these statements, which suppose the existence of Mata, are not based immediately on information taken on the spot, but are rather conjectures of the author as to what seems probable.

In the Rejoinder filed by the United States Government there is an extract from a letter of the Dutch missionary STELLER, dated December 9th, 1895. It appears from this letter that the Resident of Menado, at the same time as he set up the Netherlands coat of arms at Palmas (or Miangas), had had the intention to present a medal to the native Chief of the island, 'because the said chief, recently detained in Mindanao on business, would not let the commanding officer of a Spanish warship force the Spanish flag upon him'. These facts, supposing they are correct, are no proof of a display of sovereignty over Palmas (or Miangas); rather the contrary. If the Spanish naval authorities to whom the administrative inspection of the southern Philippine Islands belonged, were convinced that the Island of Palmas was Spanish territory, the refusal of the native chief to accept the Spanish flag would naturally have led either to direct action on the Island in order to affirm Spanish sovereignty, or, if the Netherlands rights had been invoked, to negotiations such as were the sequel to General Wood's visit in 1906.

As regards the information concerning the native language or knowledge of Spanish, even if sufficiently established, it is too vague to indicate the existence of a political and administrative connection between Palmas (or Miangas) and Mindanao.

In a telegram from General LEONARD WOOD to the Bureau of Insular Affairs, reproduced in the American Explanations, it is stated that 'the

administrative inspection of the islands in the south (i.e. of the Philippines), especially round their coasts, belonged absolutely to the naval Spanish authorities'. As papers pertaining to military and naval matters were not handed over to the American authorities under the Treaty of Paris, the files relating to the said administrative inspection are not in the possession of the United States. The fact that not the ordinary provincial agencies but the navy were in charge of the inspection of the islands in the south, together with another fact, incidentally mentioned by Major General E. S. ORIS, in a report of August 31st, 1899, namely the existence of a state of war or at least of subdued hostility amongst the Moros against Spanish rule, leads to the very probable—though not necessary—conclusion that the complete absence of evidence as to display of Spanish sovereignty over the Island of Palmas is not due to mere chance, but is to be explained by the absence of interest of Spain in the establishment or the maintenance of her rule over a small island lying far off the coast of a distant and only incompletely subdued province.

It has been remarked, not without reason, that the United States, having acquired sovereignty by cession only in 1898, were at some disadvantage for the collection of evidence concerning the original acquisition and the display of sovereignty over Palmas. The Arbitrator has no possibility of taking into account this situation; he can found his award only on the facts alleged and proved by the Parties, and he is bound to consider all proved facts which are pertinent in his opinion. Moreover it does not appear that the Spanish Government refused to furnish the documents requested.

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Among the methods of indirect proof, not of the exercise of sovereignty, but of its existence in law, submitted by the United States, there is the *evidence from maps*. This subject has been very completely developed in the Memorandum of the United States and has also been fully dealt with in the Netherlands Counter-Memorandum, as well as in the United States Rejoinder. A comparison of the information supplied by the two Parties shows that only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute—supposing that they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps—as seems very often to be the case—but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.

If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of infor-

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mation are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy. Thus, a comparison of the maps submitted to the Arbitrator shows that there is doubt as to the existence or the names of several islands which should be close to Palmas (or Miangas), and in about the same latitude. The St. Joannes Islands, Hunter's Island and the Isle of Mata are shown, all or some of them, on several maps even of quite recent date, although their existence seems very doubtful. The non-existence of the Island of Mata and the identity of the St. Joannes and Hunter's Island with Palmas, though they appear on several maps as distinct and rather distant islands, may, on the evidence laid before the Arbitrator, be considered as fairly certain.

The 'Century Atlas' (Exhibit No. 8 of the American Memorandum) and the map published in 1902 by the *Bureau of Insular Affairs of the United States* (Exhibit No. 11), show 'Mata I', 'Palmas I' and 'Haycock or Hunter I'. The Spanish map (Captain MONTERO), reproduced by the *War Department of the United States* (Exhibit No. 9), also mentions these three islands, although 'Haycock I' and 'Hunter I' are here different islands. The same is to be said of the map of the CHALLENGER Expedition of 1885. The only large scale map submitted to the Arbitrator which, as appears from inscriptions on it, is directly based on researches on the spot, is that attached to the Netherlands Memorandum (British Admiralty Chart No. 2575). Now this map shows neither an island of Mata, nor of Hunter, nor of any other name in the regions where they should be, according to the other maps, and Haycock Island is indicated at two points other than that adopted in 'Exhibits Nos. 8 & 11'. Whatever be the accuracy of the British Admiralty Chart for the details in question, these points show that only with the greatest caution use can be made of maps as indications of the existence of sovereignty over Palmas (or Miangas). The maps which, in the view of the United States, are of an official or semi-official character and are of Spanish or American origin are that of Captain MONTERO and that of the *Insular Department*, referred to above (Exhibits Nos. 8 & 11). The first mentioned gives for that matter no indication as to political frontiers, and the second only reproduces the lines traced by the treaty of December 10th, 1898. They have therefore no bearing on the point in question, even apart from the evident inaccuracies, at least as regards Hunter Island, which they appear to contain precisely in the region under consideration.

As regards maps of Dutch origin, there are in particular two which, in the view of the United States, possess an official character and which might exclude Palmas (or Miangas) from the Dutch possessions. The first of these, published in 1857 by M. BOGAERTS, lithographer to the Royal Military Academy, and dedicated to the Governor of that institution, if it possesses the official character attributed to it by the American Memorandum and disputed by the Netherlands Counter-Memorandum, might serve to indicate that the island was not considered at the period in question as

Dutch but as Spanish territory. Anyhow, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights. The importance of this map can only be judged in the light of facts prior or subsequent to 1857, which the Netherlands Government alleges in order to prove the exercise of sovereignty over the Island of Palmas (or Miangas); these facts, together with the cartographical evidence relied upon in their support or submitted in connection with the question of the right location of the Island or Islands called 'Meangis', will be considered at the same time as the Netherlands arguments. While BOGAERTS' map does not, as it stands, furnish proof of the recognition of Spanish sovereignty, it must further be pointed out that it is inaccurate as regards the group of islands marked 'Menangis' and indicated on this map somewhat to the north of 'Nanoesa', as well as in other points, for example the shape of Mindanao and the colouring of certain small islands.

The conclusions drawn in the United States Memorandum from the second map, i.e. the atlas published by the Ministry for the Colonies (1897-1904), appear to be refuted by the information contained in the Netherlands Counter-Memorandum. A Copy of a detailed map from the same atlas is there shown which represents 'P. Miangis (E. Palmas)' amongst Dutch possessions, not only by the coloured contours, but also because it indicates the Sarangani Islands as 'Amerikaansch'. The general map, on the other hand, reproduced as 'Exhibit No. 10' in the American Memorandum excludes the former island from Dutch territory, by a line of demarcation between the different colonial possessions. There seems to be no doubt that the special map must prevail over the general, even though the latter was published three months later.

As to the special map contained in the first edition of the same atlas (Atlas der Nederlandsche Bezittingen in Oost-Indië [1883-1885]), where the 'Melangies' are reproduced as a group of islands north of the Nanusa and distinct from 'Palmas', the same observations apply as to BOGAERTS' map, which is fairly similar on this point. The 'Explanations' filed by the Netherlands Government make it clear that the authors of the map did not rely on new and authentic information about the region here in question, but reproduced older maps.

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In the last place there remains to be considered *title arising out of contiguity*. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, 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 Governmer.ts of the same State have on

different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms parts of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

There lies, however, at the root of the idea of contiguity one point which must be considered also in regard to the Island of Palmas (or Miangas). It has been explained above that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly un-subdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.

It is, however, to be observed that international arbitral jurisprudence in disputes on territorial sovereignty (e.g. the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola; LAFONTAINE, *Pasicrisie internationale*, pp. 201–209) would seem to attribute greater weight to—even isolated—acts of display of sovereignty than to contiguity of territory, even if such contiguity is combined with the existence of natural boundaries.

As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.

As regards the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualized. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the Island of Palmas (or Miangas) and neighbouring regions. The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as

confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives.

IV

The *Netherlands arguments* contend that the East India Company established Dutch sovereignty over the Island of Palmas (or Miangas) as early as the 17th century, by means of conventions with the princes of Tabukan (Taboekan) and Taruna (Taroena), two native chieftains of the Island of Sangi (Groot Sangihe), the principal island of the Talautse Isles (Sangi Islands), and that sovereignty has been displayed during the past two centuries.

In the annexes to the Netherlands Memorandum the texts of conventions concluded by the Dutch East India Company (and, after 1795, by the Netherlands State), in 1677, 1697, 1720, 1758, 1828, 1885 and 1899 with the Princes, Radjas or Kings, as they are indiscriminately called, of Tabukan, Taruna and Kandahar (Kandhar)-Taruna. All these principalities are situated in the Northern part of the Island of Sangi (Groot Sangihe or Sanghir) and, at any rate since 1885, include, besides parts of that island, also certain small islands further north, the Nanusa Islands—all incontestably Dutch—and, according to the Netherlands, also the Island of Palmas (or Miangas). These successive contracts are one much like another; the more recent are more developed and better suited to modern ideas in economic, religious and other matters, but they are all based on the conception that the prince receives his principality as a fief of the Company or the Dutch State, which is suzerain. Their eminently political nature is confirmed by the supplementary agreements of 1771, 1779 and 1782, concerning the obligations of vassals in the event of war. The dependence of the vassal State is ensured by the important powers given to the nearest representative of the colonial Government and, in the last resort, to that Government itself. The most recent of these contracts prior to the cession of the Philippines to the United States, that of 1885, contains, besides the allocation of powers for internal administration, the following provisions also, in regard to international interests: exclusion of the Prince from any direct relations with foreign Powers, and even with their nationals in important economic matters; the currency of the Dutch Indies to be legal tender; the jurisdiction over foreigners to belong to the Government of the Dutch Indies; the vassal is bound to suppress slavery, the White Slave Traffic and piracy; he is also bound to render assistance to the shipwrecked.

Even the oldest contract, dated 1677, contains clauses binding the vassal of the East India Company to refuse to admit the nationals of other States, in particular Spain, into his territories, and to tolerate no religion other than protestantism, reformed according to the doctrine of the Synod of Dordrecht. Similar provisions are to be found in the other contracts of the 17th and 18th centuries. If both Spain and the Netherlands had in reality displayed their sovereignty over Palmas (or Miangas), it would seem that, during so long a period, collisions between the two Powers must almost inevitably have occurred.

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The authenticity of these contracts cannot be questioned. The fact that true copies, certified by evidently the competent officials of the Netherlands Government, have been supplied and have been forwarded to the Arbitrator through the channels laid down in the Special Agreement, renders the production of facsimiles of texts and of signatures or seals superfluous. This observation equally applies to other documents or extracts from documents taken from the archives of the East India Company, or of the Netherlands Government. There is no reason to suppose that typographical errors in the reproduction of text may have any practical importance for the evidence in question.

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The fact that these contracts were renewed from time to time and appear to indicate an extension of the influence of the suzerain, seems to show that the regime of suzerainty has been effective. The sovereignty of the Netherlands over the Sangi and Talauer Islands is moreover not disputed. There is here a manifestation of territorial sovereignty normal for such a region. The questions to be solved in the present case are the following:

Was the island of Palmas (or Miangas) in 1898 a part of territory under Netherlands sovereignty?

Did this sovereignty actually exist in 1898 in regard to Palmas (or Miangas) and are the facts proved which were alleged on this subject?

If the claim to sovereignty is based on the continuous and peaceful display of State authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region.

According to the description of the frontiers of the territory of Taruna annexed to the contract of 1885, the list of dependencies of Taruna on the Talauer Islands mentions first the different islands of Nanusa, and ends by the words 'ten slotte nog het eiland Melangis (Palmas)', 'and lastly the island Melangis (Palmas)'.

The similar description of frontiers attached to the contract of 1899 states that the Islands of Nanusa (including the Island of 'Miangas') belong to the territory of Kandahar-Taruna. If these two mentions refer to the Island of Palmas (or Miangas), it must be recognized that that island, at any rate nominally, belongs to the vassal State in question; it is by no means necessary to prove the existence of a special contract with a chieftain of Palmas (or Miangas).

However much the opinions of the Parties may differ as to the existence of proof of the display of Dutch sovereignty over the Island of Palmas (or Miangas), the reports, furnished by both sides, of the visit of General WOOD, in January 1906, show that at that time there were at least traces of continuous relations between the island in dispute and neighbouring Dutch possessions, and even traces of Dutch sovereignty. General WOOD

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noted his surprise that the Dutch flag was flying on the beach and on the boat which came to meet the American ship. According to information gathered by him, the flag had been there for 15 years and perhaps even longer. Since the contract of 1885 with Taruna and that of 1899 with Kandahar-Taruna comprise Palmas (or Miangas) within the territories of a native State under the suzerainty of the Netherlands and since it has been established that in 1906 on the said island a state of things existed showing at least certain traces of display of Netherlands sovereignty, it is now necessary to examine what is the nature of the facts invoked as proving such sovereignty, and to what periods such facts relate. This examination will show whether or not the Netherlands have displayed sovereignty over the Island of Palmas (or Miangas) in an effective continuous and peaceful manner at a period at which such exercise may have excluded the acquisition of sovereignty, or a title to such acquisition, by the United States of America.

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Before beginning to consider the facts alleged by the Netherlands in support of their arguments, there are two preliminary points, in regard to which the Parties also put forward different views, which require elucidation. These relate to questions raised by the United States: firstly the power of the East India Company to act validly under international law, on behalf of the Netherlands, in particular by concluding so-called political contracts with native rulers; secondly the identity or non-identity of the island in dispute with the island to which the allegations of the Netherlands as to display of sovereignty would seem to relate.

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The acts of the *East India Company* (Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th till the 19th century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the States to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Münster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law; for the peace between Spain and the Netherlands extends to 'tous Potentats, nations et peuples' with whom the said Companies, in the name of the States of the Netherlands, 'entre les limites de leurdi's Octroys sont en Amitié et Alliance'. The conclusion of conventions, even of a political nature, was, by Article XXXV of the Charter of 1602, within the powers of the Company. It is a question for decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.

As regards *contracts between a State* or a Company such as the Dutch

East India Company and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. From the time of the discoveries until recent times, colonial territory has very often been acquired, especially in the East Indies, by means of contracts with the native authorities, which contracts leave the existing organization more or less intact as regards the native population, whilst granting to the colonizing Power, besides economic advantages such as monopolies or navigation and commercial privileges, also the exclusive direction of relations with other Powers, and the right to exercise public authority in regard to their own nationals and to foreigners. The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

In substance, it is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy for the natives. In order to regularize the situation as regards other States this organization requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory. There always remains reserved the question whether the establishment of such a system is not forbidden by the pre-existing rights of other States.

The point of view here adopted by the Arbitrator is—at least in principle—in conformity with the attitude taken up by the United States in the note already quoted above, from the Secretary of State to the Spanish Minister, dated January 7th, 1900 and relating to two small islands lying just outside the line drawn by the Treaty of Paris, but claimed by the United States under the said Treaty. The note states that the two islands ‘have not hitherto been directly administered by Spain, but have been successfully claimed by Spain as a part of the dominions of her subject, the Sultan of Sulu. As such they have been administered by Sulu agencies, under some vague form of resident supervision by Spanish agencies, which latter have been withdrawn as a result of the recent war’.

This system of contracts between colonial Powers and native princes and chiefs is even expressly approved by Article V of the Treaty of Münster quoted above; for, among the ‘Potentates, Nations and Peoples’, with whom the Dutch State or Companies may have concluded treaties of

alliance and friendship in the East and West Indies, are necessarily the native princes and chiefs.

The Arbitrator can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case.

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As to the *identity of the island* in dispute with the islands 'Melangis (Palmas)' and 'Miangas' in the contracts of 1885 and 1899 respectively, this must be considered as established by the large scale map which was sent to the Governor General of the Netherlands Indies by the Resident of Menado in January 1886 and which indicates in different colours the administrative districts on the Sangi and Talauer Islands in almost complete conformity with the description of the Territory of Taruna given in the annex to the contract of 1885, save that the name of Nanusa, applied to the group of seven islands by the contract, is there given to a single island of this group, usually called Merampi (Mehampi). This large scale map, prepared evidently for administrative purposes, of which a reproduction has been filed with the Explanations of the Netherlands Government, shows an isolated island 'Palmas or Melangis' which, though not quite correct in size and shape and though about 40' too much to the south and 20' too much to the east, cannot but correspond to Palmas (or Miangas), since the most reliable detailed modern maps, in particular the British Admiralty Chart, show no other island but Palmas (or Miangas) between the Talauer or Nanusa Islands and Mindanao.

This comparatively correct location of the island is supported by earlier maps. The map edited at Amsterdam by COVENS and MORTIER at a date not exactly known, but certainly during the 18th century, shows at about the place of Palmas (or Miangas) a single island with the inscription 't regte P: Menangus' (the right island Menangus) as distinguished from the 'engelsche Eilanden Menangus' and from the group of the Nanusa. This map proves that before that time uncertainty had existed as to the real existence of one or several islands Menangus, an uncertainty evidently due in its origin to the mention of the existence of 'Islands Meangis' made by the Englishman DAMPIER, in his book published in 1698.

In conformity with this statement by COVENS and MORTIER, the map contained in the book published in 1855 by the navigator CUARTERON shows a single island 'Mianguis', not in exactly the place of the island in dispute, but distinct from the 'Nanuse' and lying about midway between Cape San Augustin and the 'Nanuse'. CUARTERON's map shows 'Mianguis' distinctly as a Dutch possession—by colour expressly indicated as relating to political boundaries: it is accompanied by geographical and statistical information and due to an author who travelled extensively in these parts (1841-49), and against whose reliability not sufficient reasons have been given. Among other points the explanation gives for 'Mianguis' the comparatively exact geographical location (latitude north 5° 33' 30" [Special Agreement 5° 35']; longitude east of Rome 114° 42' 00" = 127° 12' 53" east of Greenwich (Special Agreement 126° 36')) and also detailed though evidently only approximative statistical information about the composition of the population. It further appears from CUARTERON's book

that 'Mianguis' is something apart from the Nanusa, though CUARTERON observes that the 'Nanuse' Islands are little known by the geographers under the name of 'Mianguis'.

A proof of the fact that the Dutch authorities were quite aware of the identity of 'Miangas' with the island charted on many maps as 'Palmas' is to be found in the reports of the Commander of the Dutch Government Steamer 'Raaf' (November 1896) and of H.M.S. 'Edi' (June 1898). These officers mention expressly the double name and give the almost exact nautical location of the island then visited.

One observation is however to be made. The island, shown on the maps and mentioned in the contracts, bears different names: Melangis, Miangas, Miangus, Mianguis. In different documents referred to in the Netherland Memorandum and Counter-Memorandum more than a dozen other variations of the name appear, although in the opinion of the Netherlands Government they all concern the same island. These differences, sometimes considerable at first sight, are sufficiently explained by the statements of linguistic experts, produced by the Netherlands Government. The peculiarity of the native language from which the name of the island is borrowed and the difficulty of transposing the sounds of this language into a western alphabet seem not only to make comprehensible the existence of different spellings, but to explain why precisely these variations have appeared. Differences of spelling are even recorded as such in documents as early as a letter, dated May 11th, 1701, of the Governor of the Moluccas and a report, dated September 12th, 1726. Moreover, the difference of spelling would not justify the conclusion that the more or less different names referred to different islands; for in the whole region in question no other island has been mentioned to which these names—or at least most of them—would better apply; for the Island of Tangelandang, with the place Minangan already referred to, is clearly distinguished from the island of Miangas in the documents of both the 18th and the 19th centuries relating to the dependencies of Tabukan.

No evidence has been submitted to support the supposition that the island, appearing on some old maps as 't regte Menangus' would be identical with Ariaga (Marare), which, according to a statement of MELVILL VAN CARNBEE, mentioned in the United States Memorandum, is uninhabited.

Great stress is laid in the Rejoinder of the United States on the fact that the Nanusa Isles or some Islands of this group are designated by several distinguished cartographers and navigators of the 19th century as 'Islands Meangis' or by some similar name, and that amongst these cartographers and sailors some are Dutchmen, in particular Baron MELVILL VAN CARNBEE. This statement which is, no doubt, exact, cannot however prove that the island Miangas mentioned as a dependency of Tabukan or Taruna or Kandahar-Taruna is to be identified with the 'Is. Meangis' and therefore with the Nanusa Isles. It is clear that the cartographers referred to apply the name of 'Iles Meangis' or some similar name to a group of Islands. On the other hand, the island the identity of which is disputed can be but a single, distant, isolated island. The attribution of the name Meangis to the Nanusa seems to be an error, because the official documents laid before the Arbitrator which belong about to the same period as

the maps mentioning the 'Is. Meangis', make a clear distinction between the principal islands composing the Nanusa and the island of Miangas or Meangas or Melangis, though the latter is considered as 'onderhoorig' of the Nanusa Isles. The identification of the Nanusa with 'Meangis' Islands may be explained by the desire to locate somewhere the Meangis Islands, famous since DAMPIER'S voyage. Seeing that up to very recent times an extraordinary inexactitude about the names and the location of the islands in precisely that part of the Celebes Sea is shown to exist by almost all the maps filed by the Parties, including the two maps of MELVILL VAN CARNBEE, an erroneous attribution of the name 'Miangas', even by Dutch cartographers, is easily possible.

It is not excluded that the three 'English Menangis Islands' which are located on some maps to the east of the 'right Menangis' and of which a detailed map with indication of the depth of the surrounding sea has been filed, did in fact exist, but have disappeared in consequence of earthquakes such as reported by CUARTERON.

Finally it may be noted that the information concerning Palmas or the other islands such as St. Juan, Mata, Hunter Island, which are to be identified with it, contains, except for the most recent period, nothing which relates to the population of the island; moreover all these names, given to the island, except Mata, may have been given by navigators who did not land or get into contact with the natives. Miangas however is a native name, which the inhabitants must have communicated to the chiefs to whom they were subject and to the navigators with whom they came in touch. The name of Miangas as designating an inhabited place (negorij) is much older than the establishment of the more centralized village in 1892.

It results from these statements that, when the contracts of 1885 and 1899 mentioned, in connection with, but distinct from the Nanusa, a single island Melangis or Miangis as belonging to Taruna or Kandahar-Taruna, only the island in dispute can have been meant, and that this island has been known under these same or similar names at least since the 18th century. No plausible suggestion has been made as to what the single island 'Miangas', the existence of which cannot be doubted, might be, if it is not the island in dispute.

The special map on sheet 14 (issued in 1901) of the 'Atlas van Nederlandsch Oost-Indië' (1897-1904), in showing 'P. Miangis (Palmas E.)' as a Dutch possession in the place indicated in the Special Agreement, is in conformity with earlier maps and information, particularly with the Government's special map of 1886. Under these circumstances no weight can be given to the fact that on BOGAERTS' map of 1857 and in the atlas of STEMFORT and SIETHOFF (1883-85), as well as on other maps, a group of islands called Meangis, or a similar name, appears.

* * *

The preliminary questions being settled, the evidence laid before the Arbitrator, by the Netherlands Government in support of its claim is now to be considered.

As regards the documents relating to the *17th and 18th centuries*, which

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in the view of the Netherlands show that already at that date the Prince of Tabukan had not only claimed, but also actually displayed a certain authority over Palmas (or Miangas), the following must be noted:

The Netherlands Government gives great weight to the fact that Dutch navigators who, in search of the islands Meangis mentioned by DAMPIER, were sailing in the seas south of Mindanao and whose reports are at least in part preserved, not only came in sight of Palmas (or Miangas), but were able to state that the island belonged to the native state of Tabukan, which was under Dutch suzerainty, as shown by the contracts of November 3rd, 1677, and September 26th, 1697.

The existence of Dutch rule would be proved by the fact that the Prince's flag—i.e. the Dutch East India Company's flag—was seen being waved by the people of the island when the Dutch ships *De Bye*, *Larycque* and *De Peer* were in sight of the island on November 21st, 1700, but were prevented from landing by the conditions of the sea. The commander of the *Larycque*, who had already sighted the island on November 12th of the same year, was instructed to make more precise investigations by landing, and he was able to do so on December 9th and 10th. Not only was the Prince's flag again hoisted by the natives, but the inhabitants informed the sailors that the name of the island was 'Meangis'. They gave to the commander a document—lost since that time—which, dating from 1681 and emanating from MARCUS LALERO, the late king of Tabukan, whose existence and death are confirmed by the contract of 1697, stated the allegiance of the people of 'Miangis' towards Tabukan. There exists however only an indirect report on this visit of December 10th, 1700, namely a letter dated May 11th, 1701, and sent by the Governor in Council of the Moluccas at Tarnate to the Governor General and India Council. In this letter, based, no doubt, on information furnished by the commander of the *Larycque*, who had reached Ternate on December 29th, 1700, the Governor says that the island in question is the farthest of the Talauer islands and that its name, correctly spelt, is not 'Meangis', but 'Mayages'.

These statements as well as the circumstance that all the reports without any mention of neighbouring islands, speak of a single island, the shape of which corresponds fairly with that of Palmas (or Miangas), would make it almost certain that the island in question is in fact Palmas (or Miangas), unless the nautical observations given in the report mentioned above ($4^{\circ} 49'$; $4^{\circ} 37'$; $5^{\circ} 9'$) might point to the Nanusa group, to which the allegiance with Tabukan would equally apply. These observations, though no doubt subject to error, would however seem to offer relatively more guarantee of accuracy than those based on the length of time taken to cover a distance at sea, mainly relied upon in the Netherlands Memorandum for the location of the island. Since, however, no other single island in those parts of the Sea of Celebes seems to exist, and since it is most unlikely that the navigators would on none of the three visits in November and December have sighted and mentioned neighbouring islands, there is at least a great probability that the island visited by the *Larycque* on December 10th, 1700, was Palmas (or Miangas).

The mention of an island 'Meamgy', in connection with, but distinct from the Nanusa, appears again in a document, dated November 1st, 1701,

concerning regulations as to criminal justice (suppression of vendetta and reservation of capital punishment as an exclusive prerogative of the East-India-Company) in the native State of Tabukan, to which the island visited December 10th, 1700, was reported to belong. The fact that the regulations for Tabukan are, by an express provision, declared applicable to the 'islands of Nanusa and Meangy thereunder included' proves that an island of the latter name was known and deliberately treated as belonging to the vassal State of Tabukan.

In a report of the Governor of Ternate, dated June 11th, 1706, the island 'Miangas' is mentioned as the northernmost of the dependencies of the native States of Tabukan and Taruna, in connection with 'Kakarotang' (Onrata or Kakarutan on the Brit. Adm. map) one of the Nanusa, and explicitly identified with the island first seen by the Larycque on November 21st, 1700. Finally, another report of the Governor of Ternate, dated September 12th, 1726, mentions a decision on the question whether 80 Talauers (inhabitants of the Talauer Islands) who had arrived at Taruna from the island 'Meangas off (or) Mejages' were subjects of Taruna or of Tabukan. This island is expressly identified with that which was visited in 1700 by the commander of the Larycque.

This documentary evidence, taken together with the fact that no island called Miangas or bearing a similar name other than Palmas (or Miangas) seems to exist north of the Talautse (Sangi) and Talauer Isles, leads to the conclusion that the island Palmas (or Miangas) was in the early part of the 18th century considered by the Dutch East India Company as a part of their vassal State of Tabukan. This is the more probable for the reason that in later times, notably in an official report of 1825, the 'far distant island Melangis' is mentioned again as belonging to Tabukan.

In the documents subsequent to 1825, Miangas (Melangis) appears as a dependency of Taruna, another of the vassal States in the north of Sangi (Groot Sangihe), which already in 1726 had claimed the island as its own. The date and circumstances of this transfer are not known, but it must have taken place before 1858; for a report of the Governor of Menado, dated December 31st, 1857, mentions the Nanusa and 'Melangis' as parts of Taruna. This state of things has been maintained in the contracts of 1885 and 1899. From the point of view of international law, the transfer from one to another vassal-State is to be considered as a purely domestic affair of the Netherlands; for their suzerainty over Tabukan and Taruna goes back far beyond the date of this transfer.

Considering that the contracts of 1676 and 1697 with Tabukan established in favour of the Dutch East India Company extensive rights of suzerainty over Tabukan and an exclusive right of intercourse with that State, and considering further that at least two characteristic acts of jurisdiction expressly relating to Miangas, in 1701 and 1726, are reported, whilst no display of sovereignty by any other Power during the same period is known, it may be admitted that at least in the first quarter of the 18th century, and probably also before that time, the Dutch East India Company exercised rights of suzerainty over Palmas (or Miangas) and that therefore the island was at that time, in conformity with the international law of the period, under Netherlands sovereignty.

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No evidence has been laid before the Arbitrator from which it would result that this state of things had already existed in 1648 and had thus been confirmed by the Treaty of Münster. It suffices to refer to what has already been said as to this Treaty in connection with the title claimed by Spain. On the one hand, it cannot be invoked as having transformed a state of possession into a conventional title *inter partes*, for the reason that Dutch possession of the island Palmas (or Miangas) is not proved to have existed at the critical date. On the other hand, it was stated that neither the Treaty of Münster nor the Treaty of Utrecht, if they are at all applicable to the case, could at present be invoked for invalidating the acquisition of sovereignty over Palmas (or Miangas) obtained by the Dutch at a date subsequent to 1648. It follows rather from what has been said about the rights of Netherlands suzerainty over Tabukan, in the early 18th century, and as to relations between Tabukan and Palmas (or Miangas), that the Treaty of Utrecht recognized these rights of suzerainty as comprising the radja of Tabukan amongst the 'potentates, nations and peoples with whom the Lords States or members of the East and West India Companies are in friendship and alliance'.

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The admission of the existence of territorial sovereignty early in the 18th century and the display of such sovereignty in the 19th century and particularly in 1906, would not lead, as the Netherlands Government appears to suppose, by analogy with French, Dutch and German civil law, to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime. For the reasons given above, no presumption of this kind are to be applied in international arbitrations, except under express stipulation. It remains for the Tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals.

There is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Government, as far as concerns not the vassal-State of Tabukan in general, but Palmas (or Miangas) in particular. There is however no reason to suppose, when the Resident VAN DELDEN, in a report of 1825, mentioned the island 'Melangis' as belonging to Tabukan, that these relations had not existed between 1726 and 1825.

VAN DELDEN's report, as well as later documents relating to the 19th century, shows that Miangas was always considered by the Dutch authorities as belonging to the Sangi and Talauer Isles and as being in a particular connection with the Nanusa. An extensive report of the Resident of Menado, dated August 12th, 1857, gives detailed statements about the administrative organization, including the names of the villages (*negorijen*) and districts or presidencies (*djoegoeschappen*) and the number and title and names of the native officials. The island 'Melangis' goes with the Nanusa, but is distinct from the island 'Nanoesa' (usually called Mehampi, after the chief village) and Karaton; it is administered by one 'radja', who at that time was named Sasoeh. This report leaves no room for doubt as to the legal situation of Melangis at that period, and is in conformity with the

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territorial description given for Palmas (or Miangas) in the contracts of 1885 and 1899 already mentioned, and also with a table, dated September 15th, 1889, showing the whole system of administrative districts in the Talauer Islands which are dependencies of the native principalities of the Sangi Isles.

It would however seem that before 1895 the direct relations between the island and the colonial administration were very loose. In a report on a visit paid to the island in November 1895 by the Resident of Menado, it is stated that, according to the natives, no ship had ever before that time visited the island, and that no European had ever been there; the Resident himself was of opinion that he was the first colonial official who went to Palmas (or Miangas); also the commander of H.M.S. 'Edi', who patrolled the Celebes Sea in 1898, mentions that 'in man's memory a steamer had never been at Miangas'. The documents relating to the time before 1895 are indeed scanty, but they are not entirely lacking. A series of statements made by certain natives, chiefs and others, mostly of good age, whose memories went back far beyond 1906—at least to 1870—, have been laid by the Netherlands Government before the Tribunal, two of them also in the native language used by the witnesses. It would seem to result from these depositions that the people of Miangas used to send yearly presents (pahawoea) to the radja of Taruna as token of their submission; even details about the distribution of the tribute to be collected are given. On the other hand the radja of Taruna was under the obligation to give assistance to the island in case of distress. A deposition made by a Dutch civil officer gives the list of 8 headmen who had been instituted either by the radja of Tabukan (probably Taruna) or by the Resident of Menado at Miangas until 1917.

Whatever may be the value of such depositions made all since 1924, they are at least in part supported by documentary evidence. Thus the list of headmen is confirmed as concerns the nomination of Timpala by a decree signed on September 15th, 1889, by the Resident of Menado. The most important fact is however the existence of documentary evidence as to the taxation of the people of Miangas by the Dutch authorities. Whilst in earlier times the tribute was paid in mats, rice and other objects, it was, in conformity with the contract with Taruna of 1885, replaced by a capitation tax, to be paid in money (one florin for each native man above 18 years). A table has been produced by the Netherlands Government which contains for all the dependencies of the Sangi States situated in the Talauer Islands the number of taxpayers and the amount to be paid. There 'Mena-gasa' ranks as a part of the 'Djoegoeschap' (Presidency) of the Nanusa under the dependencies of Taruna, with 88 'Hassilplichtigen' (taxpayers), paying each Fl. 1.—.

It further results from a report of the Controleur of Taruna dated November 17th, 1896, that the people of 'Melangis' paid their tax by selling products on the larger islands and thus getting the money with which the new tax was to be paid. The effective payment of the tax is likewise confirmed by the commander of H.M.S. 'Edi' in a report dated June 18th, 1898.

The report of the Controleur of Taruna referred to mentions the fact that on November 4th, 1896, a coat of arms was handed to the 'Kapitein-

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laonet' (administrative head) of 'Melangis', just as two days before, the same act had taken place at Karaton (Karatong), an island of the Nanusa. The report mentions that in both cases the native authorities were informed as to the meaning of this act. The distribution of coats of arms and flags as signs of sovereignty is regulated by instructions sanctioned by the Crown in 1843. The coats of arms placed at Miangas in 1896 were found in good state by H.M.S. 'Edi' in 1898. The existence of a 'vlaggestok' on the island is proved by sketches made in 1895 and 1898 by officers of the Dutch ships 'Raaf' and 'Edi'.

The orders given, May 13th, 1898, to H.M.S. 'Edi' which was to be stationed in the seas of North-East Celebes and Ternate leave no doubt that the task of the said vessel was to patrol these coasts and the Sangi and Talauer Islands, and, 'if necessary, to make respected the rules for the maintenance of strict neutrality'. The log-book of the ship proves that H.M.S. 'Edi' twice visited Palmas (or Miangas) during the war, in June and in September 1898.

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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 in the note of the Department of State, dated January 25th, 1915, and the note of the Netherlands Minister at Washington, dated May 29th, 1915. The events falling between the Treaty of Paris, December 10th, 1898 and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding. It is to be noted in the first place 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. The contract with Kandahar-Taruna of 1899 runs on the same lines as the preceding contract of 1885 with Taruna, and was in preparation already before 1898. The system of taxation, as shown by the table of the years 1904 and 1905, is the same as that instituted in 1895. The headman TIMPALA, instituted in 1889, was replaced by a new man only in 1917.

The assistance given in the island after the typhoon of October 1904, though in itself not necessarily a display of State functions, was considered as such—as is shown by the report of the Resident of Menado, dated December 31st, 1904—that the island 'Miangis', which was particularly damaged, could only get the indispensable help through Government assistance ('van Gouvernementswege'). Reference may also be made to a relation which seems to have existed already in former times between the tribute paid by the islanders to the Sangi radjas and the assistance to be given to them in time of distress by the larger islands with their greater resources.

V

The **Conclusions** to be derived from the above examination of the arguments of the Parties are the following:

The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain. The essential point is therefore to decide whether Spain had sovereignty over Palmas (or Miangas) at the time of the coming into force of the Treaty of Paris.

The United States base their claim on the titles of discovery, of recognition by treaty and of contiguity, i.e. titles relating to acts or circumstances leading to the acquisition of sovereignty; they have however not established the fact that sovereignty so acquired was effectively displayed at any time.

The Netherlands on the contrary found their claim to sovereignty essentially on the title of peaceful and continuous display of state authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of state authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time.

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of Sangi (Talautse Isles).

b. These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal state as a part of his territory.

c. Acts characteristic of State authority exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and

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peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial power over a native State, and in regard to outlying possessions of such a vassal state.

Now the evidence relating to the period after the middle of the 19th century makes it clear that the Netherlands Indian Government considered the island distinctly as a part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place.

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 Netherlands over the Talauise (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700–1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counter-balance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of state authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of state authority (so-called prescription), some of which have been discussed in the United States Counter Memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial states. A clandestine exercise of state authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of

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suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such 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, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas), would not be subject to the rule of notification.

There can further be no doubt that the Netherlands exercised the state authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of state authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

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.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

The title of recognition by treaty does not apply, because even if the Sangi States, with the dependency of Miangis, are to be considered as 'held and possessed' by Spain in 1648, the rights of Spain to be derived from the Treaty of Münster would have been superseded by those which were acquired by the Treaty of Utrecht. Now if there is evidence of a state of possession in 1714 concerning the island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands. But even if the Treaty of Utrecht could not be taken into consideration, 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.

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, therefore holds good.

* * *

The same conclusion would be reached, if, for argument's sake it were admitted that the evidence laid before the Tribunal in conformity with the rules governing the present procedure did not—as it is submitted by the

United States—suffice to establish continuous and peaceful display of sovereignty over the Island of Palmas (or Miangas). In this case no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party.

A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article I) presuppose for the present case that the Island of Palmas (or Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, Parties to the dispute. For since, according to the terms of its Preamble, the Agreement of January 23rd, 1925, has for object to 'terminate' the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a 'non liquet', but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

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 to the Special Agreement, 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.

For the reasons given above, no presumption in favour of Spanish sovereignty can be based in international law on the titles invoked by the United States as successors of Spain. Therefore, there would not be sufficient grounds for deciding the case in favour of the United States, even if it were admitted, in accordance with their submission, that the evidence produced by the Netherlands in support of their claim either does not relate to the Island in dispute or does not suffice to establish a continuous display of state authority over the island. For, in any case, the exercise of some acts of state authority and the existence of external signs of sovereignty, e.g. flags and coat of arms, has been proved by the Netherlands, even if the Arbitrator were to retain only such evidence as can, in view of the trustworthy and sufficiently accurate nautical observations given to support it, concern solely the Island of Palmas (or Miangas), namely that relating to the visits of the steamer 'Raaf' in 1895, of H.M.S. 'Edi' in 1898 and of General Wood in 1906.

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of state authority, or a commencement of occupation of an island not yet forming a part of the territory of a state; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of state authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence

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of different interests which are worthy of legal protection. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any State, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title—at least as long as no dispute on the matter had arisen, i.e. until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21st, 1906, that the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each Party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration—as the Arbitrator considers should be done—all the evidence which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which—as has been stated above—may be regarded as sufficiently proving the existence of Netherlands sovereignty.

FOR THESE REASONS THE ARBITRATOR,

in conformity with Article I of the Special Agreement of January 23rd, 1925

DECIDES that:

THE ISLAND OF PALMAS (or MIANGAS) forms in its entirety a part of Netherlands territory.

Done at The Hague, this fourth day of April 1928.

MAX HUBER,
Arbitrator.

MICHIELS VAN VERDUYNEN,
Secretary General.

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