AUSTRALIAN SOVEREIGNTY IN ANTARCTICA
Part I

BY GILLIAN TRIGGS*

[*In this article Ms Triggs critically examines the viability, in international law, of Australian claims to sovereignty over some 42% of the Antarctic continent. In Part I of her article she examines the principles of international law which relate to the acquisition and maintenance of territorial sovereignty before moving on, in Part II, which will appear in the next issue of the Review, to apply these principles to the Australian situation.*]

Modern international law is concerned to an increasing extent with the management and allocation of resources.[1] This is particularly true of the Antarctic. The Southern Ocean is abundant in high protein krill, seals and whales, birds and other living organisms.[2] The geological structure of the continental land margin of the Antarctic coast promises significant quantities of oil and gas[3] and serious efforts are being made to harness the fresh water resources of Antarctic icebergs.[4] As scientific research, exploration and technological developments confirm the extent and quality of these resources and the feasibility of their exploitation the question of which State, if any, has sovereignty over them becomes crucial. At present seven States claim territorial sovereignty over sectors of Antarctica: New Zealand, United Kingdom, France, Chile, Argentina, Norway and Australia.[5]

* LL.M. (S.M.U.), LL.B.; Barrister and Solicitor of Supreme Court of Victoria, Lecturer in Law, University of Melbourne.

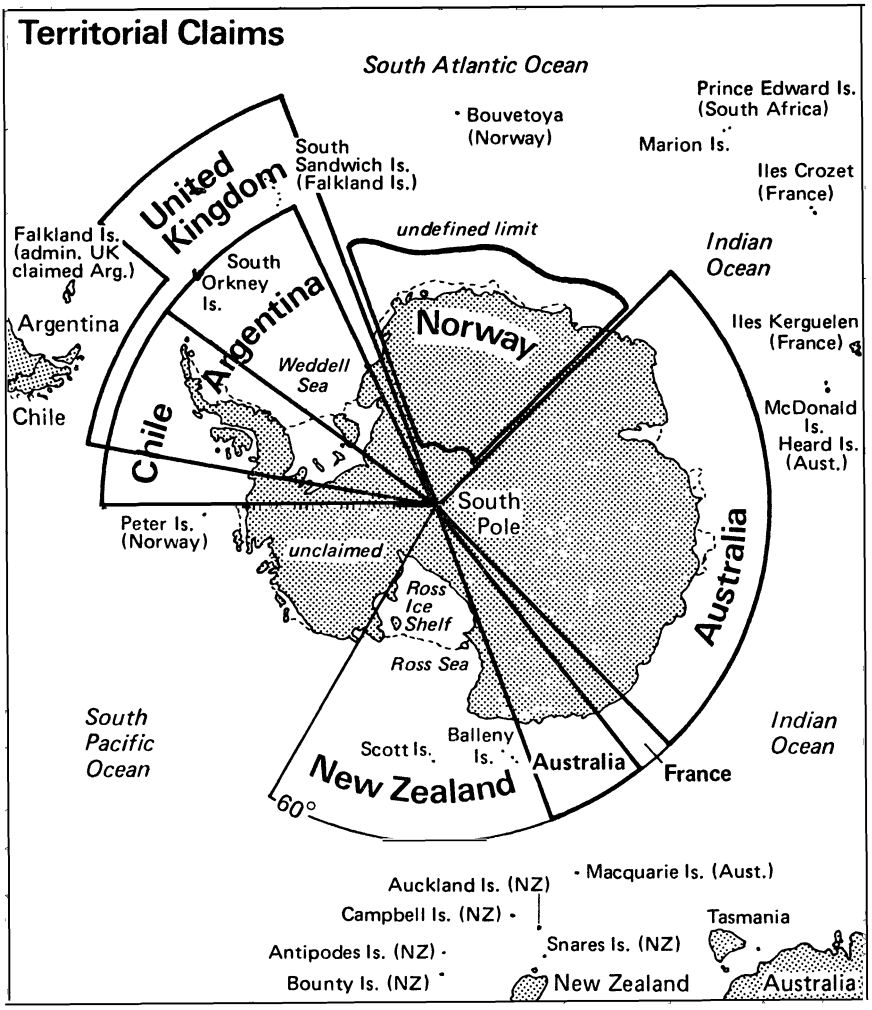
[1] See Charter for Economic Rights and Duties of States 1974, the New International Economic Order, and recent U.S. legislation concerning the sale of uranium discussed in *In re Westinghouse Electric Corp. Uranium Contract Litigation* [1978] A.C. 547.

[2] Report of a Meeting of the SCAR Group of Specialists on Living Resources of the Southern Ocean, (1976) 52 *Scientific Committee on Antarctic Research Bulletin* reprinted in (1976) 18 *Polar Record* 103. For a summary of Antarctic resource potential see Lovering J. F. and Prescott J. R. V., *Last of Lands . . . Antarctica* (1979) and Dugger, 'Exploiting Antarctic Mineral Resources — Technology, Economics and the Environment' (1978) 33 *University of Miami Law Review* 315, 317-20.

[3] Wright N. A. and Williams P. L., *Mineral Resources in Antarctica*, (1974) U.S. Geological Survey Circular 705.

[4] Weeks W. F. and Campbell W. J., 'Icebergs as a fresh water source: An Appraisal' (1973) 12 *Journal of Glaciology* 207.

[5] See generally Daniels P. C., 'The Antarctic Treaty' in *Frozen Future* (1973). The claims are: United Kingdom 1908, 20°–80° West Longitude. New Zealand 1923, 150° West Longitude–160° East Longitude. France 1924, 136°–142° East Longitude. Australia 1933, 45°–160° East Longitude; excepting the French claim. Norway 1939, 20° West Longitude–45° East Longitude (coastal not sector claim). Chile 1940, 53°–90° West Longitude; overlapping the U.K. claim between 53° and 80° West Longitude. Argentina, 25°–70° West Longitude; entirely within the U.K. claim and overlapping the Chilean claim between 53°–74° West Longitude. 90°–150° West Longitude, as the most inaccessible region remains unclaimed.



While several other non-claimant States are active there they do not recognize the validity of these claims[6] and, indeed, the claimant States dispute between themselves the extent and validity of their titles.[7] Territorial sovereignty is based upon the traditional international law doctrines of acquisition. However the development of the common heritage concept

[6] *E.g.* United States and the Soviet Union. For a recent statement by Dixy Lee Ray, Assistant Secretary of State, see U.S. Antarctic Policy: U.S. Policy *re* Mineral Exploration and Exploitation in the Antarctic: Hearing Before The Subcommittee on Oceans and International Environment of the Committee on Foreign Relations, 94th Congress 1st Session (1975) 14, 17.

[7] Only five States recognize their claims *inter se*; the claims of the others, Argentina, Chile and the United Kingdom, overlap.

through the Third United Nations Conference on the Law of the Sea[8] and Third World demands for a New International Economic Order[9] challenge the appropriateness and legal validity of these doctrines.

Australia claims approximately 42% of the Antarctic continent. It has been the consistent policy of the government that Australia has sovereignty over the Australian Antarctic Territory and *ipso facto* exclusive jurisdiction over the continental shelf and super-jacent waters 200 miles from the coast. This policy has been stated recently as follows:

> [T]he right to exploit resources is traditionally an integral part of the concept of national sovereignty. Australia's policy towards Antarctic mineral issues therefore proceeds from the view that any long term solution to the question raised cannot be reached solely by resorting to a provision similar to Article IV of the Antarctic Treaty which preserves the positions on sovereignty of both the claimant and non-claimant states. Australia and the other claimants will be looking for a role in a regime commensurate with their sovereign status.[10]

The Australian Government has argued that any such regime whether for environmental protection or resource management and exploitation must be commensurate with Australian sovereignty, and at the same time must protect the interests of all concerned States without prejudicing those of the rest of the international community.

The purpose of this article is to assess the legal strength of Australia's claim to sovereignty in Antarctica. This requires an examination of the traditional doctrines of territorial acquisition in the context of the factual evidence supporting Australia's claim. To the extent that customary international law is found to have changed however, it becomes necessary to decide how it has changed and whether such changes can affect the establishment or maintenance of sovereign title. It will be argued that Australia has not established sovereignty over the Australian Antarctic Territory and that the continent remains *terra nullius*. The vague and uncertain doctrine of inchoate title will be examined as a means by which Australia might perfect her incomplete title under the protection of a 'prior right' to the territory claimed.

This discussion has not been prompted by any particular dispute between Australia and a rival claimant. Rather, it is intended to examine, in advance of such a dispute, both the relevant legal principles and the historical evidence upon which Australia bases its sovereignty. This analysis considers the possibilities of a single State challenging Australia's right to regulate matters within its sector on the ground that it has a better title or that the continent is *res nullius*. It is also possible, and more likely, that the international community may object that the continent is *res nullius* or subject to 'common rights'.

[8] United Nations Draft Convention on the Law of the Sea (Informal Text) Article 136, (1980) 19 *International Legal Materials* 1129.

[9] See Friedberg A., *The U.N. Conference on Trade and Development of 1964* (1964); Shuvrie H., *UNCTAD II; A Step Forward* (1968).

[10] January 1981, *Australian Foreign Affairs Record* 4, 12-3.

It is not intended to evaluate political and economic factors which are likely to play, if not the conclusive role, at least a substantial role in any compromise of the competing interests. While the legal arguments may not in the final analysis be decisive, it remains important that Australia's sovereignty claim be measured against the requirements of international law. It is upon international law that Australia's position depends. If government policy in the future were to contemplate an interest 'of less than full sovereignty'[11] in Antarctica, such a change should rest upon a clear understanding of the strengths and weaknesses of Australia's present claim to title.

Part I of this article is concerned with the principles of international law as they relate to the acquisition and maintenance of territorial sovereignty. Part II will apply these principles to the evidence of Australian occupation and settlement of Antarctica.

The discussion is divided as follows:

1. The doctrine of effective occupation.
2. The sector principle.
3. Inchoate title based upon discovery and minor acts of administration.
4. Intertemporal law.
5. Establishing the critical date.
6. British and Australian activity in the region of the Australian Antarctic Territory up to 1961.
   (i) 1820-1933
   (ii) 1933-1961
7. Status of Australia's Antarctic claim as at 1961.
8. The Antarctic Treaty.
9. Development of customary international law since 1961.
10. The Australian Antarctic Territory from 1961 to the present.
11. Assessment of Australia's activities in Antarctica since 1961 in the light of evolving customary international law.
12. Conclusion.

1. THE DOCTRINE OF EFFECTIVE OCCUPATION

The term 'sovereignty' is used in both municipal and international law and is given a variety of meanings. For the purposes of this discussion of territorial acquisition sovereignty may be described as the term for the plenary competence of a State or, in other words, the totality of the rights and duties of a State which are recognized by international law.[12] This includes the exclusive right to exercise the functions of a State and is

[11] As suggested by Greig D. W., 'Territorial Sovereignty and the Status of Antarctica' (1978) 32 *Australian Outlook* 117.

[12] O'Connell D. P., *International Law* (2nd ed. 1970) i, 403; Crawford J., *The Creation of States in International Law* (1979) 26-7; Jennings R. Y., *The Acquisition of Territory in International Law* (1963) 1-6.

predicated upon territory. Territory is a necessary ingredient of sovereignty: nationality depends upon the relationship between the individual and territory, and one of the clearest rules of international law is that no State may exercise its sovereignty within the territory of another State. For this reason the delimitation of sovereign power upon a territorial basis is central to the system of international law.

The relationship between sovereignty and territory implies that sovereignty and the ownership of territory are coincidental. That is, a sovereign has property rights over the territory in which it exercises its *imperium*. International law has treated territorial sovereignty by a State as analogous to the ownership of land by natural persons. However there is an important difference between the concept of property in the common and civil law systems. Under common law the Crown has the ultimate reversion and sovereignty and property are indistinguishable. By contrast, Roman law maintained a distinction between sovereignty and property. Grotius, for example, made a distinction between *dominium* and *imperium* on the ground that it was possible to acquire sovereignty over something which could not be owned. This distinction has assumed significance for the exercise of sovereignty over maritime areas or air space and outer space. For present purposes territorial sovereignty will be treated as encompassing property or title to the soil, and describes the fullest possible rights over territory.

The traditional texts list five modes by which territorial sovereignty may be acquired.[13] These are occupation of *terra nullius*, prescription (by which title flows from effective possession over a period of time), cession or transfer by treaty, accretion where water changes the shape of the land and finally, conquest. Only the first of these has any relevance to the question of Antarctic sovereignty. Before examining the doctrine of occupation it should be noted that international tribunals have been reluctant to place their decisions within the 'neat classifications prepared for them by text-writers'.[14] The means by which States may acquire territory are not always mutually exclusive and tribunals may examine a combination of them before concluding that a valid title exists.

Throughout the period of colonial expansion from the 16th to the 19th centuries States did not adhere to any one doctrine of territorial acquisition.[15] Territorial expansion was justified on grounds ranging from

[13] *E.g.* O'Connell, *op. cit.* 405-43; Johnson D. H. N., 'Consolidation as a Root of Title in International Law' (1955) *Cambridge Law Journal* 215-6, nn. 5-11; Oppenheim L., *International Law* (8th ed. 1955) i, 543-77.

[14] Johnson D. H. N., 'Acquisitive Prescription in International Law' (1950) XXVII *British Yearbook of International Law* 332, 348.

[15] O'Connell, *op. cit.* 408.

elaborate religious ceremonies[16] to 14th century Papal Bulls.[17] As a practical reality however, States found it necessary to consolidate their claims to title by 'actual settlement and administration, coupled with at least the presumption to exclude others by force if necessary . . .'.[18]

While territorial sovereignty implies the protection of both possession and abstract title, 'international law . . . cannot be presumed to reduce a right such as territorial sovereignty . . . to the category of an abstract right, without concrete manifestations'.[19] For this reason international law follows the rule of private law that stresses the importance of possession; the right to sovereignty has tended to follow the fact of sovereignty. By the end of the 19th century State practice recognized that effective presence was the only way a State could protect its exclusive territorial claims.

The concept of effective occupation was articulated for the first time by the Powers at the African Conference held in Berlin in 1885 as follows:

> The signatory powers of the present Act recognise the obligation to ensure the *establishment of authority* in the regions occupied by them on the coasts of the African continent sufficient *to protect existing rights*, and as the case may be, freedom of trade and of transit upon the conditions agreed upon.[20]

While this was originally limited to the African continent its terms were redrafted in the Convention of St. Germain of 1919 to apply generally. States now recognized the obligation to notify claims to territory and to maintain in the territories occupied by them an authority sufficient to protect acquired rights and freedom of commerce and transit. As Waldock points out, the African Conference marked a shift in emphasis from the physical taking of possession of land and the exclusion of others 'to the manifestation and exercise of the functions of government over the territory'.[21]

International tribunals have only rarely been required to examine the classical doctrines of territorial acquisition, or more specifically to give precision to the concept of effective occupation. On those occasions when they have done so, it has been in relation to remote and relatively inhospitable areas. The analogical relevance for Antarctic claims is obvious. It was argued, and continues to be the view of the editors of Oppenheim,[22]

[16] The Spanish and Portuguese claims were considered to be founded in 'divine rather than in the human law'. O'Connell, *op. cit.* 408.

[17] See *Inter Caetera* (Alexander VI) in favour of Ferdinand and Isabella of Spain; *Documents Relating to Antarctica* prepared in the Office of the Legal Advisor to the Department of Foreign Affairs, 1976 (hereinafter cited as *Documents*) III, 1. (These are available only through the Department.)

[18] O'Connell, *op. cit.* 409.

[19] Huber, sole arbitrator in the *Island of Palmas* case (1928) 2 Reports of International Arbitral Awards 829, 839.

[20] 76 *British Foreign State Papers* 19. See also discussion in *Clipperton Island* case (1931) II U.N. Rep. 1105 ff. Emphasis is author's.

[21] Waldock C. H. M., 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) 25 *British Year Book of International Law* 311, 317.

[22] *International Law* (7th ed. 1948) i, 509; see also Vattel E. de, *Le Droit des Gens* (1863) 491; Phillimore R. J., *Commentaries on International Law* (3rd ed. 1879) i, 333.

that as polar regions are uninhabitable they are not subject to national claims of sovereignty. The view that polar regions are not subject to national appropriation rested upon the doctrine that actual settlement or use of territory is essential to its effective occupation. Where conditions were remote or inhospitable and habitation difficult or impossible, effective occupation could not be achieved and hence no claim to sovereignty could be maintained.

This logic was rejected by three arbitral and judicial decisions made between 1928 and 1933 in the *Island of Palmas*,[23] *Eastern Greenland*[24] and *Clipperton Island* cases.[25] These defined effective occupation as a flexible and comparative standard dependent upon the degree of control required in the particular circumstances. Before examining these cases in detail a possibly obvious point should be made. In each instance the court or arbitrator was required simply to decide which of the contesting States had a better title to the territory in question. In anticipation that a scramble for territory might otherwise result, the tribunals refused to consider the possibility that the land might be *res nullius*. Instead they strained to discover sovereignty in one claimant or the other. An important difference exists between these cases and the question as to the validity of Antarctic claims as the latter springs from neither a dispute between the claimant States nor from specific third State claims of a superior title. Rather it arises from a political argument that the existing claims cannot be maintained *erga omnes*, that is, as against the rest of the international community. While the effect and intention of the decisions has been to establish title *erga omnes*, the tribunals considered the issue from the blinkered perspective of a choice between two possibly incomplete titles. For this reason alone they have a limited value and are distinguishable in relation to the question of Antarctic sovereignty.

In the first of these cases, the *Island of Palmas*, a dispute arose in 1906 between the United States and the Netherlands as to sovereignty over an isolated island located between the Philippines and Indonesia. The United States rested its claim upon cession to it by Spain in the Treaty of Paris 1898, and hence derivatively upon Spanish discovery and subsequent effective occupation. Holland argued that prior effective occupation had been achieved on its behalf by the Dutch East India Company through treaties with the princes and chieftains of the islands. While the question of occupation of uninhabited territory did not arise sovereignty depended upon the establishment of a sufficient local administration. The dispute was submitted by agreement to the Permanent Court of Arbitration. Max Huber of Switzerland was the sole arbitrator. Huber defined territorial

[23] (The Netherlands v. U.S.) (1928) 2 R.I.A.A. 829.
[24] (Denmark v. Norway) (1933) Series A-B No. 53 P.C.I.J. 22.
[25] (1932) 26 *American Journal of International Law* 390 (France v. Mexico), Arbitrator: King Victor Emmanuel III of Italy.

sovereignty as giving a State the right to exercise the functions of a State in relation to its territory to the exclusion of all others. He stressed that territorial sovereignty could not be maintained as an abstract right without 'concrete manifestations'.[26] These were the actual, continuous and peaceful display of power. Huber added the following qualification:

> 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. . . .[27]

With the substantive law thus clarified, Huber went on to examine the historical evidence of sovereignty up to the date of Spain's purported cession. He could find no trace of Spanish activities of any kind specifically relating to Palmas. While he concluded sovereignty might be regarded as confined within 'narrow limits' in such a region, the island though isolated had a native population sufficient to warrant certain acts of public administration. By contrast, the Netherlands government could demonstrate that the acts of sovereignty between the native princes and chiefs, and the East India Company acting on its behalf, were sufficient to form the basis of a territorial claim. There was considerable doubt as to the exact identity of the Palmas Island and it was difficult to establish whether activities related specifically to it or to other islands. Further the arbitrator concluded that documents relating to the period before 1895 were scanty though not entirely lacking. He seemed most impressed nonetheless by evidence showing the Dutch authorities had taxed the native population of the island group since 1885 and had distributed Dutch coats of arms and flags on the islands:[28] very meagre evidence indeed, existing over a period of five years prior to the Treaty of Paris. Huber justified this by saying that sovereignty might properly be 'founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute'.[29] He concluded in fact that all acts between 1700 and 1906 should be considered as evidence of Dutch sovereignty. As a matter of law Huber found it unnecessary to delve back to any far distant period, providing sovereignty existed at the critical date and had done so continuously and peacefully so as to allow any other power to ascertain the strength of the prior right. He concluded that the positive acts of sovereignty displayed by the Dutch prevailed over the inchoate title of the Spanish based on discovery.

While it may be accepted as reasonable that sufficient manifestations of sovereignty depend upon the circumstances of the territory and its

[26] (1928) 2 R.I.A.A. 829, 839.
[27] *Ibid.* 840.
[28] *Ibid.* 865.
[29] *Ibid.* 870.

inhabitants, the evidence of effective occupation in this instance seems so slight as to warrant the conclusion that neither party had established sovereignty. Huber's judgment itself suggests that neither title was fully valid:

> 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.[30]

The judgment in favour of the Netherlands is best seen as required by the terms of the Special Agreement defining the arbitrator's mandate. The Agreement assumed the territory belonged to one party or the other and directed the arbitrator to 'terminate'[31] the dispute. Huber interpreted this as requiring that he should found his decision on the relative strengths of the titles invoked by each party. The exercise of some acts of State authority by the East India Company was sufficient to tip the balance.

While the arbitrator's interpretation of the facts according to the legal principles is unsatisfactory, the *Island of Palmas* forms the basis of a decision three years later by the Permanent Court of International Justice in the *Eastern Greenland* case. The historical facts culminating in this dispute are significant as they demonstrate why, for the second time, an international tribunal was required to award full title to one of two apparently inadequate claimants. Greenland was colonized originally in the year 1000 *A.D.* by the Norwegians, the best known of whom was Eric the Red. While the crowns of Norway and Denmark were united in 1380, Greenland was regarded as a Norwegian possession and remained so despite the disappearance of the colonies by 1500. The 17th and 18th centuries saw a revival of interest in Greenland with Dano/Norwegian exploration, the founding of Hans Egedes colonies in 1721, the grant of trade monopolies, and legislation in 1740-1751 to protect and enforce them. The Court recognized that while the intent to exercise sovereign rights seemed clear in relation to the trade settlements and colonies, the difficult question was whether this conferred a valid title to the whole territory. In 1774 Greenland was administered by an autonomous board and all trade in the area became a State monopoly. As the East coast was more difficult to settle, colonies, factories and stations were limited to the West coast.

In 1813 Denmark was defeated in battle by Sweden and her allies, Russia, Great Britain, and Prussia, whereupon Denmark ceded the Kingdom of Norway to Sweden. The Treaty of Kiel, on 14 January 1814, specifically excluded Greenland, along with the Ferroe Isle and Iceland.

[30] *Ibid.*
[31] See preamble to agreement between the U.S. and the Netherlands (1925) 2 R.I.A.A. 831.

Greenland thenceforth became a possession in right of the Danish crown. During the 19th and early 20th centuries the coasts of Greenland were entirely explored. Several Danish expeditions among many others, explored the non-colonized parts of Greenland including the whole of the East coast. In 1894 the first Danish settlement was established on the East coast, and in 1905 a Proclamation was published notifying the existence of Danish colonies on the West coast from latitude 60° to latitude 74° 30′ N. Also in 1905 a three mile territorial sea was claimed around the coast of Greenland reserving all fishing to Danish subjects. In 1908 and in 1921 laws were promulgated for the administration of the whole of Greenland. During this later period Norwegian activities were limited to periodic expeditions, the establishment of a wireless station at Mackenzie Bay, hunting operations and the building of houses and cabins in the disputed territory.

In 1920 the Danish government attempted to clarify its title to Greenland and gained satisfactory assurances from Britain, France, Italy, Japan and Sweden on the subject of recognition. In his dissenting opinion N. Anzilotti argued that each of these government responses implied that formal possession of the entire area had not yet taken place but that it was desirable that Danish sovereignty should extend to the whole of Greenland.[32] No assurance was forthcoming from the Norwegian government which wanted to ensure the historical liberty of its citizens to fish and hunt on the East coast. Moreover the Norwegians maintained that the uncolonized part of the East coast remained *terra nullius* and open to occupation by other States. In an attempt to resolve this impasse Norway and Denmark negotiated a Convention coming into force on 10 July 1924. Its aim was to strengthen friendly relations between the States, to guarantee ships of both nationalities free access to the East coast and to give the crews the right to land and winter in the territory for hunting and fishing. The question of sovereignty was reserved. A year later on 1 April 1925 the Danish government limited fishing and hunting in Greenland to Danish subjects who obtained licences under the terms of the Convention. This was followed by further administrative arrangements for the whole of Greenland reserving all commercial activities for the Danish State. Norway made 'categorical reservations' to this monopoly in so far as it related to non-colonized areas of Greenland. Danish settlements at this time were confined to ice-free pockets on the West, South-East and South-Western coasts with a total population of thirteen thousand, most of whom were Eskimos.

The situation remained quiescent until 1930 when Norway conferred police powers on its citizens to inspect Norwegian hunting stations in East Greenland. This was clearly incompatible with the Danish view of its own

[32] (1933) No. 53 P.C.I.J. 80.

sovereignty. Matters came to a head in June 1931 when Norwegian hunters hoisted the Norwegian flag in Mackenzie Bay on the East Coast and proclaimed the area for the Norwegian crown. The Norwegian government consolidated this with a Royal Resolution placing part of the East Coast under Norwegian sovereignty, naming it Eirik Raudes Land. Two days later, on 12 July 1931, the Danish government instituted proceedings before the International Court of Justice. The essence of the Danish application was that it had established sovereignty over all of Greenland by continuous and peaceful occupation uncontested by any other nation. Norway repeated its assertion that Danish sovereignty existed only in relation to the limits of her colonies. The rest of Greenland was *terra nullius.*

This recitation of the facts demonstrates that while Norway was concerned to protect relatively limited interests in fishing and hunting she could do so only by making the radical claim to sovereignty in those areas not settled by Denmark. The Court recognized that this dispute was unusual as no competing claim to sovereignty existed until as recently as 1921.[33] It was nonetheless unwilling to concede that, at best, the Danish title was inchoate. The Court acted on the assumption that territorial sovereignty lay with one of the competing States, very probably to avoid a politically dangerous scramble to settle the interior. Critical to the Court's conclusion was the following oft-quoted observation:

> 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. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[34]

The Court echoed the reasoning in the *Island of Palmas* but isolated two elements essential for occupation: the intent and will to act as sovereign, and the actual exercise or display of such authority. The Court concluded that in the absence of a competing claim, and given the inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway had a valid claim to sovereignty in Greenland at the time of the Treaty of Kiel in 1814. Between 1814 and 1915 Denmark's intent to act as sovereign in the uncolonized areas was demonstrated by the concessions granted, legislation enacted, treaties negotiated and by the recognition of foreign governments.[35] From 1915 to 1931 the Court found that Denmark had exercised the functions of sovereignty by promulgating administrative, hunting and fishing regulations, and mounting scientific, mapping and exploratory expeditions. As in the *Island of Palmas* the International Court of Justice stressed that the question was whether

[33] *Ibid.* 46.
[34] *Ibid.*
[35] *Ibid.* 48 ff.

sovereignty existed at the critical date of 1931. The activities during this later period were alone deemed sufficient to justify the conclusion that Danish sovereignty over all of Greenland had been established. Hence the Court's conclusion was that Norway's occupation and subsequent Resolution of 1931 were illegal and invalid.

It is clear that the Court was not daunted by the limited extent of Danish coastal settlement in Eastern Greenland. It ignored the facts that for long periods of Danish 'sovereignty' no settlements existed and that in the most recent period Norway had established settlements in the disputed area over which the Danes had no administrative control at all. The Court recognized Danish title to the entire area on the basis of Denmark's intent and will to act as sovereign as had been demonstrated by the extension of administrative legislation to the entire area of Greenland; a rather empty gesture to the extent that the Danish settlement was limited to small, primarily Eskimo populated, colonies on the coast. Despite this the Court said:

> Legislation is one of the most obvious forms of the exercise of sovereign power, and it is clear that the operation of these enactments was not restricted to the limits of the colonies. It therefore follows that the sovereign right in virtue of which the enactments were issued cannot have been restricted to the limits of the colonies.[36]

The competing claims to territorial sovereignty in the *Clipperton Island* case were even more specious than those of the *Eastern Greenland* or the *Island of Palmas* cases. Here the French claim to a virtually uninhabited Pacific island off the coast of Mexico rested upon the discovery in 1858 by Lieutenant Victor Kerweguen. Although unable to land, he made geographical notes of the island while cruising half a mile from it, and authorized by the French navy, he formally declared it to be the territory of Emperor Napoleon III and his successors. The declaration was duly reported in the Honolulu journal the *Polynesian* some months later. Apart from the grant of a concession to U.S. citizens for guano, the French did nothing more in relation to the island until 1897 when a Mexican gunboat visited. This sparked off a diplomatic dispute in which the Mexicans claimed sovereignty on the basis of prior Spanish discovery.

The matter was submitted to arbitration by the King of Italy, Victor Emmanuel III. He rejected the Mexican historical title and proceeded on the basis that the island was *terra nullius* in 1858 and hence the question of whether the Mexicans could establish sovereignty after 1897 depended upon whether the French had effectively occupied it prior to that time. While accepting that the doctrine of effective occupation normally required 'an organization capable of making [the State's] laws respected',[37] he considered that there may be cases where this was not necessary. If the territory was uninhabited a State might acquire sovereignty simply by

[36] *Ibid.* 48.
[37] (1932) 26 *American Journal of International Law* 390, 394.

showing that it was 'from the first moment when the occupying State makes its appearance there, at the absolute and undisputed disposition of that state . . .'.[38] The arbitrator concluded that such was the position in this instance and that France had acquired sovereignty in 1858. Hence the declaration of annexation was valid. Despite the fact that France had not exercised her authority there in any positive manner since 1858, it did not 'imply the forfeiture of an acquisition already definitively perfected'.[39] Further, the requirements of the African Conference were held not to apply on the ground that it related only to the African continent and Mexico was not a party.[40]

For the third time, an international tribunal was willing to recognize the acquisition of sovereignty where actual possession and administrative control were minimal, or in this case, non-existent. Each decision has rested upon the fact that the territory was sparsely settled or unpopulated and did not require continuous administration. Minimal control was for practical purposes also 'effective' occupation. Consideration was not given to the possibility that where continuous and effective occupation was impossible so too was the acquisition of sovereign rights.

The next two decisions apply the general principles of territorial acquisition as stated in the *Eastern Greenland*, the *Island of Palmas* and the *Clipperton Island* cases. They demonstrate the minute historical and legislative detail that the International Court of Justice has seen fit to examine in order to assess whether effective occupation and hence sovereignty has been established. In the *Minquiers and Ecrehos* case[41] the Court was 'requested to determine whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic'.[42] The Court was not given the option of deciding either that the territory was *res nullius* or that a condominium had been established. Again, a tribunal was required to choose the better of two competing claims. It should be noted that it was accepted by the parties that some rocks and islets might not have been capable of appropriation. In this event the Court was to consider the group as a whole without applying the detail in relation to particular rocks within the group. Each party contended that it had an ancient or original title to the group and that this had been maintained and never lost. For this reason the Court said the case was not one of sovereignty over *terra nullius*. In other words one of the two titles was necessarily valid.

The Court did not discuss the international law theories of territorial acquisition other than to state that the evidence should demonstrate the

[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] (1953) I.C.J. Reps. 47.
[42] *Ibid.* Article II, 49.

intention of the State to act as sovereign and that these acts should be of such a character as to manifest State authority.[43] The Court said that the question of sovereignty depended ultimately on evidence relating directly to possession of the islands and attached 'in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation'.[44] The Court then proceeded to examine a wealth of complex and ancient detail of administrative control over the area and concluded that sovereignty lay with the United Kingdom.

The evidence considered decisive included British criminal proceedings in relation to a shooting on Ecrehos in 1826, inquests on corpses found there, the establishment of a custom house in the island group, and the inclusion of an island boat within the Jersey fishing boat register. Contracts for the sale of land in the group were registered in Jersey's Public Registry, and the rocks of the Ecrehos were included within the limits of the Port of Jersey. The Court examined ancient treaties dividing the Duchy of Normandy in the middle ages and concluded that the islands were part of the fief of the Channel Islands and were held by the English king. No such evidence of title or occupation could be established by the French. The Court attached the greatest importance to acts of legislation, local administration and jurisdiction by which the State might fulfil its international obligations. Acts of individuals, geographical data, and the special interests of the parties were not considered by the Court. Although the Court considered the more recent manifestations of sovereignty to be the most significant, it also considered medieval treaties and documents to assess the relationship between the claimant State and the disputed territory.

In contrast with the *Eastern Greenland, Island of Palmas* and *Clipperton Island* cases, the United Kingdom's effective administrative control over the island group was clearly superior to that of France, and indeed to that of any of the claimant States in the earlier cases. More importantly, the activities took place without interval over a 250 year period and were sufficient to discharge any duty of sovereignty imposed by international law. The decision is consequently, and with respect, correct, as the British title was established and maintained by continuous effective occupation in accordance with the requirements of international law.

The case is yet again subject to the criticism that the International Court of Justice considered itself bound to choose between two alternatives, rather than to make a decision upon the general principles of international law. It must be admitted that the Court's reference to the terms of the *compromis*[45] weakens the value of the judgment as the Court's decision affects not only the parties but the rest of the world. It may well be that, in any event, the imposition of a non-exhaustive set of solutions upon the

[43] *Ibid.* 71.
[44] *Ibid.* 65.
[45] *Ibid.* 52.

Court conflicts with Article 38 of the Court's statute.[46] While this is probably correct it remains unlikely that the Court would come to a conclusion which is manifestly incompatible with international law. Further, the evidence of sovereignty in the *Minquiers and Ecrehos* case was substantial and the Court was justified in awarding title to the U.K. regardless of the invalidity of the *compromis*.

The most recent decision in which the doctrine of effective occupation was significant is the *Western Sahara* case.[47] Here the International Court of Justice was asked for an advisory opinion by the United Nations General Assembly as to, *inter alia*, the validity of Morocco's claim to sovereignty over the Western Sahara on the grounds of immemorial possession. Morocco in reliance upon the *Eastern Greenland* principles, supported her claim by stressing that over a long period Morocco was the only independent State in North-West Africa, that the Western Sahara is geographically contiguous to Morocco, and that the area was of a desert character. The Court distinguished the *Eastern Greenland* case from the present case on the basis that while the Western Sahara was sparsely populated, it was a 'territory across which socially and politically organized tribes were in constant movement and where armed incidents between these tribes were frequent'.[48] This presumably demonstrated that clear evidence of administrative control was necessary. Such evidence as Morocco was able to adduce as to its authority in the area did not relate unambiguously to Western Sahara. The Court was reluctant to give effect to a concept of contiguity particularly as the geographical unity was unclear. The Court also distinguished between the personal allegiance of Saharan tribes to Morocco from the political authority which was essential for sovereignty. It concluded that while there were legal ties of allegiance with the Sultan of Morocco the evidence did not support sovereign title to the area. The Court did not discuss the theories of territorial acquisition but simply applied the Permanent Court's statement that sovereignty depended upon 'the intention and will to act as sovereign and some actual exercise or display of such authority'.[49] While the Court impliedly affirmed the correctness of the *Eastern Greenland* case in its application to isolated and uninhabited areas, it avoided recognizing title in any party by distinguishing the facts.

As precedents for the acquisition of territory in Antarctica these cases are weak. In the three most recent decisions the International Court of Justice and the arbitrator applied the law of effective occupation as it had been articulated in the *Island of Palmas* and *Eastern Greenland* cases. Of

[46] Judge Basdevant's individual opinion implies that an alternative judgment was necessarily restricted by the *compromis*. *Ibid.* 84. As to the 'illegality' of such a *compromis* see: Fachiri A. P., *The Permanent Court of International Justice* (2nd ed. 1932) 73; Roche A. G., *The Minquiers and Ecrehos Case* (1959) 151-4.
[47] (1975) 12 I.C.J. (A.O.).
[48] *Ibid.* 43.
[49] (1933) No. 53 P.C.I.J. 45-6.

all these five decisions, two, including the cornerstone case of the *Island of Palmas*, were by single arbitrators of *ad hoc* tribunals, and concerned relatively trivial territorial disputes. In only the *Eastern Greenland* case does the statement of principle have the judicial weight of the Permanent Court of International Justice.

The most potent criticism lies in the failure of these tribunals to consider options other than that one of the competing claims was valid. While political and pragmatic considerations certainly dictated that the territories should not be declared *terra nullius* the necessary result of awarding title to one of the disputants was that it created title *erga omnes*. The declaration of the African Conference in 1885 had stated the rationale of effective occupation as the establishment of sufficient authority to protect existing rights and freedom of trade and transit. It would have been logically consistent with this to conclude that where such rights and duties do not exist, neither can sovereignty. The better approach, and consistent with such prior case law as existed, would have been to declare that at best inchoate titles existed. This would have allowed the relevant States to consolidate their claims while at the same time preventing other States from joining the scramble to establish sovereignty.

It has been noted[50] that Judge Huber in the *Island of Palmas* case considered himself bound by the terms of the *compromis* between the Netherlands and the United States. He implied[51] that had he not been so bound he would have been prepared to find a *non liquet* if neither party could establish title at general international law. This is an important concession as it in turn implies that the *compromis* might require a court to make a finding which is inconsistent with international law. The International Court of Justice was also constrained by a *compromis* in *Minquiers and Ecrehos* but the evidence was sufficiently substantial to support the validity of title in that case. The evidence was not of such a character in the *Island of Palmas* case, and for this reason Huber's judgment is substantially weakened. It is interesting that the only instance in which a tribunal chose not to recognize title was the advisory opinion of the International Court of Justice where no *compromis* existed.

Even had the tribunals applied the law as they understood it, the evidence of actual occupation in each case, other than *Minquiers and Ecrehos*, was so slight as to suggest that full sovereignty could not exist. There was no evidence that Clipperton was at the absolute disposition of any State, and Huber found it difficult to ascertain the correct name of Palmas or whether the administrative acts actually applied to it. Finally, while the Permanent Court of International Justice in *Eastern Greenland* considered that 'very

[50] *Supra* and Article I of the Special Agreement (1925) 2 R.I.A.A. 831, 837, 869.
[51] (1928) 2 R.I.A.A. 829, 869 '[I]t is the evident will of the Parties that the arbitral award shall not conclude by a "non liquet" . . .'.

little in the way of the actual exercise of sovereign rights'[52] was required, it awarded title to Greenland on the basis of Denmark's intent to act as sovereign rather than on any positive act in the uncolonized areas.

At the very least the *Eastern Greenland, Island of Palmas* and *Clipperton Island* cases should be confined in their historical and political contexts. It was seen as important that the tribunals should award sovereignty to one claimant in order to avoid potentially dangerous attempts to consolidate title. There was no precedent for internationalization and the 'common heritage concept' was unknown. The primary concern and indeed each tribunal's mandate was to resolve the dispute. In the best traditions of the law this is precisely what the tribunals achieved. The cliché that hard cases make bad law seems appropriate. However the reasoning in the *Island of Palmas* and *Eastern Greenland* cases does not provide binding or even persuasive precedent for the resolution of Antarctic sovereignty claims.

In summary, the doctrine of effective occupation is established at international law, both in theory and practice, as the mode of acquiring *terra nullius*. The right to acquire sovereignty in these circumstances is open to all States and may be established by evidence that the State has the intent and will to act as sovereign and that it has exercised the actual continuous and peaceful display of State functions in the territory.

Controversy exists not as to the concept of occupation but as to the conditions which will constitute valid occupation. The *Eastern Greenland* and *Island of Palmas* cases add a gloss to the general principle by holding that the requisites of effective occupation depend upon the circumstances of the territory. The functions of a State need be exercised only to the extent necessary to discharge its duties at international law. The logic is that in remote and sparsely populated areas the requirements of administration are minimal. In other words, the doctrine of effective occupation does not require actual occupation so long as States have the power to exercise administrative functions. While these cases are invariably cited in support of Antarctic claims they have weak value as precedent for the resolution of the sovereignty issue. They are predicated on the need to declare title in one of the disputing parties when a more accurate view of the evidence supports title in neither.

2. THE SECTOR PRINCIPLE

Each State claiming sovereignty in Antarctica, with the exception of Norway,[53] delimits the extent of its territory by the use of lateral boundaries

[52] (1933) No. 53 P.C.I.J. 29, 46.

[53] Norway limits its claim to the coastal region. See Exchange of Notes between Norway and Great Britain, August and November 1930, Treaty Series, No. 25 (1931) Cmnd 3875. The proclamation was accompanied by a minute of the Ministry of Foreign Affairs recognizing British, Australian and French sovereignty. While recognizing Canadian sovereignty over the Sverdrup Islands, Norway refuses to sanction the sector principle. See also *Documents*, IV 7.8.

to the South Pole, a technique described as the sector principle. To the extent that this principle was ever considered as a means of territorial acquisition, it is no longer accepted as a root of title in international law.[54] Indeed the Antarctic claimants do not rely upon it to assert the validity of their titles. Discussion of the principle is nonetheless warranted in the context of the present analysis as an international tribunal may accept sectors as a convenient means of defining the area effectively settled by State occupation.

The principle was first used to define a claim by Canada in 1907 with regard to the islands and lands between its Northern coast and the North Pole.[55] The use of the North Pole as the point of reference led to a proliferation of Arctic claims including the Russian (Sturmer) Declaration on 20 December 1916.[56] The British first applied the concept to the Antarctic in relation to the Falkland Island sector in 1917 to include all islands and territories between certain longitudes and south of the 50° latitude.[57] Despite the Soviet Union's continued claim to an Arctic sector it denies validity to sector claims in the Antarctic.[58] The United States has denied any validity to the sector principle in both the Arctic and Antarctic.

The sector principle as a simple means of delineating territorial boundaries draws support from the concepts of the hinterland, regions of attraction, and contiguity. These concepts were particularly in vogue during the 19th century period of colonial expansion and were designed to mark out areas for further and future occupation. The hinterland principle contended that when a State took possession of a territory it gained sovereignty over areas adjacent to it.[59] Oppenheim explains the rationale as being the need for the integrity, security and defence of the land which is actually occupied.[60] The doctrine typically operated as a compromise between two States whose territories bordered areas they did not control. These States might divide the unoccupied area between them and renounce political influence in the part reserved to the other party.

The region of attraction is a similar concept and has been applied only by Soviet jurists.[61] The doctrine foreshadows the *Anglo-Norwegian Fisheries* case[62] and states that where there is a socio-economic interdependence

[54] Fenwick C. G., *International Law* (4th ed. 1965) 89-98; Bernhardt J. P. A., 'Sovereignty in Antarctica' (1975) 5 *Californian Western International Law Journal* 297, 332; Smedal G., *Acquisition of Sovereignty over Polar Areas* (1931) 58. *Cf.* Savarlieno, 'The Sector Principle in Law & Practice' (1960) 10 *Polar Record* 248.

[55] Dominion of Canada, *Parliamentary* Debates, Senate, (1906-7) 266-71.

[56] See Lahktine W., 'Rights Over the Arctic' (1930) 24 *American Journal of International Law* 703, 708.

[57] Letters Patent, 28 March 1917; Statutory Rules and Orders, 1917, 1135.

[58] Lahktine W., *op. cit.* 711.

[59] Lindley M. F., *The Acquisition and Government of Backward Territory in International Law* (1926) 235. Fauchille P., 'Le Conflit de Limites entre le Bresilet la Grande Bretagne' (1905) 12 *Revue Generale de Droit Internationale Public* 531.

[60] *International Law* (8th ed. 1955) i, 561.

[61] Lahktine W., *op. cit.* 711.

[62] (1951) I.C.J. Reps. 116.

between the inhabited and uninhabited territory title may be claimed to the latter. Lahktine applies this to the Soviet sector claim in the Arctic saying '*regardless of discovery and regardless of effective occupation, the discovered lands and islands belong as a matter of fact to States* in the region of attraction in which they are situated'.[63] Hayton denies the application of this concept generally, and in relation to Antarctica, on the ground that the strategic motivation for controlling nearby territory cannot replace the international law doctrine of occupation.[64]

A more substantial basis for the sector principle has been the doctrine of contiguity.[65] While the physical proximity of territory is not considered to be a root of title in itself a clear relationship between two areas of land has often been seen as warranting their legal assimilation. This derives in part from the practical need to treat certain areas, such as archipelagos, as a whole and in part from notions of national security. Under this doctrine States have claimed the islands lying close to their territory but outside their territorial waters. The Russian claim to the islands of Siberia were, for example, supported on the ground that they were 'a northern extension of the Siberian continental upland'.[66] Contiguity may be justified in the Arctic, if at all, on the grounds that the States with continental polar territories have the best resources and are the States most likely to control and settle the area. However contiguity has no place whatever in the context of Antarctica. Firstly, the sector claims do not even approximate the existing continental land masses of the claimant States.[67] If the sectors had been drawn from the territorial mainland to the South Pole, the Australian, Chilean, United Kingdom and Argentinian claims would be considerably different, and the Norwegian and French claims would be non-existent. The existing sectors in fact reflect *ad hoc* discoveries and delineate those areas which States intended to occupy in the future. Secondly, the Antarctic is an isolated land continent and no State territory projects even so far as the Antarctic circle.[68] There are no socio-economic implications of proximity such as exist in the Arctic and hence any argument in the spirit of the *Anglo-Norwegian Fisheries* case must fail. Thirdly, the doctrine of contiguity was rejected in the 1885 Declaration of the African Conference, and denied as a principle of international law in the *Island of Palmas* case.[69]

[63] Lahktine W., *op. cit.* 711.
[64] Hayton R. D., 'Polar Problems in International Law' (1958) 52 *American Journal of International Law* 746.
[65] See Jessup P. and Taubenfeld H., *Controls for Outer Space and the Antarctic Analogy* (1961) 140-59.
[66] Russian decree 20 September 1916; see Lahktine W., *op. cit.* 708.
[67] See Taubenfeld H., 'A Treaty for Antarctica' (1961) 531 *International Conciliation* 245, 265-70.
[68] Chile is the nearest State being 400 miles from Antarctica. Australia is 2,000 miles from the nearest point on the Antarctic mainland.
[69] (1928) 2 R.I.A.A. 829, 854. See also Bernhardt *loc. cit.* (n. 54).

When the Arctic and Antarctic claims were made, international law required effective occupation of *terra nullius* to convert an inchoate title based on discovery into full sovereignty. Consequently while claimant States may prove effective occupation over certain parts of Antarctica this will not justify sovereignty over the entire sector. This is not to suggest that occupation must exist in every nook and cranny but rather that claimant States must show genuine settlement up to the boundaries of their respective sectors. The validity of the sector principle in the Australian Antarctic Territory was doubted by the Law Officers in the advisory opinion as to how the territory should be delineated.[70] However the decision was taken to claim through the longitudes to the South Pole. This can probably be explained by the need for simplicity and the existing precedents of the Falkland and Ross Dependency sector claims.

As a final point it should be noted that the sector principle, as it is applied in Antarctica, embraces large parts of the high seas. It is an unambiguous principle of international law that the high seas are open to all States and may not be subject to State claims to sovereignty.[71] Sector delineations are clearly invalid in Antarctica to the extent that they include high seas south of the 60° latitude.

3. INCHOATE TITLE BASED UPON DISCOVERY AND MINOR ACTS OF ADMINISTRATION

It has been the argument of this article that the international tribunals in the *Island of Palmas, Clipperton Island* and *Eastern Greenland* cases ought to have considered the more likely alternative that territorial sovereignty had not been established by either of the claimant States. These tribunals would have been quick to point out that their primary responsibility was to resolve the dispute and to ensure stability and legal order. A solution to this practical difficulty might lie in recognizing an inchoate title, or in other words, a right in relation to territory which is less than full sovereignty. The possibility of an inchoate title was asserted by Hall[72] and Twiss[73] in their international law texts of 1884. Such a title operates as a temporary bar to the establishment of effective occupation, and hence title, by any other State. An inchoate title gives a State the first right to perfect an otherwise incomplete title.

The doctrine of effective occupation might arguably require that a State which is in the process of consolidating its claim to *terra nullius* should have the right to perfect title as against other States. It is clear that mere

[70] *Documents* IV 7.1. 5-8.

[71] Grotius H., 'Mare Liberum . . .', being a chapter of *De Iure praedae* (1609); see also UNCLOS Draft Convention on the Law of the Sea, Article 87, (1980) 19 *International Legal Materials* 1129.

[72] Hall W. E., *A Treatise on International Law* (8th ed. 1924) by A. Pearce Higgins.

[73] Twiss T., *The Law of Nations Considered as Independent Political Communities* (revised ed. 1884).

discovery of *terra nullius* was not, and is not, sufficient *per se* to establish sovereignty. Judge Huber gave authority to this rule in the *Island of Palmas*,[74] but he conceded that discovery alone could create an inchoate title to the territory. He qualified this by saying that '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'.[75] He concluded that the inchoate title in Spain had been superseded by the Netherlands' effective occupation. Huber also required that an inchoate title must be 'completed within a reasonable period by the effective occupation of the region claimed to be discovered'.[76] In fact Huber accepted the possibility of a long-term inchoate title when he asked whether Spain's right arising from her prior discovery was validly ceded to the United States.

Hall describes the effect of an inchoate title based on discovery as follows:

> [W]hen discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition.[77]

The notion of an inchoate title based upon discovery and relatively minor acts of administration and exploration may be applied to the problem of Antarctic sovereignty. Even if the claimant States have not yet perfected their Antarctic titles they may argue that they have a prior right to do so as against any other State. British[78] and Norwegian[79] practice supports the application of an inchoate title in modern international law, however the United States view[80] is that discovery gives no title, inchoate or otherwise. The Soviet view[81] appears to be that early Russian discoveries in Antarctica give her a prior right to establish sovereignty there.

Brownlie argues that the idea of an inchoate title is misleading as title is usually a question of the relative strength of State activities.[82] Even when evidence of a State's activity is weak, if the evidence is stronger than that of another State the first State will have a valid title. As has been shown the decisions of international tribunals support Brownlie's view that

[74] (1928) 2 R.I.A.A. 829, 846.
[75] *Ibid.*
[76] *Ibid.* See also O'Connell D. P., *International Law* (2nd ed. 1970) i, 416.
[77] Hall, *op. cit.* 127.
[78] McNair A. D., *International Law Opinions* (1956) i, 285, 287, 320; Hackworth G., *Digest of International Law* (1940) i, 455; see also *British Guiana Boundary Arbitration* (1899) C.9501, 720.
[79] Hackworth, *op. cit.* 400, 453, 469.
[80] *Ibid.* 389-400, 457, 460.
[81] Whiteman M., *Digest of International Law* (1963) ii, 1029; Toma, 'Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic' (1956) 50 *American Journal of International Law* 611, 616-7.
[82] Brownlie I., *Principles of Public International Law* (2nd ed. 1973) 150.

sovereignty will be recognized in the better of two alleged rights. Further, the logical effect of an award of an inchoate title to one of two disputants may not be dissimilar in practice to an award of full title. That is, the State with an inchoate title will be free to establish effective occupation in the future and to exclude competing activity by another State. In the context of Antarctica this may not arise as there are at present no competing claims other than those overlapping sectors claimed by the United Kingdom, Argentina and Chile. Those States which have discovered, annexed, explored, administered and conducted scientific research in Antarctica might at the very least be able to claim the benefit of a preferential right to consolidate a claim to sovereignty which is currently inadequate.

A difficulty with the notion of inchoate title is exposed by Huber's view that an inchoate title cannot prevail over effective occupation by another State. This implies that even if an inchoate title were recognized in one disputing State there is nothing to stop the other proceeding to establish a superior title in the future. Hall points out however, that subsequent effective occupation must take place in the absence of opposition. Presumably any attempt to acquire sovereignty in the presently claimed sectors would lead immediately to protest. But the solution may not be so simple. The Soviet Union and the United States, as non-claimant States, have a superior claim to occupation based on the level of their scientific and exploratory work in Antarctica and, more pertinently, in the Australian sector. While this has taken place under the auspices of the Antarctic Treaty it remains possible that both these States may attempt to substantiate claims in the future. The cylinders dropped by these States over Antarctica strengthens this supposition.[83] While it is unlikely that these States would violate the terms and spirit of the Antarctic Treaty in this way, it must at least be considered as of political significance in resolving the future of Antarctic resource management.

The concept of inchoate title appears to add nothing to the right of any State to attempt to establish sovereignty over *terra nullius*. It does not preserve priority to the first claimant if that State does not in fact settle the territory. The doctrine appears to protect the first claimant against a second only to the extent that the first claimant has actually and sufficiently occupied the area. If another State can, by clearer acts of occupation,

[83] *E.g.*: the Ellsworth claim for the United States, 11 January 1939 to 77,000 square miles in the interior of Australia's Princess Elizabeth Land was supported by deposited cylinders; see Swan R. A., *Australia in the Antarctic; Interest, Activity and Endeavour* (1961) 226. Note also: Admiral Bird's instructions from the U.S. President, 25 November 1939; Sullivan W., *Quest for a Continent* (1957) 138-9; and secret directions for three U.S. Navy expeditions in 1946, 1947 and 1955 listing 'extension and consolidation of "United States sovereignty over the largest practicable area of the Antarctic continent" as among their objectives' — see Hayton R. D., 'Polar Problems in International Law' (1958) 52 *American Journal of International Law* 746, 763.

achieve full sovereignty over the prior discovery and less effective acts of occupation by the first claimant, an inchoate title has no effect whatsoever.

A final criticism of the doctrine of inchoate title is that international law has not defined the precise period of time in which a State may perfect an inchoate title. Huber asserts that it must be within a 'reasonable period'. The Soviets argue that there is no time limit. The Soviet decree defining their Arctic sector claims all lands and islands discovered as well as those which may be discovered in the future.[84]

Despite the illusory and confusing nature of the doctrine of inchoate title it has been suggested that it might have some value in preserving for Antarctic claimants the 'first option' to perfect title. The difficulty with this suggestion is that international tribunals have not done so in the past, and it would require a reshaping of the doctrine as it is currently understood to do so in the future.

4. INTERTEMPORAL LAW

A primary function of modern international law is to preserve a delicate balance between stability in the relations between States and the development and flexibility of the law regulating those relations. This function is particularly reflected in the doctrine of intertemporal law which, while not confined to questions of the acquisition of territory, has typically been used to resolve competing sovereignty claims. Intertemporal law is a part of the general rule against retroactivity and states 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'.[85]

This doctrine is of particular significance when considering the legal effect of State activities in Antarctica. Resolution of the question as to which, if any, State has valid title may vary depending upon whether the acts constituting the territorial claim are assessed according to international law at the time they took place, or at the time of the dispute. As will be discussed, customary international law on the acquisition of territory may have altered since 1930 and State activities which then sufficed to establish sovereignty may no longer do so.

The problem is illustrated in the *Island of Palmas* case. The United States claimed sovereignty over the island by cession from Spain which had acquired its original title by discovery in the 16th century. The arbitrator Judge Huber considered, probably incorrectly,[86] that at that time

[84] U.S.S.R. Institute of State and Law, *International Law* (1960) 190-2; Hackworth Q. H., *Digest of International Law* (1940-4) i, 461.

[85] Jennings R. Y., *The Acquisition of Territory in International Law* (1963) 28.

[86] Most authorities argue that discovery alone was never a basis for title. See: Lindley *op. cit.*, Von der Heydte F. G. F., 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 *American Journal of International Law* 448; Keller, Lissitzyn, Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* (1938); Goebel J., *Struggle for the Falkland Islands* (1927) 90 ff.

customary international law recognized discovery as a valid basis for title. However he argued that by the beginning of the 20th century discovery alone did not confer valid title. Discovery he concluded must now be consolidated by peaceful and effective occupation as an essential condition for the acquisition of sovereignty. This the Netherlands claimed to have achieved by the time the dispute arose in 1906. Hence the legal problem was to assess what significance the new customary international law might have upon a title originally validly acquired upon a basis which was no longer valid. What are the effects, in other words, of a change in law upon existing legal rights? Judge Huber stated the doctrine of intertemporal law as follows:

> [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.[87]

The parties to the dispute accepted that the legal effect of the Spanish discovery was to be assessed in light of contemporary law. Judge Huber however was troubled by the possibility of title continuing regardless of changes in the law over the ensuing 250 years. There might be territory which is 'neither under the effective sovereignty of a State, nor without a master, but which [is] reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law . . .'.[88] To resolve the lacunae in effective control he drew a distinction between the creation and existence of rights and concluded that:

> 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.[89]

The most difficult aspect of the judgment lies in the following passage:

> [I]t 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.[90]

The Huber doctrine of intertemporal law adapts existing rights to new conditions by applying two apparently inconsistent elements. First, the acts must be judged according to the law contemporaneous with their creation. Secondly, rights validly acquired may be lost if they are not maintained in accordance with developing international law. The first element creates little difficulty. The second has been the subject of strong criticism.[91] As Elias has pointed out, Judge Huber's formulation adds a gloss to the doctrine as it was understood before 1928.[92] Indeed, Sir Hersch Lauterpacht

[87] (1928) 2 R.I.A.A. 829, 845.
[88] *Ibid.* 846.
[89] *Ibid.* 845.
[90] *Ibid.* 839.
[91] *E.g.* Versfelt W. J. B., *The Miangos Arbitration* (1933) 14-6, 149; Fauchille, *op. cit.* 55.
[92] Elias T. O., 'The Doctrine of Intertemporal Law' (1980) 74 *American Journal of International Law* 285, 306.

has noted that the *Island of Palmas* case constitutes a 'clear departure from the views expressed on this subject by a number of international lawyers'.[93]

Jessup argues that the logical conclusion required by this extension of intertemporal law is that 'title insurance would be an impossibility'.[94] While the acts of a claimant State must be judged according to the law of the time they were performed, that State must also maintain a constant vigilance to retain its title. If this were a correct statement of the law, he says, title would lose significance and the primary function of international law — stability — would be threatened. Jessup's point is illustrated in an extreme form by the Indian suggestion that the Portugese title to Goa, based as it had been upon conquest 400 years previously, was no longer valid. The Indian representative in the Security Council argued that:

> If any narrow-minded, legalistic considerations — considerations arising from international law as written by European law writers — should arise, those writers were, after all, brought up in the 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 which 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 the European concept and it must die.[95]

Jessup's conclusion is not warranted if the offending passage is read in context with Huber's understanding of territorial sovereignty. While Huber confirms territorial sovereignty as the exclusive right to display the activities of a State he argues that this right has a corollary duty: the obligation to protect within the territory the rights of other States and its own nationals.[96] By emphasizing this duty Huber concludes that where the peculiar characteristics of the territory require minimal activity to protect these rights the test of 'continued manifestation' of sovereignty becomes less stringent. The obligations of sovereignty vary 'according to conditions of time and place'.

This is both practical and sensible. Where a State fails to maintain a minimal level of sovereign activity as is appropriate to the territory it is reasonable to conclude that it has abandoned title and another State is at liberty to acquire it. This does not necessarily imply that a State is permanently at risk. Rather it affirms the view that sovereign rights cannot be maintained over territory if a State fails to exercise the duties which arise in relation to it. Or, put more simply, tacit abandonment provides the opportunity for rival claims.

Further, international law at the turn of the 20th century recognized that territory could be acquired by acquiescence, prescription, desuetude or

[93] *The Function of Law in the International Community* (1933) 284.
[94] 'The Palmas Island Arbitration' (1928) 22 *American Journal of International Law* 735.
[95] Mr Jha's speech on 18 December 1961 — Security Council Official Records, S/PV. 987, 11. See also Lissitzyn O. J., 'International Law in a Divided World' (1963) 542 *International Conciliation* 55 ff.
[96] (1928) 2 R.I.A.A. 829, 839.

abandonment.[97] This suggests that no subsequent possessor of territory could gain a valid title unless the original titleholder had clearly abandoned it and unless this abandonment had existed over a reasonably long period. As Jennings argues,[98] the rule requiring the maintenance of title ought not to be interpreted to mean that the State with title necessarily loses it if it fails to maintain an equal degree of activity to its rival claimant. Rather,

> No amount of activity on the part of the 'prescripting' 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. . . .[99]

Consequently while the second element of Huber's doctrine of intertemporal law seems to cancel, or at least modify, the effect of the first, this is more apparent than real as a matter of principle. That is, if the international law rules differ as between the acquisition and maintenance of sovereignty, Huber's second element is entirely consistent with his first. The loss of sovereignty is to be judged according to contemporaneous actions (or inaction), and the state of international law at the time of acquisition is not relevant. As a matter of practice, Huber's view of intertemporal law is unlikely to result in injustice where a State has manifested its sovereignty over territory by concrete acts of administrative occupation.[1] If a State fails to do so no inequity results if another State is deemed to possess a superior title by effective occupation. Also, as Roche points out,

> intertemporal law has never been applied where a change in the law has come about in a short time . . . [it] will apply in cases where international customary law has changed gradually over the years. In which case, the change of the rule of law will usually be the result of the combined practice of many states.[2]

Finally, if, as seems to be the case, most international tribunals view international law as a dynamic and flexible system of law, there is no reason why a right should remain valid for all time, particularly where the State demanding that right does not exercise it. Nonetheless, most authors,[3] while accepting the Huber doctrine as correct, concede that the criticisms of Jessup, Jennings and Verfselt are in point as they emphasize the difficulties and care which must be taken in applying intertemporal law in specific instances.

International tribunals have had the opportunity of applying the doctrine in a number of cases since 1928. Generally these courts have adopted the Huber analysis, applying a dynamic view of international law rather than subjecting it to static interpretation when balancing the values of stability

[97] See Brownlie, *op. cit.* 132-3; Elias, *op. cit.* 286-7.
[98] Jennings, *op. cit.* 30.
[99] Fitzmaurice G., 'The Law and Procedure of the International Court of Justice 1951-54' (1955-6) 32 *British Year Book of International Law* 31, n. 1.
[1] Brownlie, *op. cit.* 132-3.
[2] Roche, *op. cit.* 83.
[3] *E.g.* Brownlie, Elias and Schwarzenberger, *International Law as applied by International Courts and Tribunals* (3rd ed. 1957) 21-4.

with the fact of changing State practice. In the *Island of Palmas* case itself the arbitrator found that at the critical date of 1898 there was no evidence of Spanish acts of sovereignty over the island and that the Netherlands government through the East India Company had exercised sovereign territorial rights peacefully, though intermittently, since 1700.[4] The arbitrator concluded that the prior Spanish title based upon discovery could not prevail over subsequent effective occupation by the Dutch. Here the doctrine of intertemporal law operated to deny an originally valid title by acknowledging sovereignty in the effective occupier in accordance with the developing international law.

The Huber doctrine was approved and applied as the modern international law rule of intertemporal law in the *Minquiers and Ecrehos* case in 1953. The International Court of Justice was faced with a legal difficulty similar to that which existed in the *Island of Palmas*. Original feudal title to the Minquiers and Ecrehos islands in the English Channel appeared to lie with France. However both Britain and France claimed title at the time of the dispute on the basis of subsequent effective sovereign occupation. The Court agreed with the parties that the case was one to which intertemporal law applied, saying 'original feudal title of the Kings of France in respect of the Channel Islands could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement'.[5] The Court examined the historical claims of each party in great detail, including evidence of possession from the 11th century. Elias argues that the Court's examination of this historical detail, as relevant, rather than merely ancient, history, confirms the application of the second limb of Huber's doctrine. The Court

> upheld the principle that the creation of a right must be appreciated in the light of the law contemporaneous with the acts creative of the right and that the continued validity of that right at any future date must depend on the state and requirements of international law at that particular moment.[6]

Judge Alvarez went further than the majority in *Minquiers and Ecrehos,* emphasizing that the Court had placed excessive importance upon the historic titles, and did not sufficiently take into account the 'present tendencies'[7] of international law in regard to territorial sovereignty. He considered it to be the task of the Court to apply not traditional or classical international law but rather 'that which exists at the present day and which is in conformity with the new conditions of international life, and to develop this law in a progressive spirit'.[8]

Certainly then, the International Court of Justice was prepared to deny an originally valid title in favour of a title subsequently acquired in

[4] (1928) 2 R.I.A.A. 829, 867-8.
[5] (1953) I.C.J. Reps. 47, 56.
[6] Elias, *op. cit.* 307.
[7] (1953) I.C.J. Reps. 47, 73.
[8] *Ibid.*

accordance with its understanding of developing customary international law. The court said 'even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years'.[9]

On drafting the Convention on the law of treaties, the International Law Commission examined the application of intertemporal law to the interpretation of treaties.[10] The members of the Commission were divided as to how a temporal element should be included in the treaty and, after considerable discussion and revision, drafted the following provision.

> Article 27(c). There shall be taken into account, together with the context:
> (c) any relevant rules of international law applicable in the relations between the parties.[11]

This final article deleted an earlier draft provision which provided that the terms of the treaty are to be appreciated in the light of general rules of international law in force at the time of the conclusion of the treaty. Government submissions in response to this draft considered that it did not sufficiently deal with the problem of changing law on treaty interpretation.[12] The Commission adopted the final text in the belief that the temporal element would be applied correctly by the parties when they interpreted the term in good faith. The Commission also thought that 'the relevance of rules of international law for the interpretation of treaties . . . was dependent on the intention of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties'.[13]

The final text consequently suggests that any subsequently developed rules of international law may be considered when interpreting the provisions of a treaty. It is contrary however to the approach taken in the older case law. The courts have typically applied the first limb of Huber's doctrine that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not with the law in force at the time when the dispute in regard to it arises or falls to be settled', but have not given effect to the second element. In the *Grisbadarna* case[14] for example, the arbitral tribunal decided that the maritime boundary between Norway and Sweden inadequately fixed by the Peace Treaty of Roskilde in 1658, was to be established according to the principles of law in force at the time. Hence neither the 'median' or the 'thalweg' methods were adopted as they were not valid at international law in the 17th century. Rather, a 'general direction of the coast' principle was adopted on the ground that it was more in accordance with notions of law prevailing at that time.[15]

[9] *Ibid.* 56.
[10] United Nations International Law Commission Yearbook (1966) ii, 220.
[11] *Ibid.* 218.
[12] *Ibid.* 222.
[13] *Ibid.*
[14] (1910) 4 *American Journal of International Law* 226, or (1909) 11 R.I.A.A. 155.
[15] See discussion by Elias, *op. cit.* 290.

Similarly in the *North Atlantic Coast Fisheries* arbitrations[16] the Permanent Court of Arbitration interpreted the term 'bay' in an 1818 Treaty between Great Britain and the United States 'in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the Treaty under the general conditions then prevailing . . .'.[17] The Court said it was

> unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule; nor can this Tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as ten mile or twelve mile limits of exclusion based on international acts subsequent to the treaty of 1818. . . .[18]

The Court concluded that there was no international law limit at the time of the treaty on the extent of the bay, but recommended to the parties in the interests of predictability, that in future a ten mile rule should be used.

In the *Rights of Nationals of the United States of America in Morocco*[19] the International Court of Justice was asked to construe the expression 'any dispute' in treaties of 1787 and 1836. The Court said 'it is necessary to take into account the meaning of the word "dispute" at the times when the two treaties were concluded'.[20] The same approach was taken by Lord Asquith as arbitrator in the *Abu Dhabi* arbitration[21] when he refused to intepret an oil concession granted in 1938 by reference to the continental shelf doctrine which made its appearance in international law several years later.

In contrast with these earlier cases the International Court of Justice applied both aspects of the Huber doctrine of intertemporal law when interpreting the treaties upon which its jurisdiction was founded in the *Aegean Sea Continental Shelf* case.[22] The relevant issue for present purposes was whether the Court had jurisdiction to decide a dispute between Greece and Turkey as to the delimitation of the continental shelf appertaining to them in the Aegean Sea. Jurisdiction depended upon the terms of the Greek reservation to its instrument of accession to the General Act of 1928. The reservation excluded

> (b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece.[23]

Turkey pointed out by letter to the Court (though she did not participate in the proceedings), that Greece had inadvertently excluded the jurisdiction of the Court by the terms of its reservation and hence could not

[16] (1910) 11 R.I.A.A. 167, (Permanent Court of Arbitration).
[17] *Ibid.* 195.
[18] *Ibid.* 196.
[19] (1952) I.C.J. Reps. 176.
[20] *Ibid.* 189.
[21] (1952) 1 *International and Comparative Law Quarterly* 247, (1951) 18 I.L.R. 144.
[22] (1978) I.C.J. Reps. 1, (1951) (Greece v. Turkey).
[23] Translation quoted by the Court, (1978) I.C.J. Reps. 20-1, para. 48.

rely on the General Act of 1928 to give the Court jurisdiction. Greece argued that this reservation did not exclude the Court's jurisdiction in the present case for two reasons. First, the reservation was concerned only with matters relating to territorial status which also concerned 'questions which by international law are solely within the domestic jurisdiction of States'.[24] This was its intention, Greece argued, at the time the instrument of accession was deposited. The Court rejected this restrictive interpretation on the grounds that treaty practice at the time used the term 'territorial status' in a generic sense and covered 'the integrity and frontiers, as well as the legal régime, of the territory in question'.[25]

Secondly, Greece argued that the idea of a continental shelf was unknown at the time Greece acceded to the General Act in 1938, and hence the shelf could not be covered by the reservation. The Court rejected this argument also. It stated that

> Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law.
>
> . . .
>
> [T]he term 'rights' in Article 17 of the General Act has to be interpreted in the light of the geographical extent of the Greek State today, not of its extent in 1931. It would then be a little surprising if the meaning of Greece's reservation of disputes relating to its '*territorial* status' was not also to evolve in the light of the change in the territorial extent of the Greek State brought about by 'the development of international relations'.[26]

These arguments applied equally to the inclusion of various islands in the Aegean Sea which came into Greek possession after 1931.

On rejecting both the above arguments, the Court concluded that the reservation was to be interpreted in accordance with the current rules of international law rather than those in 1931. As developments in international law since 1931 would include the continental shelf in the concept 'territorial status' the reservation effectively excluded the Court's jurisdiction.

While the International Court of Justice did not use the term 'intertemporal law', the judgment clearly applied the two limbs of the Huber doctrine. The critical term 'territorial status' was interpreted, according to treaty practice at the time, as subject to general principles of international law. This gave the Court the freedom to find that international law had developed since 1945 to include the concept of a continental shelf as part of 'territorial status'.

[24] *Ibid.* paras. 48 and 49.
[25] *Ibid.* 31, para. 75.
[26] *Ibid.* 32-3, paras. 77-8.

It should be noted however that the Greek government was in the invidious position of arguing that the term 'territorial status' meant one thing in the jurisdictional clause of the General Act of 1928, and another in the reservation clause of 1931. In effect Greece was arguing that the Court should accept the jurisdiction to delimit the continental shelf in 1978, and at the same time exclude the concept of a continental shelf from the exceptions contained in its reservation of 1931. As Elias points out, logic alone required that the Court reject this reasoning.[27]

While the International Court of Justice interpreted the treaty according to the current rules of international law rather than those rules as they existed at the time of the acts in question, the decision depended nonetheless upon a finding that the intention of the parties at the time the treaty was negotiated was that 'territorial status', as a generic term, should encompass changes in customary international law. This is consistent with the general rule that treaties are to be interpreted according to the law at the time they were contracted.

The difficulties in applying intertemporal law have been demonstrated most recently and significantly in the area of decolonization. In the *Western Sahara* case[28] the International Court of Justice was asked to give an advisory opinion as to whether, at the time of the colonization of the Western Sahara by Spain, the territory was *terra nullius*. If not, the Court was asked further about the nature of the legal ties between the territory and Morocco and Mauritania.

In a separate opinion De Castro took up a point made by the Moroccan counsel that the dispute between Morocco and Spain was particularly significant as 'past legal facts are titles for many States — titles to sovereignty which have present-day application or which may bring about consequences for the present time'.[29] De Castro argued that the Court ought to have made clearer in its majority judgment whether the ties referred to at the time of colonization by Spain remained unaltered by the passage of time, or whether they were subject to the rules of intertemporal law.[30] He considered that the principle of intertemporal law requires that new facts are subject to the rules of law in force at the time when they occur. In the present case the status of the Western Sahara had, before Spanish colonization, 'not crystallized and was not fixed *ad aeternum*. It was subject to changes in the times'.[31] The new facts in this case were that under the United Nations Charter, Western Sahara became a 'non-self-governing territory' in which the administering power had a duty to develop self-government. A series of General Assembly resolutions up to December

[27] Elias, *op. cit.* 301-2.
[28] (1975) I.C.J. Reps. 12.
[29] *Ibid.* 168.
[30] *Ibid.* 172.
[31] *Ibid.* 169.

1974 had urged Spain to end its colonial domination of the territory.[32] The new law in force by 1974 was based on the principle that the peoples of non-self-governing territories have the right to decide by democratic means whether to become independent or to integrate with an independent State. The International Court of Justice had earlier recognized in 1971 that the development of international law with regard to non-self-governing territories applied the principle of self determination to all of them and included territories under a colonial régime. In the *Legal Consequences* case[33] the Court said it 'must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.[34] As a consequence, whatever legal ties Morocco or Mauritania may have had with Western Sahara at the time of colonization by Spain, these ties were subject to intertemporal law and could not override the new international law principle of self determination. The majority view was that while legal ties of allegiance existed between Morocco and Mauritania and Western Sahara at the time of Spanish colonization, they were not of such a nature as to affect the application of the General Assembly Resolution 1514 on the decolonization of Western Sahara. De Castro was concerned to point out that regardless of the nature of the Moroccan and Mauritanian ties with Western Saharan tribes, minimal though he considered them to be, they were subject to the changed rules of customary international law relating to colonial independence.

As the question put to the International Court of Justice by the General Assembly was whether the Western Sahara was *terra nullius* at the time of colonization, it is not surprising that the intertemporal point was not considered by the majority. It sufficed to examine the question at or around 1884. Nonetheless De Castro's judgment provides a useful amplification of the important function of the intertemporal doctrine in the General Assembly's policy of decolonization. That is, despite the presence of acquired rights in relation to territory, these rights are subject to the new international law of self determination.

In summary, the recent practice of the International Court of Justice and other international tribunals has been to apply the two-limbed Huber doctrine of intertemporal law. Further, the final text of the International Law Commission's Vienna Convention on the Law of Treaties confirms the view that subsequent changes in international law may be used in the interpretation of treaties. The notion of intertemporal law has special significance for the question of territorial sovereignty in the Antarctic. If the Huber gloss is correct, and it appears to be, territorial claims in the

[32] General Assembly Resolutions 1514-3992 (1974).
[33] (1971) I.C.J. Reps. 16.
[34] *Ibid.* 31.

area, even if valid at the time they were made, are subject to the requirement that they be 'continuously manifested' according to the evolution of international law.

5. ESTABLISHING THE CRITICAL DATE

When a tribunal is required to assess competing claims to territorial sovereignty it will typically establish the date upon which the legal position depends. This is known as the 'critical date'. While the term is implicit in all territorial disputes it was first used as one of art by Judge Huber in the *Island of Palmas* case. United States sovereignty depended upon whether Spain had sovereignty at the moment she purported to cede the island to the United States by the Treaty of Paris on 10 December 1898. This was the 'critical moment'[35] at which 'the question arises whether sovereignty . . . existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris'.[36]

The purpose of the concept is to establish the point at which the court will deny legal effect to the subsequent activities of the parties. As Sir Gerald Fitzmaurice put it for the United Kingdom in the *Minquiers and Ecrehos* case,

> 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 had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now.[37]

The significance of the critical date is illustrated in the *Minquiers and Ecrehos* case. Here the French argued that in order to establish title it need do so only up to 1838, the date of an Anglo-French Fisheries Convention of 1839. Had the Court accepted this as the critical date the more favourable evidence of British acts of sovereignty after 1839 would have been excluded. For this reason the choice of the relevant critical date in territorial disputes can become the principal issue. In fact Jennings has argued that the concept is in danger of evolving into a rule of law rather than retaining its place as a technique for resolving disputes.[38]

In some cases there is no difficulty in choosing the critical date. In *Eastern Greenland*, for example, the critical date had to be the date on which Norway issued a Proclamation of sovereignty on 10 July 1931. If Danish sovereignty existed at this date the Proclamation was invalid. If not, Norway was entitled to establish sovereignty over the area. The situation was the same in the *Clipperton Island* and *Delagoa Bay*[39] cases, and the *Walfisch Bay* arbitration.[40]

[35] (1928) 2 R.I.A.A. 829, 866.
[36] *Ibid.* 845.
[37] I.C.J. Pleadings ii, 94-5.
[38] Jennings, *op. cit.* 34.
[39] Moore J. B., *International Arbitrations* (1898) ii, 1865.
[40] (1911) 11 R.I.A.A. 265.

However it is not always so easy to establish the critical moment. Clearly it can be no later than the institution of legal proceedings, and should be earlier than a time at which a State deliberately embarks on activities with a purpose of improving its legal position. A tribunal may have the unenviable task of assessing the subjective motives of claimants to distinguish genuine acts of sovereignty from contrived manoeuvres.[41] Further, it may be that there is no single critical date, but two or more. When a party derives title by treaty, for example, it may need to show that sovereignty has not subsequently been abandoned. In this way the doctrine of intertemporal law will widen a tribunal's examination of the historical evidence of occupation.

These difficulties were considered by the International Court of Justice in the *Minquiers and Ecrehos* case when the choice of a critical date was one of the principal issues. The Court accepted a notion suggested by counsel for the United Kingdom that the critical date was the time when the dispute 'crystallized' into a definite issue between the parties. The Court said:

> A dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when France for the first time claimed sovereignty over the Ecrehos and Minquiers respectively. But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned.[42]

While the dispute was said to have 'crystallized' around 1886-1888 the Court admitted post-critical date acts and events. This does not destroy the purpose of setting a critical date to the extent that they may throw light on the preceding events and hence illuminate what the earlier legal position was. As Fitzmaurice puts it:

> If the critical date in a given case is determined to be the year X, and a number of years after X you find one of the contestants exercising a sovereignty which has all the signs of stability and continuity, that in itself gives rise to a strong presumption that this sovereignty has existed for some time and existed at the critical date also.[43]

The admissibility of subsequent activities, however, remains subject to the 'non-improvement of legal position' condition mentioned by the Court. Indeed, when a party seems to be acting to improve its position subsequent to the critical date it may be inferred that its title was not valid.

Fitzmaurice lists three types of territorial dispute.[44] The first arises where a party maintains the territory is *res nullius* and the other party asserts existing sovereignty over it. Here the critical date is the moment of a claim or event where the issue of *res nullius* arises. The second occurs where one party has had sovereignty over the territory in the past but another party

[41] Fitzmaurice, *op. cit.* 24-6.
[42] (1953) I.C.J. Reps. 56, 59.
[43] I.C.J. Pleadings ii, 94.
[44] Fitzmaurice G., 'The Law and Procedure of the International Court of Justice 1951-54' (1955-6) 32 *British Year Book of International Law* 30-7.

subsequently acquires title by prescription. Here the critical date should be set at a time which allows for the gradual nature of a prescriptive title. This date may be the moment when the new State makes a public claim to sovereignty or, as is more likely, when the original sovereign State protests, hence halting for the time being the prescriptive process. The third instance occurs where there are long-standing traditional or historical claims and it is assumed that the territory has always been owned by one of the parties. The question is, which? Here the test is which party can show a better title on the basis of the relative weight of its claim. This involves, as in both the *Island of Palmas* and *Minquiers and Ecrehos* cases, a process of assessing each alleged title by itself and then comparing them over the whole period. This can involve an examination of facts and events of considerable antiquity as occurred in the *Minquiers and Ecrehos* case. A dispute of this sort is unlikely to 'crystallize' for a long time. The critical date here should not be until the dispute arises in order to allow all the facts over the entire period to be taken into account.

The complexities involved in establishing a critical date are particularly evident in the context of sovereignty claims over Antarctica. There has been a considerable upsurge in the level of activity in the area over the last 10 years.[45] It is not unduly cynical to suggest that this has been an attempt to consolidate existing, or prospective, claims. The vital legal point is to assess whether valid titles have been acquired by States prior to this recent activity. These acts have legal significance if the territory was previously *res nullius* or was already subject to a valid title by the States committing the acts. If the territory was already subject to another's sovereignty the acts are clearly 'illegal and invalid'.[46]

It is not easy to discern the moment at which Australia's claim to sovereignty in Antarctica should be assessed. Is it at the moment Australia accepted control of the Australian Antarctic Territory in 1933, or when claimant States froze their titles under the Antarctic Treaty in 1961? Or, yet again, has title 'gelled' with the considerably increased activities in the region over the past 10 years? This last question prompts the further question of whether activities during the continuance of the Treaty might be made the basis for a claim if a State chooses to withdraw from its treaty obligations after 1991?

An important difference from the earlier case law exists in relation to the Antarctic territory. There is no critical date in the sense that a dispute has arisen upon which the legal analysis may focus. And, with the exception of the overlapping U.K., Argentinian and Chilean sectors, the claims are not competing claims. Australia, New Zealand, Britain, France and Norway recognize the validity of each other's territorial sovereignty

[45] See generally, Auburn F. M., 'Offshore Oil and Gas in Antarctica' (1977) 20 *German Year Book of International Law* 139.
[46] *Eastern Greenland* case (1933) Series A-B No. 53 P.C.I.J. 22, 64.

in their respective sectors. It is a unique situation in which the claimant States currently anticipate a rejection of their sovereignty by the international community, either as a whole, or by the 'group of 77'. The United States and Soviet Union have specifically denied the existing sovereignty claims typically on the ground that the accepted occupation requirement has not been met. Even these States, however, do not, at least as yet, allege that their own activities constitute a superior claim. Consequently, the claimant States are battling a faceless adversary and can prepare for legal or political attack only by consolidating their claims in accordance with the current requirements of international law.

A dispute challenging Australia's sovereignty in the Antarctic may be by a single State alleging a superior title or that the continent is *terra nullius*, or the international community of States may argue that the area is either *res nullius* or subject to the common heritage principle regardless of whether sovereignty has existed in the past. These possible territorial disputes raise each of the categories mentioned by Fitzmaurice.

For the purposes of this analysis, and in light of the fact that there is no critical date in the usual sense, the legal question of whether Australia has a valid title to sovereignty in the Antarctic will be considered at two periods. The first is at the time of entry into force of the Antarctic Treaty in 1961.[47] This is an appropriate time because of the effect of Article IV of that Treaty. This states that the Treaty is not to be interpreted as a renunciation or diminution of an existing claim or basis of a claim. Nor is it to prejudice the position of a party with regard to its recognition or non-recognition of another State's claim. Further, the Article states that no acts during the life of the Treaty may constitute the basis for creating, asserting, supporting or denying a claim to sovereignty in Antarctica. No new claim or enlargement of an existing claim may be made while the Treaty remains in force. As the Treaty remains in force, and hence Article IV controls the legal position between the parties to it, an appropriate date at which to assess the validity of a sovereignty claim is 1961.

The second analysis of Australia's claim at the present time is a pertinent exercise despite the continuing existence of the Antarctic Treaty. This is because the Treaty binds only the parties to it.[48] It cannot affect the legal rights of third States. Consequently, from the point of view of the international community and the application of a common heritage principle, it remains crucial to assess the legal effects since 1961 of State activity both in relation to States within the Treaty and those outside it.

[47] 23 June 1961; *United Kingdom Treaty Series* 97 (1961) Cmnd 1535; (1961) 402 *United Nations Treaty Series* 71; (1960) 54 *American Journal of International Law* 477.

[48] See discussion of this point in Section 8: The Antarctic Treaty in Part II of this article.