THE ACQUISITION OF TERRITORY

IN INTERNATIONAL LAW

by

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

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

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

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

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

[2] See above at p. 26.

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

ESTOPPEL

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

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

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

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

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

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

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

Estoppel and Recognition

Let us consider first how far an estoppel worked by recognition may affect a question of territorial title. Dr. Schwarzenberger, in an important article on the subject, puts the matter in a striking way.

> The pliability of recognition as a general device of international law makes recognition an eminently suitable means for the purpose of establishing the validity of a territorial claim in relation to other States. However weak a title may be, and irrespective of any other criterion, recognition estops the State which has recognized the title from contesting its validity at any future time.[2]

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

[1] Cf. however n. 3 on p. 50 below.

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