THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1954

THIRTY-FIRST YEAR OF ISSUE

Issued under the auspices of the
Royal Institute of International Affairs

GEOFFREY CUMBERLEGE
OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO
1956

THE SCOPE OF ACQUIESCENCE IN INTERNATIONAL LAW

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Meaning of the term 'acquiescence'

ACQUIESCENCE, in the accepted dictionary sense of tacit agreement or consent, is essentially a negative concept. In the present article it is used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion. Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.

The scope of the doctrine of acquiescence

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 the 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. Tribunals may be called upon to resolve the conflict inherent in the rival claims to consideration of the maxims *ab injuria jus non oritur* and *ex factis jus oritur*. It is the purpose of this article to indicate the circumstances in which the doctrine of acquiescence may assist in this reconciliation.

Acquiescence operates in the sphere to which the maxim *ex injuria jus non oritur* is least applicable, that is, where the vindication of a claim or course of action depends on the consent of the States affected. The presumption of consent which may be raised by silence is strengthened in proportion to the length of the period during which the silence is maintained. The passage of time is an essential element in prescriptive and historic rights; in the formation of rules of customary international law it

is not necessarily so decisive a factor. Although the relation of acquiescence to customary law is discussed below,[1] the present inquiry is mainly concerned with its function in the law of prescriptive and historic rights.[2]

I. *Nature and general function of acquiescence*

Validity of tacit consent

It has occasionally been maintained that the effectiveness of consent is vitiated if the consent be tacit or passive. Such an assertion amounts to a denial of the validity of any doctrine of acquiescence in the strict sense; that is, a denial that an illegal act or one of doubtful legality can be cured by anything short of positively expressed approval on the part of interested and affected States.[3] For Fauchille, acquiescence means express consent, and he was in some doubt as to the propriety of implying the consent of States simply from their inaction.[4] He quotes Perels to that effect without comment.[5] Similarly, Professor Ross, who mentions consent first among the circumstances which 'exclude the normal illegitimacy of an act', emphasizes the qualification that 'in all cases . . . there should be real consent and not merely passivity in the face of inevitable facts'.[6]

A similar view is reflected in a forcefully written Opinion of the Queen's Advocate (Harding) given in the course of the dispute between Great Britain and Spain over the Cuban 'Cays'. He wrote:

> 'I am wholly unaware of the Spanish "Royal Order of the 8th July, 1859", alluded to by Senor Collantes: but his attempt to rely on this Order for proof that this limit has been conceded, merely because no nation has "reclaimed upon this point" (i.e. I presume because no Nation formally protested against the Order) is in my opinion preposterous. It is obviously not competent for one Nation, merely by its own authority to appropriate to itself any portion of that which is open and common to all; or to make any alteration in derogation of the common law and usage of Nations; other Nations have not sanctioned nor consented to this claim; "*non placuit gentibus*".'[7]

[1] See pp. 150 ff. [2] See below, pp. 152 ff.

[3] Professor (now Judge) Lauterpacht has not gone quite so far. He has limited this contention to the class of acts 'so patently at variance with general international law as to render [them] wholly incapable of becoming the source of a legal right' or 'so tainted with nullity *ab initio* that no mere negligence of the interested state will cure it' (in this *Year Book*, 27 (1950), pp. 397, 398).

[4] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, p. 382.

[5] *Manuel de Droit Maritime International* (French translation by Arendt, 1884), p. 44: 'L'exercice unilatéral de prétendus droits, même quand il ne soulève pas les réclamations d'autres états, soit par connivence, soit par impuissance de résister, ne peut jamais être opposé à ceux qui n'ont pas acquiescé expressément ou par des actes dont l'intention est évidente.'

[6] *A Textbook of International Law* (1947), p. 243. See also the decision in 1915 of the Imperial Supreme Prize Court in Berlin in the case of *The Elida* (translated in *American Journal of International Law*, 10 (1916), pp. 916 ff.). Discussing the question of the permissibility of extensions of national waters by unilateral national legislation, the Court concluded that such claims were founded 'not so much upon the independent regulation by the single State, as upon the supposition of a tacit acknowledgment of such an extension by the other States. . . . A mere failure to object, however, is not identical with a positive concurrence of the nations' (ibid., p. 918).

[7] Opinion of 11 November 1859: F.O. 83/2371: quoted in Smith, *Great Britain and the Law of Nations* (1932), vol. ii, p. 230.

A more recent expression of this view is contained in a Note, dated 7 April 1951, written by the French Government in reply to a request by the United Kingdom for a statement of its position in regard to the claims of various States to extend their territorial waters beyond the generally accepted limits by means of unilateral legislative acts. The French Note runs, in part, as follows: 'Aucun État ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auront pas formellement acceptée. Une renonciation à une règle de droit international établie dans l'intérêt de la communauté des nations ne peut pas se présumer.'[1] In so far as these views deny the relevance and legal effect of acquiescence in the form of absence of protest they run counter to the general current of opinion both past and present,[2] as will be suggested hereafter.

(*a*) *The general function of acquiescence.* The function of acquiescence may be equated with that of consent, which was described by Professor Smith as 'the legislative process of international law';[3] it constitutes a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which were formerly in process of consolidation. The primary purpose of acquiescence is evidential; but its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical. The interpretative function of acquiescence and the part it plays as an element in the concept of estoppel are discussed below.[4] Apart from these and other considerations which are set out more fully hereafter, the significance of acquiescence has been expressed in various ways: it has been interpreted as justifying the assumption that, to the acquiescent States, 'there is nothing shocking to the general legal conscience';[5] more positively, as providing 'evidence of the essential conformity of [a] new practice with the principles of international law';[6] as implying recognition of a *de facto* situation, although not *de jure* recognition

[1] Printed in the *Fisheries* case, *Pleadings*, vol. iv, p. 605.

[2] See, e.g., Anzilotti, *Cours de droit international* (French translation by Gidel, 1929), p. 348: 'La simple manière de se comporter d'un État, y compris, dans des circonstances déterminées, même son seul silence, peut signifier la volonté de reconnaître comme légitime un état de choses donné. Naturellement des considérations politiques induisent souvent les États à préférer cette voie à celle d'une reconnaissance explicite.' And see the Russian *Memorandum* to Great Britain in the *Alaska* dispute between Great Britain and Russia, which contained the following comment on the British failure to protest against Russian claims: 'La Russe étoit donc pleinement autorisée à profiter d'un consentement, qui, pour être tacite, n'en était pas moins solennel . . .' (quoted in Smith, op. cit., vol. ii, p. 5).

[3] Op. cit., vol. i, p. 13.

[4] See pp. 146–7.

[5] *Secretariat Memorandum on the Régime of the High Seas* (14 July 1950), United Nations (General Assembly) Doc. A/CN.4/32, p. 60.

[6] See Lauterpacht in this *Year Book*, 27 (1950), p. 395.

of the annexation which preceded it;[1] as constituting an admission;[2] as establishing an unfavourable precedent;[3] and as inviting further encroachment on the rights of the acquiescent State.[4]

(*b*) *Acquiescence as an element of interpretation.* Evidence of the subsequent actions of the parties to a treaty may be admissible in order to clarify the meaning of vague or ambiguous terms. Similarly, evidence of the inaction of a party, although not conclusive, may be of considerable probative value. It has been said that '[the] primary value of acquiescence is its value as a means of interpretation'.[5] The failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.[6] The influence of acquiescence may similarly

[1] See Memorandum, dated 9 June 1936, by the Chief of the Division of Near Eastern Affairs in the United States Department of State, which contains this passage: 'It might be argued, therefore, that our failure to protest the recent Italian decree extending Italian jurisdiction over American nationals (and other foreigners in Ethiopia) or its application to American nationals would *not* constitute *de jure* recognition of the Italian annexation of Ethiopia. However, our failure to protest might be interpreted as a recognition of the *de facto* conditions in Ethiopia' (*Foreign Relations of the United States*, 1936, vol. iii, p. 241).

[2] On the death of Pope Pius IX, the Law Officers of the Crown were asked to advise whether there was any legal objection to an acknowledgement by the Secretary of State of letters addressed to the Queen by the College of Cardinals and the new Pope. The Law Officers considered that an acknowledgement might properly be sent, but they issued this warning: 'In the Pope's letter there are two expressions, "supreme Pontificate" and "Catholic Church" to which we would call your Lordship's attention, since we think the answer should be so framed as not to admit, even by silence, the claim of the Pope to Supreme Pontificate. . . . In reference to the Cardinals' letter, the like observations apply to the expressions "Catholic Church", "Supreme Pastor", and "Apostolic See". And in the answer we suggest that words should be used carefully avoiding the recognition of those titles or descriptions' (Report of the Law Officers, dated 2 March 1878).

[3] The United States Secretary of State, in instructions, dated 25 July 1936, to the American Chargé d'Affaires in Switzerland (*Foreign Relations of the United States*, 1936, vol. ii, pp. 805–7), urged him to press for exemption for American goods from Swiss Customs Regulations imposing a stamp tax on payment of import duties. Admitting that the tax did not discriminate against the United States, the Secretary of State added: 'However, it is felt that, if a violation of the agreement is allowed to go unchallenged in this instance, a precedent may be established for the levying of further taxes . . . which might have the effect of nullifying the concessions in the trade agreement' (ibid., p. 807). And see ibid., 1933, vol. v, pp. 6–9.

[4] The United States Chargé d'Affaires in Moscow, in a dispatch, dated 21 February 1938, to the Secretary of State concerning the increased strictness with which Soviet Customs Regulations were being enforced, wrote: 'If, therefore, the American Government and other governments maintaining diplomatic missions in Moscow permit without protest curtailments of the courtesies accorded by Soviet Customs officials to their diplomatic representatives, new and more serious curtailments of such courtesies may be expected in the future . . .' (*Foreign Relations of the United States: the Soviet Union*, 1933–9, p. 639). See also *Foreign Relations of the United States*, 1935, vol. ii, pp. 515–16.

[5] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 619. And see ibid., p. 556, where counsel for the United States insisted 'that the doctrine of acquiescence is a substantive element in international law, and under that doctrine of acquiescence you can inquire into every subsequent fact which is pertinent to the issue, showing the intent of the Parties by their subsequent acts'.

[6] In the case of *Pigeon River Improvement, Slide and Boom Company* v. *Charles W. Cox, Limited* (1934), 291 U.S. 138, the question whether the imposition of tolls for the use of certain works constructed in Pigeon River, a boundary stream between the United States and Canada, was a violation of the Webster–Ashburton Treaty of 1842, was decided by the United States Supreme Court by reference to the 'practical construction' placed by the parties upon the ambiguous provisions of the treaty and which consisted of their failure to protest when the works were constructed and when charges were made for their use. See also the *Russian Indemnity* case of 1912 between Russia and Turkey (Scott, *The Hague Court Reports* (1916), pp. 297 ff.).

be observed in the assumption by international organizations of functions for which their constituent instruments provide no warrant. Dr. Jenks drew attention to the practice of the International Labour Office of interpreting the texts of conventions adopted by the International Labour Conference, although the Constitution of the International Labour Organization assigned this task to the Permanent Court of International Justice. He cited part of a Memorandum submitted to the Governing Body by the International Labour Office in October 1921, which contains the following passage:

> 'More recently it has happened that the same point of interpretation has been raised by more than one Member of the Organisation. In these cases the Office has been able to point out that when the point was previously raised and it was consulted thereon, the information supplied by it and the conclusion to which it appeared to lead had been accepted by the Member in question and had given rise to no objection after publication in the *Official Bulletin*. The process of the development of international law is, in fact, an exactly similar process, and the tacit acceptance of an interpretation acted on by a Member and communicated through the *Official Bulletin* constitutes important authority which can always be invoked for that interpretation.'[1]

(*c*) *Acquiescence as an estoppel.* The growing frequency with which use is made of arguments based upon the principle of estoppel affords a valuable indication of the extent to which the doctrine of acquiescence itself constitutes a precept for equitable conduct in which considerations of good faith are predominant.[2] Although some thirty years ago there may have been some justification for a certain hesitancy in invoking the concept of estoppel in the sphere of international law,[3] modern opinion is tending to

[1] See this *Year Book*, 20 (1939), p. 133.

[2] Judge Lauterpacht has indicated (in this *Year Book*, 27 (1950), pp. 395–6) the way in which the absence of protest may in itself become a source of legal right in relation to estoppel or prescription. The far-reaching effect of failure to protest 'is in accordance with equity', he wrote, 'inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States' (ibid., p. 396). See the Award in the *Grisbadarna Arbitration* of 1909, translated in *American Journal of International Law*, 4 (1901), pp. 233 ff.

[3] See, e.g., Sir Arnold (now Lord) McNair in this *Year Book*, 5 (1924), at pp. 34–37, where he discussed the nature and scope of estoppel in international law. Notwithstanding the dearth of authority upon this problem, he concluded that an international tribunal could hardly fail to be unfavourably impressed by evidence that a State had been inconsistent in its attitude. He found evidence of the existence of such a tendency in the fact that the Arbitrators in the *Fur Seal Arbitration* (Moore, *International Arbitrations*, pp. 755 ff.) expressly found against the United States allegation that Great Britain had conceded the claim of Russia to exercise exclusive jurisdiction over the seal fisheries in the Behring Sea outside territorial waters, being fortified in this conclusion by the fact that the United States, as well as Great Britain, had protested against the Russian Ukase of 1821 in which these claims were advanced. 'This is not estoppel *eo nomine*,' Sir Arnold McNair wrote, 'but it shows that international jurisprudence has a place for some

elevate the concept of estoppel to the rank of one of the 'general principles of law recognized by civilized nations'. The principle of estoppel featured in the jurisprudence of the Permanent Court of International Justice in the case of the *Serbian Loans*[1] and, more prominently, in the case concerning the *Legal Status of Eastern Greenland*.[2] The principle was also recognized, although not applied, in the Award in the *Tinoco Arbitration* between Great Britain and Costa Rica.[3]

The main obstacle to the acceptance of the concept of estoppel as a principle of international law may well have been the long-prevalent belief that it was a technical rule of evidence and, therefore, unsuited to the 'rough jurispsudence of nations'. The changing climate of opinion may be gauged from the reconsideration given to the nature of estoppel by the Judicial Committee of the Privy Council in *Canada and Dominion Sugar Company, Limited* v. *Canadian National (West Indies) Steamships, Limited*.[4] The Board quoted with approval Sir Frederick Pollock's description of the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence',[5] and went on to state: 'Estoppel is often described as a rule of evidence, as, indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law.'[6] The tribunals before which the doctrine was canvassed accepted it by implication and without comment, approaching the solution of the problem concerned in the way in which counsel had presented it to them. The doctrine has been invoked in varying forms over a period of a century and a half and although there have been occasions on which it has been held to be inapplicable to the facts its jurisprudential basis has been unchallenged.[7]

recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*' (this *Year Book*, 5 (1924), p. 35).

[1] *P.C.I.J.*, Series A, Nos. 20/21, pp. 38-39. The principle was approved by the Court but the circumstances were not such as to warrant its application. The Court pointed out that 'no sufficient basis has been shown for applying the principle' of estoppel, and drew attention to the lack of constituent elements of estoppel, noting the absence of any 'clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied' and of any 'change in position on the part of the debtor State.' (Ibid., p. 39.)

[2] *P.C.I.J.*, Series A/B, No. 53. Norway maintained that the attitude of Denmark when seeking recognition of her position in Greenland from other States between 1915 and 1921 was inconsistent with the possession of sovereignty at that time and that Denmark was therefore estopped from alleging a long-established sovereignty over the whole of Greenland (ibid., p. 45). The Court, however, found that the circumstances provided no ground for holding Denmark thus estopped (ibid., p. 62). The Court observed that by accepting as binding several treaties 'Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty . . .' (ibid., pp. 68-69). The Court further said: 'It follows that, as a result of the understanding involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and, *a fortiori* to refrain from occupying a part of Greenland' (ibid., p. 73).

[3] See *American Journal of International Law*, 18 (1924), pp. 155-7.

[4] [1947] A.C. 46.

[5] Ibid., p. 55.

[6] Ibid., p. 56.

[7] The United States argued in the *Chamizal Arbitration* that Mexico was estopped from

In the dispute between Great Britain and the United States concerning the *Title to Islands in Passamaquoddy Bay*, the concluding passage of the case of Great Britain observed that, in view of the silence of the United States with regard to the island of Grand Manan for some twenty-three years, and the admission by the United States of the fact of British settlement and jurisdiction over the island during that period, 'It may admit of some doubt whether this profound silence . . . ought not now to preclude all further claim to it on their part, even though their pretensions might originally have had some foundation';[1] and the doubt was supported, the case continued, by the principle laid down by the Agent for the United States in his argument before the Commissioners under Article IV of the Treaty of 1794 (the Treaty of Ghent), in which he contended that, had the State of Massachusetts remained silent spectators of the improvements made upon the British Settlement on territory claimed by the United States, that would have indicated that the State of Massachusetts had no claim to the territory.[2]

An extract from the draft of a letter[3] from Earl Granville to Musurus Pasha in 1884 referring to the disputed right of a British shipping company to operate vessels on the Tigris and Euphrates, in the context of a disagreement concerning the terms of the Agreement of 1846 concerning general rights of navigation, employs a similar argument. The right was claimed by virtue of the terms of a Vizirial letter of 1861. Earl Granville pointed out that the company had enjoyed that privilege ever since 1861 with the knowledge and acquiescence of the Porte. The absence of protest during that period showed, according to Earl Granville, that the attitude of the Porte had not been, as alleged by Musurus Pasha, one of friendly tolerance,[4] but one of acquiescence in a claim of right on the faith of which the company had made large capital investments. 'Whatever may be the true construction of the Agreement of 1846 as to the general right of navigation', the letter adds, 'Her Majesty's Government consider that the attitude of the Porte during the last twenty-two years debars them from now disputing the validity of the rights claimed and exercised by the Company under the

asserting title by reason of the long 'undisturbed, uninterrupted, and unchallenged possession' of the disputed territory by the United States. Since it was held that in the circumstances of the case the failure of Mexico to protest did not amount to acquiescence, the question of the application of the doctrine of estoppel did not directly arise. Its validity, however, was not questioned by Mexico or by the Commissioners. (The Award is printed in *American Journal of International Law*, 5 (1911), pp. 785 ff.)

[1] See Moore, *International Adjudications* (Modern Series), vol. vi, p. 195.

[2] See below, p. 162.

[3] Quoted in McNair, *The Law of Treaties* (1938), pp. 49-50.

[4] The dissenting Judges in the case concerning *Rights of Nationals of the United States in Morocco* held similarly that the conduct of the French Government which knew of the United States claim to exercise capitulatory rights, and, in spite of their knowledge, continued the old practice without any reservation, was not due merely to 'gracious tolerance' (*I.C.J. Reports*, 1952, p. 221).

Vizirial letter of 1861, and that they are entitled to insist on the status quo of the Company being maintained. . . .'[1]

In the course of the correspondence respecting the boundary between Venezuela and British Guiana, part of which was incorporated in the Venezuelan Argument, the United States Secretary of State,[2] Olney, dismissed British claims to have established title to the disputed territory on the basis of the settlements made by British subjects in the belief that the territory was British, on the ground that the British and not the Venezuelan Government had perpetrated and encouraged that belief, and that it was simply a matter between the persons concerned and the British Government. The Secretary of State concluded: 'In but one possible contingency could any claim of that sort by Great Britain have even a semblance of plausibility. If Great Britain's assertion of jurisdiction, on the faith of which her subjects made settlements on territory subsequently ascertained to be Venezuelan, could be shown to have been in any way assented to or acquiesced in by Venezuela, the latter Power might be held to be concluded and to be estopped from setting up any title to such settlements.'[3]

A similar argument was advanced by the Norwegian Government in the *Fisheries* case; and Judge McNair, although not prepared to hold that the conduct of the United Kingdom amounted to acquiescence, approached the problem in the same way by posing the question whether, supposing the system of delimitation adopted by Norway capable of being recognized as lawful, 'the United Kingdom had precluded herself from objecting to it by acquiescing in it'.[4]

(*d*) *The relevance of acquiescence in the development of rules of customary international law.* Despite the lack of emphasis on the length of time necessary for the formation of a customary rule, the nature of the case suggests that some considerable time may elapse between the initiation of a usage, its growth into a general practice and its final acceptance as law. Although, as one authority[5] put it, 'customary international law is not yet another expression for prescription', prescriptive and customary rights share a common process of development which involves, on the one hand, the constant assertion of the right in question, and, on the other hand, consent in that assertion on the part of the affected States. As in prescriptive rights, so in customary rights the two elements are complementary and mutually interdependent.[6]

[1] Quoted in McNair, *The Law of Treaties* (1938), p. 50.
[2] Printed in the Venezuelan *Argument*, Cmd. 9501 (1899), p. 63. [3] Ibid.
[4] *I.C.J. Reports*, 1951, p. 171. [5] Judge Lauterpacht in this *Year Book*, 27 (1950), p. 393.
[6] See Sorensen, *Les Sources du droit international* (1946), p. 101: 'Ce qui caractérise cependant cette catégorie de règles [sur la répartition des compétences entre les membres de la communauté internationale] c'est que l'acte positif d'un État et l'abstention ou la tolérance de l'autre se complètent, de sorte qu'il est sans importance pour l'établissement de la coutume de les considérer séparément.'

The significance of the doctrine of acquiescence in relation to customary international law has been expressed in various ways. According to Professor Hudson the elements necessary to establish the existence of a customary rule are 'the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time'.[1] From this and similar formulations of the requirements of an international custom it is not clear what function the absence of objection by other States is intended to fulfil. Failure to protest against the *conviction that the practice is enjoined by law* (the so-called *opinio juris sive necessitatis*) is not equivalent to acquiescence in the practice itself. It would seem necessary to distinguish clearly between a customary right and a customary obligation. The *opinio juris* may be essential to the development of the binding force of a customary obligation: it plays no direct part in the acquisition of customary rights.[2]

If the process of development of a customary rule is considered from the standpoint of the assertion of a claim, rather than from the standpoint of the imposition of a duty, the relevance of acquiescence becomes clear. Professor (now Judge) Lauterpacht put the matter in perspective thus: 'Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constituting evidence of it.'[3] In his Dissenting Opinion in the *Fisheries* case, Judge Read posed the question whether there had been acquiescence by the United Kingdom in the Norwegian system of delimitation 'so as to enable the claims constituting that system to ripen into rules of customary international law'.[4] It is suggested that the extent to which a uniform practice has been 'accepted as law'—in the words of Article 38 (1) (*b*) of the Statute of the International Court of Justice—may readily be gauged by reference to the degree of acquiescence which the practice has encountered. The doctrine of acquiescence is as significant a factor in the development of a customary right as is the *opinio juris* in the formation of a customary obligation.[5]

[1] *The Permanent Court of International Justice, 1920–1942* (1943), p. 609. See also Kunz in *American Journal of International Law*, 47 (1953), p. 667.
[2] The *opinio juris* might be considered relevant to the acquisition of customary rights, but only indirectly and only from the standpoint of the conduct of States which may be bound to adopt some positive course of action under the correlative obligation, to permit of the exercise of the right in question.
[3] In this *Year Book*, 27 (1950), p. 395. [4] *I.C.J. Reports*, 1951, p. 202.
[5] The following explanation is offered, with some diffidence, of the place of the *opinio juris* in the formation of a customary obligation: In the early stages of the development of a claim other interested States are faced with the choice of objecting or remaining passive. From their inaction the inference of consent in and acceptance of the validity of the claim may be drawn and

II. *Prescription and historic rights*

(*a*) *Opinions of writers*

Writers who have devoted particular attention to the juridical foundations of rights acquired by prescriptive or historic processes have consistently assigned to acquiescence, in the form of failure to protest when such a course was both possible and appropriate, a function which is important and influential. To them belongs in great measure the credit for exposing the fundamental antimony which tribunals may be called upon to resolve in questions of disputed title, namely, the rival claims to consideration of the maxim *quieta non movere*,[1] on the one hand, and of the concept of good faith, on the other hand. Hyde explains that the 'strength of the equities' of the principle of prescription 'lies in the implied acquiescence in the condition of affairs which its own conduct . . . has produced', and states that 'it has been deemed more desirable to the family of nations that an adverse occupant long in possession should be suffered to remain in unmolested control than that the existing sovereign, although unjustly deprived of possession, should retain its rights of such, at least when it has failed to make constant and appropriate effort to keep them alive, as by ceaseless protests against the acts of the wrongdoer.'[2] Fauchille, discussing

strengthened by the passage of time. So far their conduct amounts to voluntary acquiescence. However, at the same time as the claim is developing, its correlative duty is developing. Once that duty involves for its implementation a course of positive action, as opposed to simple tolerance, then the *opinio juris* becomes an element which is essential to endow that course of action with the binding force of a customary obligation. If the practice continues with uniformity and with the conviction, on the part of the States assuming the obligation, that it is enjoined by law, it will ripen into a definitive customary obligation. Only with difficulty, therefore, can it be supposed that the conviction that the practice is thus binding will be subjected to challenge on the part of other States (although it might be open to one of the States assuming the obligation to protest and, so to speak, contract out), since the other States directly concerned are the beneficiaries of the correlative right. The *opinio juris* is thus distinct from acquiescence, but it is the logical consequence of the previous acquiescence which enabled the right correlative to the obligation to be perfected.

[1] The principle underlying the maxim *quieta non movere* was given expression as long ago as 1909 by the Permanent Court of Arbitration in the *Grisbadarna Arbitration* between Norway and Sweden, and it has since received approval which, although general, has not been unreserved. It is a guiding rather than a decisive principle, and writers have not claimed that it should be applied without qualification in all circumstances. The Permanent Court of Arbitration used these words: 'It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible' (translation of Award in *American Journal of International Law*, 4 (1910), p. 233). Gidel states that the evaluation of the effect of protests on the formation of historic titles is a task of particular difficulty in which general rules should be invoked with care. He concludes that it is for those who have to decide such issues to weigh the special circumstances of each case 'en conservant présente à l'esprit la judicieuse considération' of the maxim *quieta non movere* (*Le Droit international public de la mer* (1934), vol. iii, p. 634). Judge Lauterpacht with similar caution pointed out that in international relations the demands of peace and stability were more urgent than in private relations, and concluded that there is a special reason to depart in some cases from strict evidence in matters of good faith, in favour of considerations based on the principle *quieta non movere* (*Hague Recueil*, 62 (1937) (iv), p. 333).

[2] *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. i, p. 387.

historic bays, attributes their character as such to a combination of factors involving two main elements; first, the length of the period during which continued claims to sovereignty over the area were made by the coastal State; and second, recognition of the claims by some States and the absence of protest on the part of others.[1] The four arctic seas situated along the north coast of the Soviet Union have been claimed as Russian historic bays by the writer of an article in a Soviet journal. This view is justified by reference to international acquiescence in Russian claims.[2] The title of Canada to Hudson Bay as an historic bay has been said by one writer to depend 'on the evidence of occupation by Canada and on the evidence of acquiescence in that occupation by other states'.[3] Gidel emphasized that the legal validity of exceptional claims could be derived only from the acquiescence of other States, manifested in relation to a prolonged practice.[4] The Norwegian jurist, Raestad, referring to claims to extended territorial waters, stated explicitly that the legal validity of such claims depends not so much upon the time and nature of the claim as upon the time and manner of the consent of nations with regard to the claim. It is the factor of consent, he wrote, which, express or tacit, endows the claim with legal validity.[5] There is, in effect, parity of importance between the two concomitant aspects of all questions concerning the acquisition of rights by prescription or similar methods. Neither factor would of itself be conclusive. The matter has been summed up thus: 'Display of authority by the one party, acquiescence in that display by the other party—those are the *sine qua non* of acquisitive prescription.'[6]

[1] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, pp. 380–2.

[2] See Kulski in *American Journal of International Law*, 47 (1953), pp. 131 ff. He discusses an article by S. A. Vyshnepolskii in the issue of *Sovetskoe Gosudarstvo i Pravo* of July 1952. According to Vyshnepolskii, Russian rights to the Kara Sea have been internationally recognized, either expressly or impliedly. Tsar Ivan IV refused the request of Queen Elizabeth of England in 1583 to allow English ships to navigate the mouths of the rivers flowing into the Kara Sea. Four Russian decrees enacted between 1616 and 1620 forbade any foreign navigation in the Kara Sea; and other Russian legislation in 1833 and 1869 regulated navigation there. 'Notwithstanding direct knowledge of the Kara Sea on the part of several representatives of the Western and Scandinavian countries, the latter did not deem it possible to interfere with the regulations issued by the Russian authorities concerning that sea. The right of Russia, and, by virtue of succession, that of the U.S.S.R. to establish autonomously any legal regime of navigation in the Kara Sea, a right exercised for centuries, was never subject to any protest on the part of the foreign Powers, and must be considered as "an uninterrupted and indisputable custom".'

[3] Dr. V. K. Johnston in this *Year Book*, 15 (1934), pp. 1 ff. Dr. Johnston concludes: 'On the basis of occupation, and acquiescence by other states in that occupation, Canada also has title to Hudson Bay and Hudson Strait, notwithstanding the general six (or ten-) mile rule of international law—for Canada has occupied and has developed the Bay and the Strait for navigational purposes as part of the Canadian national domain; that occupation has not been disputed and therefore has been acquiesced in by other states' (ibid., p. 20.)

[4] *Le Droit international public de la mer* (1934), vol. iii, p. 651.

[5] *La Mer Territoriale* (1913), p. 167.

[6] D. H. N. Johnson in this *Year Book*, 27 (1950), p. 345.

(b) Judicial decisions

Tribunals to which disputes involving prescriptive claims have been referred have unequivocally affirmed the importance which they have attached to the acquiescence of one party in conduct by the other which related to the subject-matter of the dispute. Acquiescence has seldom formed the sole reason for the judicial determination of a dispute, but it is clear that it is a factor to which courts have ascribed great weight.

(i) *Municipal courts.* Perhaps the most considerable body of judicial authority for the proposition that acquiescence is essential to the validity of a prescriptive title is to be found in the decisions of the Supreme Court of the United States. In a number of disputes between the quasi-sovereign States of the Union involving prescriptive claims, the Supreme Court has stressed the persuasive force of the element of acquiescence. Thus, in the case of *Indiana* v. *Kentucky*,[1] which arose out of a dispute concerning the proper construction of the instrument of cession made in 1783 by the State of Virginia in favour of the United States, Mr. Justice Field, delivering the unanimous opinion of the Court, said: 'This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognised, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.'[2]

The merits of the principle formulated in *Indiana* v. *Kentucky* have since that time received repeated recognition by the Supreme Court of the United States.[3] The most recent occasion was in 1940 in the case of *Arkansas* v. *Tennessee*.[4] Chief Justice Hughes, delivering the opinion of the Court in that case, categorically affirmed the relevance and importance of acquiescence, referring throughout to the concept which the Court applied as 'the principle of prescription and acquiescence'.

The Judicial Committee of the Privy Council made similar use of the concept of acquiescence in its judgment relating to the status of Conception Bay in the case of *Direct United States Cable Company* v. *Anglo-American Telegraph Company*.[5] By the terms of a convention between Great Britain and the United States, United States fishermen were, except for certain limited and defined purposes, excluded from Conception Bay. 'It is true', the judgment ran, 'that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of *Great Britain*, acquiesced in by so powerful a State as the *United States*, the Convention, though weighty, is not decisive.'[6] To give effect to the terms of the Convention, British legislation provided that the stipulated restrictions were to be observed by all persons other than natural-born British subjects; and penalties were laid down for non-observance, particularly for refusal to depart from the area if required to do so by the Governor. The Privy Council described these provisions as the strongest possible assertion of exclusive dominion, and concluded that 'as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of *Great Britain*'.[7]

The German Staatsgerichtshof on 10 October 1925 pronounced a provisional order in the case of *Lübeck* v. *Mecklenburg-Schwerin*,[8] which illustrates clearly the essentially twofold nature of a valid prescriptive claim, namely, the assertion of rights on the one side and acquiescence in that assertion on the other. The Court found that since the end of the sixteenth century Lübeck had exercised rights of jurisdiction in respect of fisheries over Travemund Bay which formed part of the territorial waters of Mecklenburg-Schwerin; that by legislation in 1896 Lübeck had unmistakably asserted the existence of the right in question; and that Mecklenburg-Schwerin, which, as a territorial neighbour, must be presumed to have had knowledge of this legislation,[9] neither protested against it in spite of the

[1] 136 U.S. Reports, pp. 509 ff.
[2] Ibid., p. 510.
[3] See, e.g., *Louisiana* v. *Mississippi* (202 U.S. (1906), 1). Chief Justice Fuller, speaking for the Court, said: "The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both' (ibid., pp. 53–54). The Court, in *State of Arkansas* v. *State of Mississippi* (250 U.S. (1919), 39), refused to depart from the rule of the *thalweg* 'because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain' (ibid., p. 45). The 'rule, long settled and never doubted by this court . . . that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority' was the juridical foundation of the decision of the Court in *Michigan* v. *Wisconsin* (270 U.S. (1926), 295).

[4] 310 U.S. 563; *American Journal of International Law*, 35 (1941), pp. 154 ff.; *Annual Digest*, 1938–40, Case No. 44.
[5] (1877) 2 A.C. 394.
[6] Ibid., p. 421.
[7] Ibid., p. 421. The right of the United States to treat Chesapeake Bay as national waters was upheld by the Court of Commissioners of Alabama Claims in *Stetson* v. *United States*. The Court was substantially confirmed in its view by the fact that there had been acquiescence in the claim of the United States on the part of other States (Scott, *Cases on International Law*, pp. 232, 237).
[8] *Annual Digest*, 1925–6, Case No. 85.
[9] See below, pp. 176 ff., on the requirement of notification.

fact that it was put into force and applied, nor asserted rights on her own behalf in the disputed area until 1925. In the light of these findings the Court granted the application of Lübeck for a provisional order to the effect that Lübeck should be entrusted with, and Mecklenburg-Schwerin restrained from, the regulation of the fishery rights in the disputed area. The decision was based on the long, undisturbed exercise of the rights by Lübeck, coupled with the absence of any protest by Mecklenburg-Schwerin against the Lübeck Law of 1896.

(ii) *International tribunals.* The relevance and importance of acquiescence in the form of failure to protest in appropriate circumstances has been illustrated in a number of international adjudications on disputed title to territory. The United States members of the Tribunal which determined the *Alaskan Boundary* dispute reached their interpretation of the disputed treaty provisions largely by reference to the significance of the actions of the parties subsequent to the conclusion of the treaty. Among the factors which favoured the adoption of the construction for which the United States contended, was the consideration that, for more than sixty years after the conclusion of the treaty, 'Russia, and in succession to her the United States, occupied, possessed, and governed the territory . . . without any protest or objection, while Great Britain never exercised the rights or performed the duties of sovereignty there, or attempted to do so, or suggested that she considered herself entitled to do so'.[1] The opinion of the United States members of the Tribunal cited statements made by the Prime Minister of Canada in the Canadian Parliament admitting that no protest had been made by any government against the occupation of the disputed territory by the United States, and concluded:

> 'It is manifest that the attempt to dispute that possession . . . is met by the practical, effective construction of the Treaty presented by the long-continued acquiescence of Great Britain in the construction which gave the territory to Russia and the United States, and to which the Prime Minister testifies. Only the clearest case of mistake could warrant a change of construction after so long a period of acquiescence in the former construction, and no such case has been made out before this Tribunal.'[2]

The Award[3] rendered by the King of Italy on 6 June 1904 in the dispute between Great Britain and Brazil concerning the boundary between Brazil and British Guiana, while inconclusive as to which party had the stronger claim, leaves no doubt of the importance assumed by the doctrine of acquiescence in the reasoning adopted by the Arbitrator. After concluding that Brazil could be held to have possessed only part of the disputed territory, the Arbitrator held that the Arbitral Award of 3 October 1899 in the

[1] See *Alaskan Boundary Tribunal: Award* of 20 October 1903; printed in Cmd. 1877 (1904), pp. 49 ff., at p. 79.
[2] Ibid., p. 87.
[3] Cmd. 2166 (1904).

boundary dispute between Great Britain and Venezuela, by which the territory constituting the subject of the later dispute was adjudged to Great Britain, could not be cited against Brazil, the latter being 'unaffected by that Judgment'. However, with regard to the conduct of the parties after that date, the Arbitrator found 'That . . . acts of authority and jurisdiction over traders and native tribes were afterwards continued in the name of British sovereignty. . . . That such effective assertion of rights of sovereign jurisdiction was gradually developed and not contradicted, and, by degrees, became accepted. . . . That in virtue of this successive development of jurisdiction and authority the acquisition of authority . . . was effected over a certain part of the territory in dispute.'[1]

In the *Delagoa Bay Arbitration* between Great Britain and Portugal, the French President in his Award of 24 July 1875[2] found in favour of Portugal not only by reason of the Portuguese discovery of the area but, *inter alia*, because Portugal made continual claims to sovereignty over the Bay and the exclusive right to trade there, and upheld those claims by force of arms against both the Dutch and the Austrians. The complete absence of objection to those acts on the part of the Netherlands and Austria was noted by the Arbitrator as confirming the validity of the legal basis of the Portuguese claims.

The Award made on 23 January 1933 in the *Guatemala–Honduras Boundary Arbitration*[3] is of particular interest, as illustrating an occasion on which a protest might usefully have been made, and exemplifying the result of failure to protest. By Article 5 of the Arbitration Treaty of 16 July 1930 the parties agreed that the only judicial boundary which could be established between their respective territories was the *uti possidetis* line of 1821, when their independence of Spain was declared. Accordingly, they agreed that the 'Tribunal, in determining this line, should be competent to modify it as it saw fit, should it find that subsequent to 1821 one or both parties had secured interests which should be taken into account in definitively establishing the boundary. The Tribunal held that, in its search for evidence of administrative control at the crucial time, and the necessary support for that control in the will of the Spanish King, it was at liberty to inquire into conduct indicating royal acquiescence in colonial assertions of administrative authority. The Crown, as the Tribunal pointed out, was free at all times to alter its commands or to interpret them by allowing what it did not forbid. 'In this situation', the Tribunal observed, 'the continued and unopposed assertion of administrative authority by either of the colonial entities, under claim of right, which is not shown to be an act of usurpation because of conflict with a

[1] Cmd. 2166 (1904), p. 4.
[2] Printed in Cmd. 1361 (1875), pp. 247–9.
[3] *Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 1309 ff.

clear and definite expression of the royal will, is entitled to weight and is not to be overborne by reference to antecedent provisions or recitals of an equivocal character.'[1] Again, the Tribunal emphasized: 'It is manifest that in determining this question, the action of these States in establishing their independent Governments and in formally describing the extent of the territory to the sovereignty over which they regarded themselves as succeeding, is significant. . . . The constitutions of the new States, and the Governmental acts of each, especially when unopposed, or when initial opposition was not continued, are of special importance.'[2] While admitting that no State can acquire jurisdiction over territory in another State solely by declarations on its own behalf, the Tribunal considered it to be no less true that the assertions of authority, and other acts disclosed by the evidence, on the part of Guatemala 'were public, formal acts and show clearly the understanding of Guatemala that this was her territory'.[3] Such acts, the Tribunal added, 'invited opposition on the part of Honduras if they were believed to be unwarranted'.[4] In summing up the circumstances in which the continued and long unopposed assertion of authority by Guatemala over part of the disputed territory operated to raise a presumption in favour of the claim of Guatemala which could be rebutted only by the clearest proof, the Tribunal clearly equated the fatal defect in the case presented by Honduras with her failure to protest. 'If it had been considered that Honduras was being deprived of territory to which she was entitled and especially that Guatemala was asserting authority over territory which was, or prior to independence had been, under the administrative control of Honduras, it can hardly be doubted that these assertions by Guatemala would have aroused immediate antagonism and would have been followed by protest and opposition on the part of Honduras. The intense feeling existing at the time, and the natural jealousy of the new States with respect to their territorial rights, would have caused a prompt reaction. But it does not appear that such protest was made or that opposing action was taken by Honduras.'[5]

In the *Grisbadarna Arbitration*[6] of 1909 between Norway and Sweden the Permanent Court of Arbitration considered the acquiescence of Norway in certain acts of Sweden as a factor which supported the validity of the Swedish claims. The ownership of fishing banks off the coast outside territorial waters was in dispute, and the Tribunal indicated, *inter alia*, the following reason why the Grisbadarna Bank should be allotted to Sweden: "The circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these

[1] *Reports of International Awards* (United Nations Series), vol. ii, p. 1324.
[2] Ibid., p. 1325. [3] Ibid., p. 1327. [4] Ibid., p. 1327. [5] Ibid., p. 1328.
[6] The Award is translated in the *American Journal of International Law*, 4 (1910), pp. 226 ff.

regions were Swedish as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought she was exercising her right but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards.'[1] After adverting to the principle *quieta non movere*, the Tribunal concluded: 'The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests; . . . It is shown by the foregoing that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.'[2]

In the *Island of Palmas Arbitration*[3] of 1928, between the United States and the Netherlands, the Arbitrator found that the Netherlands had a good title to the disputed island which it had 'acquired by continuous and peaceful display of state authority during a long period of time'.[4] Evidence of acquiescence by Spain and other States in the 'open and public' display of State authority over the island sufficed to satisfy the Arbitrator that the requirement that the display must be peaceful[5] had been fulfilled. The Award stated: 'Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands' sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted.'[6]

The International Court of Justice confirmed the vitality and significance of the doctrine of acquiescence, in the form of absence of protest, by its treatment of the problem of acquiescence in relation to historic rights in the

[1] Loc. cit., p. 233. [2] Ibid., pp. 234–5.
[3] The Award is printed in *Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 831 ff.
[4] Ibid., p. 869.
[5] Compare the Award of the Commissioners in the *Chamizal Arbitration* of 1911, between the United States and Mexico (printed in *American Journal of International Law*, 5 (1911), pp. 785 ff.). The Commissioners, after noting the condition that a 'characteristic of possession serving as a foundation for prescription is that it should be peaceable' (ibid., pp. 806-7), concluded that the United States plea of prescription should be dismissed, since 'the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment' (ibid., p. 807). [6] Ibid., p. 868.

Fisheries case.[1] The Judgment, after stating that the Court was bound to hold that the Norwegian system of delimitation was consistently and uninterruptedly applied from 1869 until the time when the dispute arose, continued: 'From the standpoint of international law it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States. . . . The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. . . . It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.'[2] This part of the Judgment ends with the following much-quoted passage, which puts the matter clearly and forcefully:

'The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

'The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of Governments bears witness to the fact that they did not consider it to be contrary to international law.'[3]

Such language confirms the correctness of the view of the United Kingdom as to the essential criteria by which a valid historic title is to be judged. The Court accepted the United Kingdom contention that Norway could justify her claim to fjords and sunds which have the characteristics of a bay or of a legal strait 'on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognised although it constituted a derogation from the rules in force'.[4] The use of the phrase 'general toleration' where 'general acquiescence' might have been expected is of no apparent significance: the terms are synonymous.[5]

[1] *Anglo-Norwegian Fisheries* case, Judgment of 18 December 1951: *I.C.J. Reports*, 1951, p. 116. [2] Ibid., p. 138.

[3] Ibid., p. 139. It may be noted that in an earlier passage the Court, preparatory to approving the method of using straight base-lines in conformity with the principle that the belt of territorial waters must follow the general direction of the coast, took into consideration, albeit in cursory fashion, the fact that 'several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other states' (ibid., p. 129).

[4] Ibid., p. 130.

[5] It has been suggested that the phrase 'general toleration' was probably intended to bear a somewhat weaker meaning than 'general acquiescence' (see D. H. N. Johnson in *International and Comparative Law Quarterly*, 1 (1952), p. 165, n. 33). The remainder of the Judgment hardly supports the view that such a distinction was intended. Confusion may well arise from the looseness of the terminology employed by jurists in this particular matter. If acquiescence is used to signify only tacit consent and not express approval or recognition, the use of the term 'general toleration' in place of 'general acquiescence' does not alter the sense to any readily appreciable extent. The 'imprecise use of such terms as acquiescence . . . sufferance . . . usage . . . and custom' in the course of the case concerning *Rights of United States Nationals in Morocco*, has been the subject of unfavourable comment (see Bin Cheng in *International and Comparative Law Quarterly*, 2 (1953), pp. 361–2; and see below, p. 173.)

The fact that the Court did not base its decision solely on the validity of the claim of Norway to an historic title ought not to detract from the importance of the part which the question of historic title assumed both in the pleadings and in the Judgment in the *Fisheries* case. It is significant that the sole reason given by Judge Hackworth for his concurrence in the operative part of the Judgment was that, in his view, Norway had proved the existence of an historic title to the disputed areas of water.[1] The question is given further attention in the separate Opinion of Judge Hsu Mo and in the two dissenting Opinions. Judge Hsu Mo declared that Norway was justified in using her method of delimitation 'because of her special geographical conditions and her consistent past practice which is acquiesced in by the international community as a whole. But for such physical and historical facts, the method employed by Norway in her Decree of 1935 would have to be considered to be contrary to international law.'[2] No less illuminating is Judge Read's treatment of the question of historic title. One of the lines of development he traced in his review of the history of the law relating to territorial waters, ten-mile bays and historic waters, was the recognition that, regardless of breadth, the coastal States could treat as internal waters 'those bays over which they had exercised sovereignty, without challenge, for a long time'.[3] 'This he characterized as the doctrine of historic waters. He pointed to the absence of successful challenge to the claims of States to those three types of waters since the *North Atlantic Fisheries Arbitration* in 1910. Significantly he concluded: 'They can, therefore, all be regarded as established by rules of customary international law.'[3] Whether the disputed areas may be regarded as historic waters or the Norwegian system may be regarded as 'special or regional law' applicable to Norway, depends, he argues, on the proof by Norway that her system

[1] *I.C.J. Reports*, 1951, p. 144.

[2] Ibid., p. 154.

[3] Ibid., p. 188. It is tempting to consider this conclusion, at least in relation to the concept of historic waters, as indicating that, in the opinion of Judge Read, there has been acceptance as a rule of customary international law of the notion that the prolonged exercise of sovereignty, without protest from other States, suffices for the acquisition of an historic title; or, to put it in another way, that the principle of prescription or historic title, based on the elements of display of authority and acquiescence in that display, ranks in the hierarchy of sources in Article 38 of the Statute of the International Court of Justice under 'international custom, as evidence of a general practice accepted as law', rather than under the more controversial 'general principles of law recognised by civilised nations'.

evolved as part of the law of Norway, that it was made known in a way in which other States would have, or ought to have, knowledge of it and, lastly, 'that there has been acquiescence by the international community, including the United Kingdom'.[1] Judge Read's appreciation of the evidence led him to conclude that, for reasons with which it is proposed to deal later, there had been no acquiescence by the United Kingdom in the Norwegian system. Similar reasons impelled Sir Arnold McNair to hold likewise, but his treatment of the question of acquiescence is related to the special ground on which Norway relied upon it to justify the 1935 Decree, and it merits separate consideration.[2]

In none of the other cases discussed did acquiescence assume so significant a place as in the *Fisheries* case. Its role in the formation of historic titles was canvassed at length by both parties; and in the Judgment and in the Individual and Dissenting Opinions its relation to historic title and related concepts has been expounded in a manner which establishes its jurisprudential basis on a footing which is at once firmer, more systematic and more authoritative than hitherto.[3]

(c) *The practice of States as evidenced by statements in pleadings and other official pronouncements*

States, in their pleadings before international tribunals and in their diplomatic correspondence, have relied, where appropriate, on absence of protest as evidence that the legal validity of the claims in question has been recognized. In the proceedings of the Commission under Article IV of the Treaty of Ghent with regard to the *Title to Islands in Passamaquoddy Bay*, the Agent for Great Britain ended his argument thus:

"The simple uncontroverted fact that all these islands now in question . . . were in the possession of His Majesty, and . . . continued in his possession with the tacit consent and acquiescence, not only of the Government of the United States, but that of the State of Massachusetts, always vigilant and tenacious of all her rights . . . must to any unprejudiced mind most strongly evince the sense of both nations at that time with regard to the right to these islands. . . .'[4]

[1] *I.C.J. Reports*, 1951, p. 194. And see, to the same effect, other passages in the same Opinion (ibid., pp. 195, 197).

[2] See above, p. 150.

[3] In its Judgment in the *Minquiers and Ecrehos* case the International Court of Justice, after reciting the evidence establishing long-continued exercise by the Jersey authorities of administration over the two groups of islets, drew attention to the absence of French protests directed specifically, in the case of the Ecrehos, against a legislative act which the Court considered to be a clear manifestation of British sovereignty, and, in the case of the Minquiers, against a reference, in a British Note of 12 November 1869 to the French Foreign Minister, to the Minquiers as a dependency of the Channel Islands (see *I.C.J. Reports*, 1953, pp. 66, 71). Both Judge Basdevant and Judge Carneiro, who delivered Individual Opinions, gave due weight to the failure of France to protest against the acts by which the British Government exercised authority over the disputed islets (ibid., pp. 83, 106).

[4] Moore, *International Adjudications* (Modern Series), vol. vi, p. 213.

The Colombian argument presented to the Swiss Federal Council, as Arbitrator in the *Colombian–Venezuelan Frontiers Arbitration*, relied successfully on the failure of Venezuela to protest on the two occasions on which a protest would have been expected had Venezuela believed her rights to be affected, namely, the cession by Colombia to Brazil in 1907 of part of the disputed territories and the occupation by Colombia in 1900 of the Orinoco Basin.[1] The point was briefly made thus: 'L'absence de protestation est, en droit international, une des formes de l'acceptation ou de la reconnaissance de certains faits.'[2]

Attempts by the Spanish authorities to capture alleged smugglers at varying distances from the shore, which Spain justified largely by the *tu quoque* argument presented by the British Hovering Acts, prompted Lord Howden in a dispatch dated 9 February 1853[3] to ask if the British Government intended to contest the extended jurisdiction claimed by Spain. Lord Howden indicated that the Spanish claim had been made consistently since the earliest times; and Hertslet, in a Memorandum concerning Lord Howden's query, commented:

'It is not stated that Great Britain has at any time objected to this jurisdiction; and it may be assumed that it was exercised at the time when the war commenced between Spain and Great Britain in 1796.

'In that case, Great Britain may be considered as bound to conform to it since she is bound by treaty to respect the conditions which existed prior to 1796.'[4]

Denmark contended in her pleadings in the *Eastern Greenland* case that, in virtue of the rules of international law respecting possession of territory, absence of protest was a factor which, in conjunction with public, peaceful, and prolonged display of sovereignty, constituted a good and sufficient title.[5] Norway also contended that acquiescence was a vital element in the establishment of an historic title.[6] The Netherlands pointed to the absence of protest by Spain against the Dutch acts of sovereignty over the island of Palmas.[7] The pleadings in the *Delagoa Bay Arbitration*,[8] the *British–Venezuelan Boundary Arbitration*,[9] the *Alaskan Boundary*

[1] *Reports of International Arbitral Awards* (United Nations Series), vol. i, pp. 250–1, 280.

[2] Ibid., p. 251.

[3] F.O. 72/839, No. 25; quoted in Smith, *Great Britain and the Law of Nations*, (1932), vol. ii, p. 170.

[4] F.O. 72/839; quoted in Smith, op. cit., p. 171.

[5] *P.C.I.J.*, Series C, No. 62, p. 101; No. 66, p. 2873.

[6] Ibid., No. 63, p. 1305.

[7] See, e.g., Appendix to the *Memorandum of the United States of America*, pp. 135, 141, where Notes from the Netherlands are printed in which this argument is employed.

[8] The Portuguese Government argued that evidence of the recognition of the validity of the Portuguese claims was provided by maps and related documents, by the writings of publicists, 'et aussi du fait de la non-contestation de ces droits par les autres nations' (*Case of Portugal*: printed in Cmd. 1361 (1875), p. 87).

[9] For the purpose of this Arbitration it was agreed by Treaty of 2 February 1897 between the

dispute,[1] and correspondence in the *Alaska* dispute between Russia and Great Britain,[2] provide further examples of the reliance placed on the notion of acquiescence.

On frequent occasions throughout the proceedings in the *Fisheries* case the Norwegian Government pointed to the absence of any protest on the part of the United Kingdom against the Decrees of 1869 and 1889;[3] and the fact that the United Kingdom was bound to observe the limits therein laid down was admitted by the United Kingdom as a necessary consequence of its acquiescence.[4] Norway, however, persisted in her contention that the acquiescence of other States was not a prerequisite for the formation of an historic title. Although she was prepared to admit that the attitude of other States was a factor of some importance, in so far as she was in agreement with the United Kingdom firstly, that the opposition of the international community would deprive a practice of the peaceful character it required to form the basis of an historic title, and secondly, that a State which had unequivocally opposed a claim from the time it was first formulated would not be bound to submit to it notwithstanding the consent of other States to be so bound,[5] yet she maintained that a State was barred from disputing that it was obliged to conform to a situation which had become established in the course of time, provided that the consolidation had taken place without provoking any reaction on the part of the affected State. The fact that the silence of the affected State might have been due to ignorance of the facts, and hence might not have amounted to acquiescence, Norway considered to be immaterial.

The espousal by Norway of the view that it is possible and proper to dispense with the requirement of acquiescence may be attributed to her

two States that 'adverse holding or prescription during a period of fifty years shall make a good title'. It was pointed out in the Venezuelan *Argument*, that, when confronted with positive assertions of territorial rights on the part of Spain, the Governor of Essequibo (in the disputed territory) neither protested to Spain nor suggested to his government that a protest should be made. Venezuela read into these facts a clear recognition of the territorial rights of Spain (see Cmd. 9501 (1899), p. 315).

[1] A clear expression of what Canada understood to be implied in failure to protest appears in a speech of the Minister of the Interior in the Canadian Parliament on 11 February 1898. He pointed out that in view of the long undisputed possession enjoyed by the United States, Canada was precluded from attempting to take possession of the territory. 'It must be taken as undisputed when there has been no protest made against the occupation of that territory by the United States.' And he added that the failure to protest was 'an unfortunate thing for us' but a fact (*Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 910).

[2] A Russian Memorandum presented to the Duke of Wellington argued that absence of protest on the part of Great Britain against Russian claims to extended territory signified British acceptance of the validity of such claims. In the words of the Russian Ambassador: 'La Russe étoit donc pleinement autorisée à profiter d'un consentement, qui, pour être tacite, n'en étoit pas moins solonnel . . .' (F.O. 92/51: printed in Smith, op. cit., p. 5).

[3] See *Fisheries* case, *Pleadings*, vol. i, pp. 265, 544-5, 573; vol. iii, pp. 80, 484-5; vol. iv, pp. 188, 218, 317, 549.

[4] See ibid., vol. iv, p. 454.

[5] See ibid., vol. iv, pp. 308-10.

contention that the function of historic title was limited to mere confirmation of the legality of a situation legally justified on other grounds,[1] and this latter contention in turn may be due to a misunderstanding of the nature of acquiescence. To denote by acquiescence both tacit and express agreement tends to confuse the concept of acquiescence proper with that of recognition. The latter has no relevance to the problem of prescriptive or historic rights, whereas the former entails legal consequences only in so far as it takes effect in the context of the passage of time. The period of time required to render acquiescence conclusive rather than merely presumptive varies with the type of claim asserted. It will depend on the intensity with which the claim is manifested; on the publicity surrounding its promulgation or enforcement; on the nature of the right claimed; on the position and condition of the territory affected; and so on. A prescriptive claim affecting the rights of only one other State is hardly on the same footing as an historic claim which, in theory, derogates from the rights of all other States: and in an historic claim the period is conditioned mainly by the extent to which acquiescence is general and thus promotes the conviction that the situation is in conformity with international order. Norway denied that the formation of historic titles could be primarily dependent upon the acquiescence of other States because, she insisted, a title of that kind would be indistinguishable from one resulting from recognition, except possibly in point of form; and even the formal distinction would be obliterated in the case where recognition was inferred from surrounding circumstances.[2]

The United Kingdom Government was charged with ignoring the substantial difference between the theory of recognition and the theory of historic titles, namely, the predominant part played by history in the latter. In this context the insistence of the United Kingdom on the necessity for acquiescence was misrepresented as an insistence upon the consent of other States, express or by necessary inference from surrounding circumstances, irrespective of the passage of time. However, if due weight is given to the consideration that acquiescence is primarily dependent for its legal effect upon the fact that it is necessarily conjoined with the passage of time, it will be seen that the part played by the historic element was recognized to be of major importance by both parties. The following difference, however, persisted: for Norway an historic title was merely confirmatory of rights which were intrinsically valid on other grounds, whereas for the United Kingdom an historic title provided a separate and definitive source of right whose validity was dependent on the element of consent derived from acquiescence. The United Kingdom view was that 'an historic title has its

[1] See *Pleadings*, vol. i, pp. 562-3, and vol. iv, pp. 307-8.

[2] See ibid., vol. iv, pp. 308-9.

whole legal basis in the express or implied recognition of the title by other States, that is, in their express or implied acquiescence in the enforcement of the exceptional claim'.[1] 'The Norwegian thesis, although internally consistent, leaves out of account the fundamental factor of the consent of States and conflicts with both the practice of States and the jurisprudence of municipal and international tribunals.

Counsel for the United Kingdom in the *Minquiers and Ecrehos* case alluded to the many occasions on which the French Government had refrained from protesting against clear manifestations of the exercise of sovereignty on the part of the United Kingdom, and he observed that 'these omissions related to acts of sovereignty so definite and significant that the failure to take any notice of them amounted to virtual acquiescence [in the British claims] . . . despite the formal protests which the Government of the Republic did from time to time address to the United Kingdom Government'.[2]

(*d*) *The function of acquiescence in the formation of prescriptive and historic rights*

No single element in the principle of prescription in international law has engendered so much disagreement among writers as the question of the length of time required to perfect a prescriptive title. This besetting difficulty of prescription was recognized by counsel for the United States in the *Alaskan Boundary* dispute. He suggested, however, that writers had resolved the problem by the following expedient: 'They built up alongside of prescription a new doctrine which they called acquiescence, and the great cardinal characteristic of acquiescence is that it does not require any particular length of time to perfect it; it depends in each particular case upon all the circumstances of the case. The primary value of acquiescence is its value as a means of interpretation.'[3] The virtue of acquiescence is that it looks for its determining force to the root of the processes which give rise to new rules of international law, finding its justification in the final resort in the consent of the States members of the international legal order. The most helpful definition of prescription is one which substitutes for the stipulation of a fixed term of years a conception which takes account of the consensual basis of the rules of international law. Such a definition is formulated in Oppenheim,[4] where it is proposed that the time of gestation for a prescriptive title be '*such a period as is necessary to create under the*

[1] See *Fisheries* case, *Pleadings*, vol. iv, pp. 121 ff.

[2] *Minquiers and Ecrehos* case: *Oral Pleadings*, vol. iii, p. 321. The protests which were made were considered ineffectual because they were directed to questions of fishery rights rather than to the disputed question of sovereignty.

[3] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 619.

[4] *International Law* (7th ed., by Lauterpacht, 1948), p. 527.

influence of historical development the general conviction that the present condition of things is in conformity with international order' (italics in original). It is submitted that the existence of this 'general conviction' may be gauged in an accurate and practical manner by recourse to the doctrine of acquiescence, that is, by inferring the consent of the State or States against which title is maturing from their failure to protest, and by deeming them to have thus accepted the situation as 'in conformity with international order'.

III. *Occupation and dereliction*

The impact of protest and acquiescence on the acquisition of title to territory by occupation and on the loss of title to territory by dereliction is of only passing importance. The main feature of the acquisition of title by occupation is the requirement that territory, to be susceptible of occupation, must be *terra nullius*. In practice, there may be considerable difficulty in determining whether the original acquisition satisfied this requirement, the difficulty tending to increase in proportion to the remoteness in time of the acts on which the title is alleged to be based.

It cannot be admitted that protests, however numerous or peremptory, would invalidate a title acquired by occupation, provided that, in the period immediately preceding the acts of occupation, the territory concerned clearly belonged to no State. Both protest and acquiescence in such a case are irrelevant. The purpose of protests is to reserve the rights of the protesting State. To be effective, from a legal point of view, the protest must be directed against the violation of a right which is vested in the protesting State. Where territory is ownerless, no State has a right in relation to the territory which would be infringed by its occupation by another State: hence there would exist no legal basis for protest.[1] An occupying State need not rely on the acquiescence of other States to support its title if, at the time of occupation, the legal status of the occupied territory as *terra nullius* is clear. However, there may be room for doubt concerning the legal status of territory at the time of an alleged occupation in the distant past, as, for instance, when a State asserts sovereignty on the ground that its own title was acquired prior to the purported occupation. In these circumstances assistance may be provided by the doctrine of acquiescence in determining

[1] See the authoritative exposition of the international law of occupation by Professor Waldock in his article on *Disputed Sovereignty in the Falkland Islands Dependencies*, in this *Year Book*, 25 (1948), pp. 311 ff. The first condition which a valid occupation must fulfil is that it must be peaceful; a rule which, according to Professor Waldock, 'seems to mean no more than that the first assertion of sovereignty must not be a usurpation of another's subsisting occupation nor contested from the first by competing acts of sovereignty' (ibid., p. 335). He points out that the Permanent Court of International Justice, in the case concerning the *Legal Status of Eastern Greenland*, affirmed that mere protests from Norway did not alter the peaceful character of Denmark's display of State activity (*P.C.I.J.*, Series A/B, No. 53, p. 62). These protests were, of course, ineffective since Norway had no legal right which was infringed.

the true legal position of the territory at the time of the acts which are claimed to constitute the title by occupation. Absence of protest in the face of acts performed openly[1] in the establishment of a title by occupation will tend to confirm the likelihood that the territory was *terra nullius* at the critical date.

In the same way proof of an intention to abandon a title once perfected may be provided by the continued acquiescence of a State confronted by competing acts of sovereignty. Rather less in the way of State activity may be required to enable a State to retain a right already acquired than might be appropriate for the initial acquisition of the right. It has been pointed out that cases of abandonment in recent times are extremely rare and that jurists are agreed that an intention to abandon must clearly appear: but the same authority adds that the intention to abandon may be spelled out from the circumstances of the supposed withdrawal of State authority.[2] In view of the condition formulated in the Award in the *Island of Palmas Arbitration*—that effectiveness is, and since the nineteenth century has been, necessary for the maintenance of a title by occupation[3]—failure to protest against competing acts of sovereignty, openly performed, might suffice to indicate that the requisite degree of effectiveness in maintaining the title was not being shown. Where there has been no reaction to adverse assertions of sovereignty which were, or ought to have been, known to the original owner, such failure to protest, in circumstances in which both judicial authority and the practice of States afford ample indication of the necessity for protest to preserve the right in question, ought to bear the necessary implication of an intention to abandon the right.

IV. *Limitations on the doctrine of acquiescence*

(*a*) *Acquiescence is to be restrictively interpreted*

Perhaps the safeguard most necessary to a realistic and acceptable application of the doctrine of acquiescence lies in the demand that it be

[1] The question of notoriety and notification is discussed below, pp. 173 ff.

[2] Hackworth, *Digest of International Law*, vol. i (1940), p. 442.

[3] See *Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 845–6. The Arbitrator said (ibid., p. 845): '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.' A protest alone may be a manifestation of the ability and will to act as sovereign sufficient to rebut any presumption of abandonment. The Arbitrator in the *Clipperton Island Arbitration* held that no question of abandonment by France arose. He said: 'There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she had not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected' (*American Journal of International Law*, 26 (1932), p. 394). This passage may properly be read in the light of the fact that on the occasion of the only challenge to her authority before the Mexican assertion of right, France did react by protesting to the United States Government. This is not to imply that complete inaction in similar circumstances might not be held to predicate abandonment.

interpreted strictly. The purpose of insisting on circumspection in inferring the consent of a State from its inaction is to ensure that such acquiescence corresponds accurately with the implied intention of the acquiescing State, and to limit the benefits of acquiescence to claims which have been formulated in such a way that the acquiescing State has or ought to have knowledge of them. The two dissenting Judges in the *Fisheries* case supported their view that the United Kingdom had not acquiesced in the Norwegian system of delimitation by reference to the principle that acquiescence should be imputed to a State only in respect of claims which were, or ought to have been, within the contemplation of the acquiescing State during the prescriptive period. The United Kingdom conceded that by its acquiescence in respect of the Decrees of 1869 and 1889 it was bound to respect the limits therein laid down. Both Judge McNair and Judge Read insisted that the effect of that acquiescence was confined to the localities covered by those Decrees and that there had been no acquiescence in claims extending beyond those territories.[1] The majority of the Court, however, read the evidence as showing that the United Kingdom must have known not only of the Decrees of 1869 and 1889 but also of the *system* of delimitation and all its implications.[2] The Imperial Supreme Prize Court in Berlin, in the case of the *Elida*, differentiated between a mere failure to object and a positive concurrence; and it was careful to point to the danger of allowing consent by implication to be given effect beyond the matters contemplated by the State or States whose toleration is invoked as equivalent to consent. The Court observed: 'Furthermore it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the three-mile zone, this by no means represents a concession to the effect that in all other

[1] Judge McNair dealt with the matter in these words: 'The question thus arises whether the two Decrees of 1869 and 1889, affecting a total length of maritime frontier of about 83 miles, and connecting islands but not headlands of the mainland, ought to have been regarded by foreign States when they became aware of them, or ought but for default on their part to have become aware, as notice that Norway had adopted a peculiar *system* of delimiting her maritime territory, which in course of time would be described as having been from the outset of universal application throughout the whole coastline amounting (without taking the sinuosities of the fjords into account) to about 3,400 kilometres (about 1,830 sea-miles), or whether these decrees could properly be regarded as regulating a purely local, and primarily domestic, situation. I do not see how these two Decrees can be said to have notified to the United Kindgom the existence of a system of straight base-lines applicable to the whole coast' (*I.C.J. Reports*, 1951, p. 177). Judge Read expressed similar views (ibid., pp. 200–1).

[2] Ibid., pp. 138–9. The writer shares the concern of those who have criticized the apparent perversity of the Court's evaluation of the evidence and the inferences drawn therefrom (see, e.g., Sir Gerald Fitzmaurice in this *Year Book*, 30 (1953), pp. 33–39). It is going too far, however, to suggest that 'the Court seems to have sanctioned the proposition . . . that where States know of and acquiesce in the application of a special system to a limited area or in a special field, they may thereby be held to have acquiesced in its general application over the *whole* field' (ibid., p. 40). The Court, in fact, inferred from the evidence that the *system* was, or ought to have been, known to the United Kingdom and hence came within the ambit of the doctrine of acquiescence.

respects the waters in question are included within the territorial jurisdiction.'[1] Anzilotti has applied the principle to express recognition:[2] no less imperative considerations demand its application to the doctrine of acquiescence.[3]

(i) *Silence may be interpreted as consent.* Whether silence is to be interpreted as amounting to acquiescence depends primarily on the circumstances in which the silence is observed. Thus Anzilotti remarked that silence maintained by a State after a situation had been notified or had become generally known could fairly be interpreted as acquiescence and as the abandonment of claims to the contrary, if, by virtue of either special agreements or general practice, the occasion was one on which the State could, or ought to, have protested.[4] It is generally admitted, according to Verykios,[5] that long silence maintained without reason is equivalent to consent. The maxims in which this idea finds expression are well known: *quis tacet consentire videtur; taciturnitas et patientia consensum imitantur;*

[1] The decision is translated in the *American Journal of International Law*, 10 (1916), pp. 916 ff.

[2] *Cours de droit international* (French translation by Gidel, 1929), p. 348: 'Les effets concrets de la reconnaissance sont étroitement liés aux circonstances dans lesquelles elle se produit et à l'objet qu'elle concerne. A un point de vue général on peut dire que ce qui en dérive c'est qu'on ne peut plus contester la légitimité de ce qui a été reconnu. Il est inutile d'ajouter que cet effet, lui aussi, se produit seulement dans les limites précises où la reconnaissance est intervenue.'

[3] The possibility that acquiescence in a limited class of case may be interpreted as acquiescence in a wider class of similar cases is commonly guarded against. An illustration of the dangers in this situation and of the requisite precautions may be found in the following passage from the instructions, dated 20 February 1877, from the Earl of Derby to the British Minister at Rio de Janeiro, on the subject of Brazilian legislation concerning crimes committed by foreigners out of Brazilian jurisdiction: 'With respect to that part of the law which relates to crimes against the Brazilian State, the case is somewhat different. § The right of a State to punish such crimes committed by foreigners out of its territories is claimed by the French Law of the 27th June, 1866, which is only a slight modification of the Law of the 17th November, 1808, in force up to that date. A similar right has been assumed in laws passed by other States, and Her Majesty's Government have not protested against the principle thus laid down. § The only occasion on which Her Majesty's Government protested was in 1852, when it was proposed to pass a law in France extending the principle to crimes against individuals, and on that occasion the proposal was abandoned. § For these reasons Her Majesty's Government feel that they would not be justified in refusing to allow the Brazilian law to be applied to British subjects under certain circumstances, and you will so inform the Brazilian Minister for Foreign Affairs, but in doing so you will point out to his Excellency that the Brazilian law goes much further than the French law, which applies only to crimes "attentatoire[s] à la sûreté de l'Etat", to the forgery of the Seal of State, and counterfeiting national currency or papers; and that a strictly literal interpretation of the . . . Brazilian Code . . . would render non-Brazilians liable to severe punishment for acts which, however culpable they might be if committed by Brazilians, or by foreigners in Brazil, might be perfectly legitimate on the part of a foreigner out of Brazil. . . . Her Majesty's Government cannot for a moment suppose that the Brazilian law was ever intended to apply, or that the Brazilian Government would ever attempt to apply it, to such cases, but at the same time they feel it their duty formally to reserve their right to protest against the application of that law to a British subject should an occasion arise which, in their opinion, would call for remonstrance and intervention.' (The instructions form an Annex to a Report of the Law Officers (by whom it was approved), dated 16 February 1877.)

[4] See Anzilotti, *Cours de droit international* (French translation by Gidel, 1929), p. 344.

[5] *La Prescription en droit international* (1934), p. 26.

qui ne dit mot consent. The validity of the principle is buttressed, Verykios claims, by the existence of what he styles 'le mouvement instinctif de la protestation'.[1] Anzilotti, however, warns against deducing from the widespread practice of formulating protests a too general application for the principle *quis tacet consentire videtur.* It is easy, he asserts, to imagine circumstances in which the silence maintained by a State can be interpreted as amounting to no more than indifference and forbearance from formulating any expression of will.[2] Such an attitude, it is submitted, would tend to make the appreciation of the effect of acquiescence dangerously subjective.[3] Governments are not prone to understate their claims, as Sir Arnold McNair has remarked.[4] No less pertinent are the tendencies which Hyde attributed to States, of sensitiveness to the commission of acts challenging their alleged rights and of 'alertness on the part of aggrieved States to voice protest under the slightest provocation'.[5] It is difficult to believe that States will remain silent without good reason in the face of acts in derogation of their rights if they have even the vestige of a justification for retention of the rights in question. It is a matter of observable fact that the formulation of notes of protest is a constantly recurring feature of the diplomatic practice of States.[6] What is remarkable is their frequency and the variety of the subject-matters with which they deal. The very plethora of notes of protest, while tending to vitiate facile or optimistic generalizations concerning their legal effect, serves to characterize as noteworthy a failure to utilize this adaptable instrument in situations where its use would normally be expected. The formulation of a protest would appear to be almost an instinctive defence mechanism, and this circumstance has led tribunals to scrutinize with a certain degree of scepticism the reasons advanced by a party to excuse its failure to protest in appropriate circumstances.

[1] *La Prescription en droit international* (1934), p. 26.

[2] See Anzilotti, *Cours de droit international* (French translation by Gidel, 1929), p. 344.

[3] Vattel suggested that a State claiming title by prescription could not impute acquiescence to a State which 'sets forth valid reasons for [its] silence such as the impossibility of speaking' or 'a well founded fear'. This defence against prescriptive claims 'has often been employed', he added, 'against princes who by their formidable power had for a long time reduced the weak victims of their usurpations to silence' (*The Law of Nations* (English translation by Fenwick, 1916), Book 2, ch. 11, para. 144). In the course of the proceedings in the *Minquiers and Ecrehos* case France raised a plea somewhat reminiscent of this contention when she asserted that although she was aware of the British claim she had refrained from protesting simply because she was unwilling to prejudice the good inter-governmental relations then existing between the two parties. This plea, which is obviously open to abuse, was not taken seriously by the United Kingdom (*Oral Pleadings*, vol. iii, p. 321). The Attorney General pointed out that such a plea might well be available in any case in which a State desired to explain away its apparent acquiescence (ibid., pp. 270 f).

[4] *Fisheries* case, Judgment of 18 December 1951: *I.C.J. Reports*, 1951, p. 162.

[5] See *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. 1, p. 390.

[6] Thus, e.g., Hyde, loc. cit.; Anzilotti, loc. cit.

(b) Situations in which consent is not implied from silence

Although it is generally conceded that rights can be lost by inaction in the course of time, this is not to assert that failure to protest invariably entails this consequence. There may be circumstances which militate against the inference of acquiescence from failure to protest. Pleas of substance are available, by way of explanation, which, if well-founded, serve to rebut the presumption of consent which might otherwise be raised by a long, unexplained silence. The situations envisaged are those in which the parties have kept the question concerned open—by agreement, by the establishment of a *modus vivendi*, or by the continuance of negotiations; or those in which the inaction and abstention from protest has been that of a party without actual or constructive knowledge of the acts to which the alleged acquiescence relates.

(i) *The plea that the question has been left open by the disputing parties.* In the course of the *Alaskan Boundary* dispute, Great Britain sought to avoid the consequences of her failure to protest against the claims which had been made and acted upon by the United States by qualifying the doctrine of acquiescence on which the United States insisted by the proviso that failure to protest is devoid of disabling consequences when it can be shown to concern a question which the parties have agreed to leave open. Sir Edward Carson described acquiescence as 'implying that the one person has deliberately refrained from asserting a right', and he argued that it was 'impossible to say that anything that was done so long as this question remained open . . . could come within any possible doctrine of acquiescence'.[1] The substance of this limitation on the legal effect of acquiescence was not challenged by the United States.[2]

Somewhat similar restrictions on the doctrine of acquiescence were illustrated in two cases decided by the International Court of Justice. In his Dissenting Opinion in the *Fisheries* case Judge Read considered the question of whether there had been acquiescence by the United Kingdom Government in the Norwegian system of delimitation; and in particular whether the failure of the United Kingdom Government to formulate specific protests on receipt of the 1912 Report could be regarded as acceptance of the Norwegian claims. He did not probe the question of whether the Report was an adequate warning of the existence of the system, but commented on the fact that the 1912 Report was adopted by the Norwegian Foreign Ministry, as embodying the principles of international law

[1] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 715.

[2] The contention of the United States, expressed at an earlier stage of the proceedings, was that 'the uniform acquiescence and occasional concurrence of one party in an interpretation openly proclaimed and acted upon by the other . . . [formed] a complete answer to the claim that the interpretation continues open' (*Correspondence Respecting the Alaskan Boundary*, printed in Cmd. 1877 (1904), pp. 1 ff., at p. 20).

in support of the Norwegian position, in the course of negotiations for the establishment of a *modus vivendi*. 'By its very nature', he pointed out, 'a *modus vivendi* implies the reservation and preservation of the legal positions of both Parties to the controversy. . . .' In the instant case his argument was strengthened by the express stipulation on which the negotiations were based, to the effect that the question of principle should be left intact. 'In these circumstances', he concluded, 'I think that the British Government was justified in regarding all aspects of the negotiations, including the 1921 Report and the Note of November 29th, 1913, as covered by the basic reservation. The omission to make a specific reservation or objection at this stage cannot possibly be treated as proof of acquiescence in or acceptance of the Norwegian System.'[1]

In its Judgment in the case concerning *Rights of United States Nationals in Morocco*, the Court held that the fact that Morocco had acquiesced in the continued exercise of consular jurisdiction by the United States for many years after that exercise could have been based on treaty rights, did not amount to recognition of the right of the United States to do so, because, during the period in question, negotiations were proceeding between the United States and France, concerned, amongst other matters, with the question of the renunciation of capitulatory rights. In other words, the Court acknowledged that absence of protest in relation to a situation which it described as provisional did not affect the respective rights of the parties since the question was kept open by the continuance of the negotiations.[2]

(ii) *Knowledge is a prerequisite of acquiescence.* The proposition that the possession on which title by prescription rests must fulfil the requirement of notoriety is scarcely in doubt. It has been stated explicitly by a number of writers.[3] Fauchille points out[4] that only on the condition of notoriety is it possible for a State against which the possession operates to make its view known. Although, he says, it is at first sight difficult to imagine a clandestine adverse possession remaining for long unknown to the owner, it is, nevertheless, possible in the case of territories which are either distant or of slight

[1] *I.C.J. Reports*, 1951, p. 203.

[2] *I.C.J. Reports*, 1952, pp. 200–1. This was not, however, the view taken by the four dissenting Judges, who held (at p. 221) that the absence of reservations by France to conduct about which she had knowledge amounted not merely to 'gracious tolerance' but to acquiescence. It may be noted that the onus of satisfying a tribunal that the question has been left open is not easily discharged without the production of evidence of an unequivocal agreement to that effect. This is not surprising in view of the consideration that the most effective alternative to such an agreement would be constituted by evidence of protests or equivalent action; and it is just this proof of disagreement which, presumably, a State against which the doctrine of acquiescence is invoked is unable to substantiate.

[3] A useful summary of authorities on this point is contained in the *Counter Memorial* filed by the United States in the *Island of Palmas Arbitration*, pp. 90–92. Grotius stipulated that, to be effective, the silence must be that of a party knowing and freely willing. (See *De jure belli ac pacis* (Whewell's translation), vol. i, sec. 3, pp. 281–2.)

[4] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, p. 761.

importance. On the other hand, he states that knowledge must always be presumed if the possession originated in an act of violence. Johnson stresses the importance of publicity as a condition of prescription. 'Publicity is essential', he writes, 'because acquiescence is essential. For acquisitive prescription depends upon acquiescence, express or implied. Acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all.'[1]

The requirement of knowledge has been canvassed by States before international tribunals and has been confirmed by judicial and arbitral pronouncements. In the dispute between Great Britain and the United States concerning the *Title to Islands in Passamaquoddy Bay*, the Agent for the United States invoked the argument that a claim or act of one party could form no rule of future action unless it was known and acknowledged by the other.[2] In the *Alaskan Boundary* dispute between the same parties, Great Britain met the United States argument that she had acquiesced in the acts and claims to possession of the disputed territory made by the United States by explaining her failure to protest on the ground that she knew nothing of the acts in question and that her ignorance was excusable in view of the uncivilized and inaccessible nature of the country.[3] Similar reasons for failure to protest over a period of sixty years were adduced by France in the *Minquiers and Ecrehos* case and provoked the comment by Judge Carneiro, in his Individual Opinion, that ignorance of what was happening in the disputed areas indicated that France was not exercising sovereignty there.[4] The United States urged that the failure of Spain to question the rights of the Netherlands to the ownership of the Island of Palmas was adequately explained by the reason 'that the Spanish Government had no reason to suppose that the Netherlands Government claimed sovereignty over the island . . .'.[5]

[1] This *Year Book*, 27 (1950), p. 347.

[2] Moore, *International Adjudications* (Modern Series), vol. vi, p. 95.

[3] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 531: 'They say all these things were done and we never protested. Well, you cannot protest against a thing you have never heard of . . .': so the argument ran. And later: 'How is Great Britain, on any ground of justice or fairness, to be affected with knowledge of such proceedings and acquiescence in them? If it was decreed that we should acquiesce in them . . . surely at least we should have had some notice of it; and there is not even a shadow of a pretence that we knew it. In all that is alleged against Great Britain here, there is nothing that England is accused of having done as a positive act; it all consists of neglect to protest and of omissions' (ibid., p. 533). The contention advanced by the United States that the Ukase of 1799 called forth no protest or objection from foreign States was met by Great Britain's answer that the Ukase, which was in form a domestic act, 'was never notified to any foreign State with injunction to respect its provisions. In point of fact, Her Majesty's Government have been unable to discover that the Ukase of 1799 was communicated to any foreign Government in any form whatsoever' (*Alaskan Boundary* dispute, *British Counter Case*, Cmd. 6920 (1893–4), p. 16).

[4] *I.C.J. Reports*, 1953, pp. 106–7.

[5] *Island of Palmas Arbitration; Memorandum of the United States of America*, p. 94; and, to the same effect, *Counter Memorandum of the United States of America*, p. 71.

The reasoning adopted by the Arbitrator in the case concerning *Pensions of Officials of the Saar Territory* (1934) is possibly an extreme illustration of the proposition that acquiescence without knowledge is of no effect. The German Government asked the Arbitrator to hold that, in accordance with the provisions of the Baden-Baden Agreement concerning officials, dated 21 December 1925, the Governing Commission of the Saar Territory was bound, *inter alia*, to refrain from reducing the Pensions Reserve Fund, created by the Agreement, by withdrawals of capital or income. The Principal Reports on the Pension Fund were made available to the League of Nations, of which Germany was a Member and represented on its Committee at the time when the deficits occurred. 'If, in spite of this', the Arbitrator stated, 'the German Government did not protest against the withdrawals, its silence gave consent.'[1] However, the Award concluded thus: 'The right of Germany to protest against the removal of sums from the Pensions Fund is not forfeited because neither that Government nor the Committee of the Fund have so far protested. The accounts were in fact submitted to the League of Nations and showed withdrawals from the Fund at a time when the German Reich was still a Member of the League and was represented by German nationals in the League's administration. But, at that time, these officials had knowledge of the withdrawals, if at all, only as officials of the League and not as plenipotentiary representatives of the German Government. The right of that Government to protest was acquired only at the moment when it knew of the facts. The Committee of the Fund . . . is an organ of the Governing Commission and it is not necessarily its business to act for the German Government. Accordingly, the claim of the German Government is upheld.'[2]

In its Judgment in the *Fisheries* case, the International Court of Justice held that the enforcement by Norway of her system of delimitation was justified as against the United Kingdom for reasons which established circumstantially the latter's knowledge of the system. 'The Court said: "The notoriety of the facts . . . Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.'[3] The dissenting Judges, on the other hand, were clearly of opinion that the facts and circumstances alleged were not such that knowledge of the existence and extent of the system could or ought to be imputed to the United Kingdom, and such knowledge they held to be essential to

[1] *Reports of International Arbitral Awards* (United Nations Series), vol. 3, p. 1563.

[2] Ibid., p. 1567. On the question of the 'right' of a State to protest compare the view of Judge Alvarez in his Individual Opinion in the *Fisheries* case: 'A State is not obliged to protest against a violation of international law, unless it is aware or ought to be aware of this violation . . .' (*I.C.J. Reports*, 1951, p. 152).

[3] *I.C.J. Reports*, 1951, p. 139.

the binding force of an historic title. Judge Read insisted that whether the disputed areas were to be regarded as historic waters, or the system were to be considered as 'the doctrine of international law applicable to Norway either as special or as regional law', the burden was on Norway to prove three facts: (1) that the system 'came into being as a part of the law of Norway'; (2) that it was made known to the world in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge'; and (3) that there had been acquiescence by the international community, including the United Kingdom.[1] Both Judge McNair and Judge Read came to the conclusion that neither actual nor constructive notice to the United Kingdom had been proved.[2]

(iii) *Formal notification of claims is not required.* In a Note dated 7 April 1951 the French Government, in response to a request of the United Kingdom Government, stated its views with regard to the claims of various Central and South American States to extend their respective territorial waters beyond the generally recognized limits. The Note read, in part, as follows: 'Le Gouvernement français n'a jamais reçu, par la voie diplomatique, notification des resolutions ou propositions adoptées, de 1945 à 1950, par le Mexique, le Chili, le Pérou, Costa-Rica et le Salvador, ayant pour effet de changer la limite de leurs eaux territoriales. Il n'a donc pas eu, dans ces cas précis, à formuler un avis.'[3] With this statement may be compared the view expressed in a Note by the United States Secretary of State, Seward, concerning the Spanish claim to a six-mile maritime belt off Cuba: 'A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime Powers of the world. It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation.'[4]

Apart from the above official statements, there is little authority for the view that actual or formal notification is necessary. Neither the Award in the *Island of Palmas Arbitration* nor that in the *Clipperton Island* case lends

[1] *I.C.J. Reports*, 1951, pp. 194 9.

[2] Ibid., pp. 180, 201, 204.

[3] Printed in *Fisheries* case, *Pleadings*, vol. iv, p. 605. The following tentative opinion was proffered by counsel for Great Britain in the *Alaskan Boundary* dispute as to the necessary notice as between nations in regard to claims of which acquiescence was a relevant ingredient: 'I should suppose it is notice by the one Executive Government, or the proper officer of one Executive Government, to the proper officer of another Executive Government' (*Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 537). The Award by implication rejected the view that such notice was necessary.

[4] Printed in Moore, *Digest*, vol. i, p. 710.

any support to the argument that official notification of a claim is a precondition of its validity. The Arbitrator in the *Island of Palmas Arbitration* made the following remarks on the conditions for the acquisition of sovereignty 'by way of continuous and peaceful display of State authority (so-called prescription)':

> 'The display has been open and public. . . . A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or the display of sovereignty in these territories did not exist.
>
> 'Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions. . . .'[1]

The test which the Arbitrator applied, indirectly, in his review of the conditions which peaceful display of sovereignty must fulfil to ground a prescriptive title, fell far short of a requirement of notification. He propounded, in relation to the acquisition of sovereignty, a test which might, *mutatis mutandis*, satisfactorily be adopted in relation to the acquisition of other rights by prescriptive or historic processes. He demanded that the display of sovereignty exist continuously and peacefully for 'long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a reasonable claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights'.[2] By this standard, a measure of vigilance on the part of States in defence of their rights is deemed appropriate.

The Arbitrator in the *Clipperton Island* case[3] in 1931, between France and Mexico, was similarly ready to dispense with the requirement of official notification. Within a month of the original visit of the French naval detachment, the French Consul at Honolulu had published the declaration of French sovereignty over the island in the English journal *The Polynesian*. The relevant passage of the Award states: 'The regularity of the French occupation has also been questioned because the other Powers were not notified of it. But it must be observed that the precise obligation to make such notification is contained in Art. 34 of the Act of Berlin . . . which . . . is not applicable to the present case. There is good reason to think that the notoriety given to the act, by whatever means, sufficed at the time, and that France provoked that notoriety by publishing the said act in the manner above indicated.'[4]

[1] *Reports of International Arbitral Awards* (United Nations Series), vol. ii, p. 868.

[2] Ibid., p. 867.

[3] The Award is printed in the *American Journal of International Law*, 26 (1932), pp. 390 ff.

[4] Ibid., p. 393. The Arbitrator stated that there was 'ground to hold as incontestable, the

There has been no disposition on the part of writers, at least since the time of the *Clipperton Island* case, to stipulate that occupations be formally notified. Professor Ross, for example, writes that 'a formal declaration of occupation or notification is not required, but of course is often to be recommended by way of proof'.[1] It has been suggested that the requirement of publicity (not notification) for the acquisition of title by *possessio longi temporis* is so often realized that it can readily be presumed,[2] and even that it might be dispensed with altogether.[3] Fauchille, however, writing in 1925, insisted that formal notification was essential to the validity of a title by occupation.[4]

(iv) *Notoriety and constructive notice; the force of the plea of excusable ignorance.* Acceptance of the test of notoriety in place of notification, as indicated in the preceding section, necessarily leads to the adoption of the concept of constructive notice. There is little doubt that the Court in the *Fisheries* case imputed to the United Kingdom knowledge of the Norwegian system of delimitation which could have been nothing more than constructive;[5] and it was on the basis of notoriety and constructive notice that the dissenting Judges discussed the problem of acquiescence.[6]

It may perhaps be concluded from the Judgment in the *Fisheries* case

regularity of the act by which France in 1858 made known in a clear and precise manner, her intention to consider the island as her territory' (ibid., p. 393).

[1] *A Textbook of International Law* (1947), p. 147.

[2] Charles de Visscher, *Théories et réalités en droit international public* (1953), p. 243: 'Bien qu'il ne soit guère possible d'énoncer des critères précis au sujet de la portée juridique de l'abstention ou du silence qui, dans certains cas, peuvent s'expliquer par une absence passagère d'intérêts, il est permis de constater que la multiplicité croissante des relations entre Etats, l'intensité de leurs activités concurrentes, la publicité qui les entoure, tendent, à notre époque, à abréger la durée de la période requise pour une consolidation par l'action du temps.'

[3] Verykios, *La Prescription en droit international public* (1934), p. 75.

[4] *Traité de droit international public* (8th ed., 1925), vol. i, part 2, pp. 738 ff. Discussing the form of notification, Fauchille wrote: 'C'est par la voie diplomatique ordinaire qu'il doit y être procédé, que la notification doive être remise individuellement à chaque puissance ou d'une manière collective par une communication au secrétariat de la Société des Nations. Une insertion dans l'organe officiel des actes publics d'un État, c'est-à-dire, dans son Journal officiel, ne serait pas suffisante: un article de quelques lignes publié dans un journal peut échapper à l'attention. La notoriété d'une prise de possession ne saurait dispenser de sa notification: l'admettre serait ouvrir la porte aux abus et rendre possibles bien des conflits' (ibid., p. 739). The terms of Article 34 of the Act of Berlin, he added, 'condamnent l'idée que la notoriété pourrait équivaloir à une notification' (ibid., p. 743).

[5] The following passage illustrates the position adopted by the Court: 'The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety, essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 . . . which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice' (*I.C.J. Reports*, 1951, pp. 138 ff).

[6] Ibid., pp. 171 ff., 191, 199, 201.

that the views of Secretary Seward in his Note of 1863, to the effect that 'Nations do not equally study each other's Statute-books, and are not chargeable with notice of national pretensions resting upon foreign legislation'[1]—which were canvassed by the United Kingdom—no longer carry decisive weight. It is, moreover, doubtful whether such a view of the practice of States was valid at the time of its enunciation. Counsel for the United States in the *Alaskan Boundary* dispute stated what was probably the more accurate view when he discounted the British claim to have been totally unaware of the acts and claims of the United States performed in conformity with her interpretation of her treaty rights. 'These acts', counsel said, 'were not done in the dark, but publicity was given to them. All Governments of this day—that is, first class Powers—are generally informed in regard to published public documents. . . . The Treaty of Purchase was the subject of lengthy debate in Congress in 1868, and it is a violent presumption to say that the British Minister at Washington had no knowledge of it. On the contrary we may safely assume that he had full knowledge, for being there, an alert and able Representative of his Government, you may be sure that nothing appeared in the official publications that did not pass under the eyes of his secretaries.'[2]

In the light of the above considerations, and in view of the readiness with which the Court in the *Fisheries* case imputed to the United Kingdom knowledge of Norwegian legislative claims, further inquiry into the attitude of the Court towards the degree of notoriety attributable to domestic legislation may assist in gauging the likelihood of success of a plea of ignorance by one State of the legislation of another. In the case of the *Anglo-Iranian Oil Company* (Preliminary Objection), the Court found confirmation of the intention of Iran, with regard to her Declaration of acceptance of the 'optional clause' of Article 36 of the Statute of the Court, in an Iranian Law of 14 June 1931 by which the Majlis approved the Declaration, and which was passed between the times of signature and ratification of the Declaration. The Court was careful to remark that the Law could not afford a basis for the jurisdiction of the Court and that it was 'filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration'.[3] Although Judge McNair[4] and, more emphatically, Judge Hackworth[5] dissented, the following passage of the Judgment is significant:

'It is contended that this evidence as to the intention of the Government of Iran

[1] Printed in Moore, *Digest*, vol. i, p. 710: see above, p. 176.

[2] *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 916. See also ibid., pp. 921–2.

[3] *I.C.J. Reports*, 1952, p. 107.

[4] In his Individual Opinion, Judge McNair stated that he had not relied on the Iranian Law in question and that he would have preferred to exclude its consideration from the Court. Its admissibility, he said, was open to question, and its evidentiary value slight (ibid., p. 121).

[5] Judge Hackworth considered that it was neither necessary nor permissible to rely on the

should be rejected as inadmissible, and that this Iranian law is a purely domestic instrument, unknown to other governments. The law is described as "a private document written only in the Persian language which was not communicated to the League or to any of the other States which had made the declarations."

"The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years."[1]

From this it may be predicated that legislation published in the normal manner ought to be known. *A fortiori*, it may be contended, legislation on matters which may be of more apparent international interest ought to be known and scrutinized with particular care.[2] It may be considered that States have done all that can reasonably be expected of them, in the way of spelling out the intentions of a claimant State, by looking to its declaration publicly made in the international sphere, without there being any obligation on them to evaluate the international act in the light of possible explanations in the form of municipal legislation. However, in the case of legislation by a State in which it makes a claim of an international character, the legislation is itself the international act by which the State has declared its intention; and it may for this reason be more readily argued that it should be taken at its face value and that it should be known.

Despite the reluctance of tribunals to attach more than slight weight to the evidence afforded by maps with regard to territorial claims,[3] governments do not let such claims pass unopposed, and protests against map claims are not unknown.[4] Failure to protest against such a claim has been

Iranian law in question to furnish evidence of the Iranian intention since, he said, 'that was a unilateral act of a legislative body of which other nations had not been apprised' (ibid., p. 136). The fact that it was 'a public law which was available after 1933 to people who might have had the foresight and the facilities to examine it' (ibid., p. 137) was no answer, he said, to his contention that the Court must look to the public declarations made by States for international purposes, and cannot resort to municipal legislative enactments to explain ambiguities in international acts. He added that to have put other States on notice of the discrepancy between the Declaration and the act of approval, the law should have been attached to the instrument of ratification filed by Iran with the League of Nations (ibid., pp. 136–7).

[1] *I.C.J. Reports*, 1952, p. 107.

[2] The views of Judge Hackworth are strengthened by the circumstances which he envisaged, that is, when the legislation purports to explain an international act deposited with an international organization for publication.

[3] See, e.g., the views of the Arbitrator in the *Island of Palmas Arbitration: Reports of International Arbitral Awards* (United Nations Series), vol. ii, pp. 852, 853–4. And see the Individual Opinion of Judge Carneiro in the *Minquiers and Ecrehos* case: *I.C.J. Reports*, 1953, p. 105.

[4] Lord Salisbury, in a letter dated 2 August 1887 to the British representative at Lisbon, stated that it was 'impossible . . . to pass over without notice the official publication of the maps' which appeared to make claims on behalf of Portugal which conflicted with British interests. 'The maps were published as part of Portuguese White Books in which were recorded the results of negotiations by Portugal with Germany and France. (Cited in Smith, *Great Britain and the Law of Nations* (1932), vol. ii, p. 8.) And see the protest by Honduras against the attribution of Swan Island to the United States in an official United States map (*Foreign Relations of the United States* (1935), vol. 4, pp. 750–2).

relied on as a recognition of its validity.[1] The practice of States in this matter affords further evidence of the need for a substantial measure of self-interested awareness on the part of Foreign Offices and the services they administer.

It has been seen that silence and inaction in any sphere of international activity in which States may have particular or general rights to protect may, under certain conditions, entail the loss of those rights. The plea of excusable ignorance of the official acts of a State, legislative or otherwise, has seldom been successful. The onus of satisfying a tribunal in this matter is a heavy one, commensurate with the sense of responsibility and vigilance traditionally displayed by States in defence of their rights. It would, indeed, furnish cause for misgivings if, as has been alleged, 'under the Court's formulation, it would seem that ignorance as to another state's legislation on territorial waters, however excusable, can be fatal, and that states may neglect, at their own risk, to study each other's statute-books'.[2] However, as has been suggested,[3] the concepts of notoriety and constructive notice invoked by the Court, in view of the position of the United Kingdom as a North Sea Power particularly concerned in questions of maritime law, were instrumental in impressing the majority of the Court that the ignorance of the United Kingdom, if ignorance there had been, was, in the circumstances, inexcusable. It must be presumed that one of the purposes of the establishment and maintenance of diplomatic and consular posts in foreign States is to ensure that the sending State is apprised of the public acts and, indeed, of any official act of the receiving State in any matter affecting the interests of the sending State.[4] 'The hypersensitiveness of States, and their alertness to protest[5] against every actual or potential threat to their rights,[6]

[1] See the text of the Russian Memorandum delivered by Count Lieven to the Duke of Wellington in the course of the *Alaska* dispute between Great Britain and Russia (F.O. 92/51: cited in Smith, op. cit., p. 5). Compare the views of counsel for Great Britain in the *Alaskan Boundary* dispute, who denied that 'it is the part of one nation to maintain a constant supervision over all the maps of all the civilized nations in the world, and by the lapse of time to be bound by what they say' (*Proceedings of the Alaskan Boundary Tribunal*, vol. vii, p. 528).

[2] D. H. N. Johnson, in *International and Comparative Law Quarterly*, 1 (1952), pp. 165–6.

[3] See above, p. 178.

[4] Counsel for the United Kingdom in the *Minquiers and Ecrehos* case contended that the vigilant attitude of the United Kingdom concerning her rights over the disputed islets was consonant with a claim to sovereignty. It contrasted favourably, he said, 'with the lack of notice on the part of the French authorities of so many significant British acts. . . . Yet France has for many years maintained a career consul in Jersey. It is difficult to believe that France can maintain a consul in Jersey, and yet not be well aware of the Jersey attitude and position regarding the Minquiers and the Écréhous and well aware of most of the salient facts' (*Minquiers and Ecrehos* case: *Oral Pleadings*, vol. i, p. 159).

[5] See Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed. revised, 1945), vol. i, p. 390.

[6] Seven years after the Award in the *Island of Palmas Arbitration* the island again formed the subject of diplomatic correspondence between the Netherlands and the United States. The Netherlands Minister in Washington, in a Note dated 10 July 1935, brought to the attention of the Secretary of State the apparent inclusion, in Article I (1) of the Constitution of the Common-

serves only to accentuate the significance of failure to protest in appropriate circumstances.

V. *Conclusions*

The main points in the foregoing discussion may now be recapitulated briefly and, in the light of the conclusions, some observations may be made concerning the jurisprudential significance of the doctrine of acquiescence.

(1) Acquiescence is equivalent to tacit or implied consent. It takes the form of silence or absence of protest in circumstances which, according to the practice of States and the weight of authority, demand a positive reaction in order to preserve a right.

(2) It may be said to constitute an admission or recognition of the legality of the practice in question, or to serve the purpose of validating a practice which was originally illegal.

(3) A consequence of acquiescence is to preclude an acquiescent State from denying or challenging the validity of a claim in which it has acquiesced.

(4) Acquiescence is of special relevance to situations involving the application of rules of which the content or authority is open to doubt either because the rules are controversial or because they are still in process of development.

(5) The value of acquiescence is primarily evidential. However, it may afford a criterion by which the measure of acceptance of a claim may be gauged, and it may provide sufficient justification for preferring one interpretation of the rights and obligations under an instrument rather than another, on the principle that that interpretation is to be adopted which has been acted upon by one party without meeting with objection from the other.

(6) Acquiescence may furnish an indication of an intention to abandon a right previously enjoyed or a claim previously asserted.

(7) In the formation of both customary and prescriptive rights acquiescence is a necessary and significant factor, inasmuch as the validity of both classes of rights depends substantially on the degree to which they are considered to be in conformity with law, a condition which may be established by the extent to which the practice in question has encountered

wealth of the Philippines, of Palmas in limits referred to as those set forth in Article III of the Treaty of Paris of 1898. The Minister adverted to the decision of the Arbitrator in 1928 by which the island was awarded to the Netherlands; he continued: 'As however the Constitution of the Philippines refers to that Article without mentioning that fact or in any other way explicitly excluding the island of Miangas from its provisions, a certain—although remote—possibility of misunderstanding is not entirely excluded with regard to the sovereignty of the island in question.' The Minister requested an assurance that Palmas was not comprised within those limits: this was given by the Acting Secretary of State in a Note dated 17 July 1935 (*Foreign Relations of the United States*, 1935, vol. 2, pp. 605–6).

acquiescence on the part of the affected States, and which may remain unfulfilled in the light of evidence of protest or equivalent measures on the part of those States.

(8) The range of application of the doctrine of acquiescence is thus considerable. To preclude its application to circumstances which do not warrant it, and to ensure its acceptance where appropriate, the doctrine is qualified by certain necessary safeguards. Thus a State is not held to have acquiesced unless it is deemed to have had actual or constructive knowledge of the claim in question, although this need not amount to formal notification; and the effect of acquiescence is in every case confined strictly within the limits of the claim asserted and does not embrace other similar or wider claims. The presumption of consent which may be derived from acquiescence may, of course, be rebutted by a clear indication of a contrary intention.

Of the valuable features of the notion of acquiescence, three may be mentioned which are of considerable practical and theoretical interest. In the first place, it provides a salutary corrective to the more exaggerated theories of State sovereignty and it assists in circumscribing the extravagant pretensions to unlimited freedom of action on the part of States which, while basing this claim on the concept of sovereignty, nevertheless ignore the sovereignty of other members of the international community. The Judgment of the Permanent Court of International Justice in the *Lotus* case[1] appeared to sanction the proposition that States, by virtue of their sovereignty, are free to do anything which is not prohibited by a rule of international law and that the presumption operates against restrictions on the independence of States. The Court deliberately chose to state the issue before it by reference to the view of the Turkish Government that the Turkish courts should be considered competent to exercise jurisdiction 'whenever such jurisdiction does not come into conflict with a principle of international law', rather than by reference to the contention of the French Government that the onus was on Turkey 'to point to some title to jurisdiction recognised by international law in favour of Turkey'.[2] A similar disposition is to be observed in the operative part of the Judgment of the International Court of Justice in the *Fisheries* case.[3] The implications of the view that States are entitled to act in any way which is not expressly or by necessary inference prohibited by a rule of international law are not so inimical to the authority of the rule of law or the maintenance of international order as might appear at first sight.[4] The wide discretion which States enjoy in many fields is an inescapable consequence of the absence

[1] *P.C.I.J.*, Series A, No. 10.
[2] *I.C.J. Reports*, 1951, p. 143.
[3] Ibid., p. 18.
[4] Compare the views of Sir Gerald Fitzmaurice in this *Year Book*, 30 (1953), pp. 8–18.

of clear and generally accepted rules in those matters. The Court in the *Lotus* case justified its method of stating the issue on the ground not only that it was in conformity with the terms of the *compromis*, but also that it was 'dictated by the very nature and conditions of international law'.[1] The difficulties of a plaintiff State in its search for a prohibitive rule in such circumstances are not merely the result of the unfettered independence of the defendant State but are inherent in the unsettled state of the law which such a situation presupposes.[2] 'The task of a tribunal in such a case is not confined to testing the legality of the course of action in question solely by reference to the will of the actor State, but must include a consideration of the extent, if any, to which that action has impinged upon the rights of other States. Valuable evidence is afforded by the reaction of the States affected thereby, that is, by their refusal to recognize its legality by protesting against it, or by their admission of its legality, to be inferred from their acquiescence. Thus the emphasis which the Court in the *Lotus* case placed on the wide measure of discretion enjoyed by States in the matter at issue[3] ought not to obscure either the importance which the Court attributed to the fact that States had acquiesced in the assumption of jurisdiction in similar circumstances or the evidential value which it would have attached to protests in those circumstances.[4]

In the second place, the doctrine of acquiescence serves to temper the apparent rigidity of certain of the canons of positivism. Were the beneficent influence of the doctrine of acquiescence to be disregarded, insistence that a rule is not binding on a State without its consent might well prove a substantial obstacle in the way of the development of international law. Again,

[1] *P.C.I.J.*, Series A, No. 10, p. 18.

[2] The Court in the *Lotus* case considered that the contention of the French Government that Turkey must be able to cite a rule of international law authorizing her to exercise jurisdiction was 'opposed to the generally accepted international law' and would 'in practice . . . in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of . . . jurisdiction' (ibid., pp. 19–20).

[3] Ibid., p. 19: 'Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.' The Court also said: 'In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty' (ibid.).

[4] Ibid., p. 29: 'On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests. . . . It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia–Oncle-Joseph* case and the German Government in the *Ekbatana–West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.' See also the discussion of this matter by Judge Lauterpacht in *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 103–4.

a passage from the Judgment of the Permanent Court of International Justice in the *Lotus* case has been interpreted as an indication that the Court was firmly wedded to positivist principles. The Court stated: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'[1] The rigorous effects of applying strict positivist tests to the validity of a rule are mitigated somewhat, as one authority has suggested,[2] by the acknowledgment that the free will of States which evidences their consent to be bound may be expressed not only in conventions but also by reference to their acquiescence in usages which become thereby 'generally accepted as expressing principles of law'.

Finally, it must be emphasized that a far-reaching consequence of the doctrine of acquiescence is to stress the perils which confront States which are content to rely for the protection of their rights and interests upon the simple existence of generally accepted rules of international law. It has already been suggested that the body of rules which have met with general acceptance and can be clearly understood as obligatory is much smaller than might be supposed. The occasional flouting of an established rule by one or several States will not, *per se*, invalidate the rule, although it may tend to weaken its authority. To this extent the existence of the rule suffices to protect the rights of States relying on it. Repeated violations of the rule, however, or the continued and unopposed assertion of claims which are incompatible with it, although not necessarily invalidating the rule, have the effect of diminishing its sphere of application. The acquiescence of States affected by such a claim may be interpreted as a recognition of its legality as far as they are concerned, with the result that a customary or prescriptive right to be exempted from the operation of the rule may be acquired by the participants in the exceptional claim. It is clear that general disregard of a rule and the adoption of a constant general and uniform practice in violation of it not only undermine its authority but effect the substitution of a new generally accepted rule for the old one. This would be so had the old rule been of established authority or merely putative. The conclusion can hardly be avoided that a similar derogation of existing law would be entailed by general acquiescence in a practice initiated by a group of States in violation of established rules, provided that the practice affected the generality of States and met with no opposition. It would seem to be incumbent, therefore, both upon States which have a stake in upholding

[1] *P.C.I.J.*, Series A, No. 10, p. 18.

[2] Judge Lauterpacht, op. cit., pp. 102–3.

the sanctity of established principles of law and upon States which are intent on preserving their rights, to maintain a scrupulous standard of vigilance in keeping with their rights and responsibilities, and, in their own interest, to exhibit a readiness to react unequivocally, by protest or similar measures, on the occasion of each and every encroachment on their rights or infraction of the principles of law which they are concerned to defend.