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Some Benevolent Remarks regarding the Theory of Historical Consolidation of Territorial Titles

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Introduction

No other jurists better than the honoree of this Liber amicorum may savour the delicacies of the role of jurisprudence in the fashioning and shaping of legal concepts. In the case in point, the largely debated question of the conflicting territorial titles throught time is at the centre of this brief contribution.

Time plays an important role in territorial disputes, maritime and land alike, from three yet interrelated standpoints.

First, critical date is a habitué of international adjudication so that it would be hardly impossible to conceive a judicial settlement of disputes without reference to it. Elsewhere, I noted that "[by] determining the date at which the dispute is definitively 'crystallized' – namely the main effect of critical date – a judicial organ will be able at the same time to set within the framework of intertemporal law, the principles and rules

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applicable for the settlement of the dispute".[1] A the same time, the determination of the critical date allows the tribunal to distinguish between those facts that may be brought before it by the Parties to prove their claim and those that must be, in principle, be rejected for they are "carried with the sole purpose of establishing its sovereignty while the latter is precisely and overtly challenged by another state".[2]

The second dimension is that of the evolution of applicable Law. Since public international law does evolve continuously, a legal fact which admittedly produces some legal effects at a given time (and thus at a corresponding phase of the evolution of the Law) must, in order for these effects to continue to exist, fulfil relevant conditions to this effect that the Law imposes. Hence, one ought to distinguish – with regard to territorial disputes in public international law – between the birth of the title (upon which stands territorial sovereignty)[3] and its continued existence. In other words, the evolution of the law interacts with two different (temporal) stages in the life of a territorial title. Therefore, and as a general rule, it shall be noted that the need to uphold the title in conformity with the "legal systems prevailing at successive periods"[4] of time flows from the composite structure of most (if not all) of the territorial titles. Law requires then that other "vesting facts" add up to the first "vesting fact", having given birth to the original title, in order for the territorial title to strengthen and at the same time to be at consonance with the prevailing legal system, thence the close intertwining of the principle of intertemporal law with the very notion of "better title".

The third dimension is that precisely of conflicting territorial titles over time and it will be the focus of this short study. It will be shown in the following pages that these three dimensions "Time" are intimately and ultimately intertwined.

I. The Problem: Conflicting territorial titles through Time

A. Multititular and Unititular Systems of Law

Law is indeed far from being the only variable in the equation of a territorial dispute; States' titles undergo change and modifications in their strength and weight. These two concepts find their proper place in "multititular" rather than "unititular" systems with

1 DISTEFANO Giovanni, Time Factor and Territorial Disputes, in: KOHEN/HÉBIÉ, Cheltenham 2018, p. 398.

2 *Ibid*., p. 399. These two dimensions have been dealt with in the aforementioned essay.

3 DISTEFANO Giovanni, *Droit international des espaces*, Paris 2017, p. 11-14.

4 Island of Palmas case (Netherlands / USA), award of April 1928, 2 RIAA, p. 845.

regard to the establishment and extinction of territorial titles. By the former, Common law jurisprudence generally refers to a plurality of "sources" to title of ownership (and thence of claims thereof), which are independent to one another. Therefore, several "roots of title" may develop individually and concurringly, giving birth to different claims to property. On the contrary a "unititular" system of titles to ownership presupposes that there is only a sole root of title from which may stem different claims; quite simply, a title may only supersede a competing one by erasing it.

Against this backdrop, the concepts of "better title", "strength" or "weight" of title play their role in Common Law when:

> "[s]everal persons may have titles to the same thing; thus, a new possessor has, under some systems of law, *a better right* to possess than any other later possessor of the thing deriving the title from an earlier possessor... Hence there may be problems of priority of title".[5]

This entails the possibility that a new title may well crop out the root of which does not stem from a previous one, leading thus to a situation where conflicting titles continue to exist independently, strengthening or weakening reciprocally at the same time.[6]

Quite apparently, the "drawbacks" – if they may be so tagged – which flow therefrom cannot but be resolved through the recourse to "critical date" or "critical period". This constitutes an aspect which is specific to territorial disputes and must not be underrated, as Judge Levi Carneiro aptly stressed:

> "it is my view that while the French original title – which rested at most on an unproved and doubtful suzerainty said to have been accepted against the will of the vassal and not to have been respected by him – while this title was disappearing and becoming extinct, the English original title – resting on what was probably unconditional conquest by the Normans – was growing stronger, becoming consolidated, and finding a legal basis as a result of the successive treaties and the almost uninterrupted occupation of the Channel Islands as a whole, and, final-

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5 HONORÉ Anthony M., Ownership, in Oxford Essays in Jurisprudence, Oxford, 1961, p. 135 [italics added]; BALLANTINE Herbert W., Title by Adverse Possession, 32 Harvard Law Review 1918, p. 135-152.

6 "[T]he later acquisition may have the effect either of divesting the earlier or of creating a second, *concurrent title*; in the latter event, the two titles may continue indefinitely to run concurrently, or the *earlier* may lapse or become unenforceable after a period of time", HONORÉ, *supra* note 6, at 136 [italics added].

> ly, of the assertion of national sovereignty when political feudalism disappeared".[7]

In this respect, it must be borne in mind that not only international legal order is a "multititular" system but also that no territorial title is immutable, forever cast in stone. On the contrary, territorial titles evolve, undergo modifications and changes, interact with new facts and are faced to conflicting territorial claims and titles. Furthermore, other (vesting) facts and acts graft upon the original title leading thus to its strengthening or weakening; thence, the adjective "relative" referred to by Judge Huber in the Palmas case.[8]

Contrariwise, within a "unititular" system, only a sole – and common – source of title with regard to property (or sovereignty in public international law) can exist. Hence, conflict between titles cannot but envisaged in a diachronic way, i.e. more recent title will prevail over the less recent.[9] Quite naturally, "unititular" systems are pervaded by a primitive conception of a legal system and more notably of the modes of creation and extinction of subjective rights. This is why municipal and international legal orders – that are impregnated with flexibility[10] and are more sophisticated – are "multitular" in this respect.

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7 Minquiers and Ecrehos case (France / United Kingdom), Judgement of 17 November 1953, *ICJ Reports 1953*, p. 97 (individual opinion). In the same vein: "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", Fisheries case (United Kingdom *v.* Norway), Judgement of 18 December 1951, *ICJ Reports 1951*, p. 139 [italics added]; "*In Qatar, therefore, the authority of the Al-Thani gradually spread, while that of the Al-Khalifa progressively shrank*", Joint dissenting opinion of Judges Bedjaoui, Koroma and Ranjeva appended to the ICJ's Judgement in the Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgement of 16 March 2001, *ICJ Reports 2001*, § 104 (at 179) [italics in the original text].

8 Island od Palmas case, *supra* note 4, p. 869. In the same vein: SIR GERALD FITZMAURICE, The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II, 32 BYIL 1955-1956, p. 64-65; The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India / Pakistan), arbitral award of 19 February 1968, 17 RIAA, p. 528, 569. See also the diplomatic correspondence (20-22 July 1895) between Brazil and Great-Britain regarding the disputed sovereignty over the island of the Trinity in 21 Nouveau Recueil Général, 2nd series, p. 637, where one clearly recognizes the intermingling of these two concepts.

9 "[I]f the title to a thing is in A, no title to it can be acquired (independently) by B, except by a process which divests A. There is only one 'root of title' for each thing... and the present title can ultimately be traced back to that root", HONORÉ, *supra* note 5, p. 137.

10 "[I]t emerges that multititular systems are more flexible than unititular systems...", HONORÉ, *supra* note 5, p. 141.

B. The Gradation of Territorial Titles

In this connection, one may make recourse to concepts such as "better title" and "relative strength/weight" of territorial titles. These notions constitute of international tribunals' toolbox with regard to the judicial settlement of territorial disputes which are not but conflicts between legal titles. Furthermore, the link between the multititular character of the international legal order and the concept of "better title"[11] is apparent:

> "[T]he concept of title employed to solve disputes approximates to the notion of the better right to possess familiar in common law. The operation of the doctrines of prescription, acquiescence, and recognition makes this type of approach inevitable, but in any case tribunals will surely favour an approach which reckons with the limitations inherent in a procedure dominated by the presentation of evidence by two claimants, the result of which is not automatically opposable to third states".[12]

Indeed, if the dispute is brought before an international tribunal, the latter will then evaluate the "weight", the "strength" of a title compared to the competing title.[13] As Judge Huber observed in this respect:

> "If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title – cession,

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11 MCNEIL Kent, *Common Law Aboriginal Title*, Oxford 1989, p. 75; Sir Mark Frank LINDLEY, *The Acquisition and Governmentt of Backward Territory in International Law*, New York 1926, p. 229; CASSESE Antonio, Legal Considerations on the International Status of Jerusalem, 3 Palestine Yearbook of International Law 1986, p. 34. Common Law jurisprudence refers also to the so-called 'paramount title', which is from time to time borrowed by international case-law too. By this concept is meant: "In the law of real property, properly one which is *superior to the title with which is compared, in the sense that the former is the source or origin of the latter*. It is, however, frequently used to denote a title which is simply *better* or *stronger* than another or will prevail over it. But this use is scarcely correct, unless the *superiority* consists in the *seniority* of the title spoken of as 'paramount'", BLACK'S LAW DICTIONARY, St. Paul, 1990 (6th ed.), p. 1112 [Italics added]. The differentiation between 'multititular' and 'unititular' systems is recognizable in the background of territorial disputes wherein it determines the modalities of extinction of 'weaker' titles. See individual opinion of Judge Kooijmans appended to the ICJ's Judgement in the Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrein), Judgement of 16 March 2001, *ICJ Reports 2001*, §§ 59-70 (p. 240-243); *ibid*., joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma, §§ 15, 48-51 (p. 153, 162-163).

12 BROWNLIE Ian, *Principles of Public International Law*, Oxford 1990 (4th ed.), p. 124.

13 "...[S]overeignty should be accorded to that Party which has demonstrated in its own conduct the *greater degree* of continuous effective control, jurisdiction or possession", Dubai-Sharjah Border Arbitration case (Dubai / Sharjah), arbitral award of 19th October 1981, 91 International Law Reports, § 9 [italics added]. In the same vein: Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Pleadings, Oral Arguments and Documents, 1962, Vol. II, p. 525.

conquest, occupation, etc. – superior to that which the other State might possibly bring forward against it".[14]

Hence, in the context of a territorial dispute, the weight of a territorial title is perforce "relative" insofar as it is gauged vis-à-vis its potential competitors.[15]

II. The Solution: Historical Consolidation of Territorial Titles

A. The Concept and its Genesis

One may contend that territorial titles are ultimately created and extinguished through what may be called "a complex fact", which designates a bundle of single and indivisible facts compacted into a collective whole aimed at conveying or extinguishing territorial sovereignty.[16] The efficacy of this bundle of facts depends upon the circumstances. As we read in one of the most authoritative handbooks of public international law –

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14 Island of Palmas case, *supra* note 4, p. 838-839 [italics added]. International case law is particularly telling and conspicuous: Boundary delimitation case (United States v. Great-Britain), arbitral award of 10 January 1831, Pasicrisie Internationale (HENRI La Fontaine), Bern, 1902, p. 14; The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan, *supra* note 8, p. 528: "[A] judgement has to be rendered on the relative strength of the cases made out by two parties"; Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgement of 15 June 1962, *ICJ Reports 1962*, p. 30; Affaire du Partage des Etats de Seyid-Saïd (Muscat v. Zanzibar), arbitral award of 2 April 1861, 2 Recueil des arbitrages internationaux, p. 68; Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen), arbitral award of 9 October 1998, 22 RIAA, §§ 455, 496, 509 (at 313, 324, 327); Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *supra* note 11, § 203 (p. 101), even though the Court did not feel the need to apply it in that case.

15 "[I]l s'agit assez souvent, moins d'établir le bien-fondé absolu de l'une des thèses en présence – chacun offrant fréquemment des points forts et des faiblesses – que d'apprécier la valeur relative des prétentions par la recherche du 'titre meilleur'", DE VISSCHER Charles, Observations sur l'effectivité en droit international public, 62 RGDIP 1958, p. 604. In the Eastern Greenland case (Legal Status of Eastern Greenland case (Norway / Denmark), Judgement of 5 April 1933, *PCIJ Reports*, A/B 53, p. 46), the PCIJ affirmed in an uncontroversial way that: "In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. […] a superior claim". See likewise: Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area (Sprska Republic v. Federation of Bosnia and Herzegovina), arbitral award of 14 February 1997, 36 ILM 1997, § 75 (at 421).

16 See in this regard, DISTEFANO Giovanni, *supra* note 3, p. 49-51.

Oppenheim's International Law –, whose last editor is the late Professor Robert Jennings, a "complex fact" can:

> "include continued and effective occupation and administration, acquiescence and/or protest, the relative strength or weakness of any rival claim, the effects of the inter-temporal law, the principle of stability in territorial title and boundaries, regional principles such as *uti possidetis*, geographical and historical factors, the attitudes of the international community, and the possible requirements of self-determination, and also indeed the possibly unlawful origin of the original taking of possession, and that subjugation is no longer per se a recognisable title. The weight to be given to these factors and considerations, in the assessment of the total result in terms of a consolidated title, will vary with particular cases."[17]

Akin to the creation and termination of territorial titles through a "complex fact" is what has been labelled in the relevant literature as the "historical consolidation of title". This expression has been forged in the wake of the Court's judgement in the *Norwegian Fisheries Case*, where it declared:

> "Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States. The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact."[18]

The Court's statement resounded in effect as a remote echo to what Denmark had pleaded thirty years earlier in the Eastern Greenland case, where Charles De Visscher was unsurprisingly one of its legal advisers.[19]

As it has been authoritatively and persuasively noted, Professor de Visscher's "analysis … is a penetrating and illuminating observation of the way Courts actually tackle

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17 OPPENHEIM'S INTERNATIONAL LAW, ed. by Sir Robert JENNINGS and SIR ARTHUR WATTS, Harlow (Essex), 1992 (9th ed.), § 275, p. 716.

18 ICJ, Fisheries Case *supra* note 7, p. 138. It is thenceforward commonplace to attribute the construction of this concept to the prominent Belgian jurist who was indeed sitting on the ICJ's bench at that time.

19 "[C']est à la fois sa possession immémoriale et l'assentiment général et continu par les États à l'affirmation et à l'exercice de la souveraineté danoise, expression d'une volonté qui, renforcée par l'action du temps, a graduellement consolidé la possession en une situation juridique valuable erga omnes", Rejoinder of the Danish Government, PCIJ, Vol. 63, at 721 (22 July 1932), Eastern Greenland case, *supra* note 15.

questions of title to territorial sovereignty",[20] even though this concept has not been "spelled out as a doctrine by any court, and there may be some danger in allowing what is basically a simple, and indeed obvious, idea to develop into a somewhat doctrinaire principle".[21]

This theory – which purports to explain how territorial titles can evolve through time in the light of States' conducts – was positively received by subsequent doctrine[22] and case-law (both international and municipal) law alike[23]. Quite obviously, the fascination exerted by this construction – notably its versatility and its flexibility – represents the flip side of the coin for its detractors. Indeed, even those authors who do not refute its soundness feel the need to underline its (minor) drawbacks. Sir Robert Jennings wrote: "Historical consolidation is also a *voracious* concept, and it should be kept within bounds"[24], while Brownlie maintained:

> "However, it is probably confusing to overemphasise, and to lump together, this *penumbra of equities* by discovering the concept of consolidation. Apart from the concept of consolidation, the rate of social, economic, and other 'non-legal' considerations in the application by tribunals of the more orthodox legal principles is not to be denied".[25]

In fact, contrariwise to its designation "historical", this theory "is in some measure a misnomer", for it tends "to augment the significance of relatively recent possession"[26] at the expenses of a far remote past … and of historic and original titles! In fact, and quite paradoxically, the focus is put more on the recent past, i.e. the period immediately before

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20 Sir Robert JENNINGS, *The Acquisition of Territory in International Law*, Manchester, 1963, p. 26.

21 Sir Robert JENNINGS, *supra* note 20, p. 27-28.

22 See, i.a., OPPENHEIM'S INTERNATIONAL LAW, *supra* note 17, § 272, p. 709-710; Sir robert JENNINGS, *supra* note 20, p. 25; SCHWARZENBERGER Georg, Titles to Territory: Response to a Challenge", in: GROSS (édit.), *International Law in the Twentieth Century*, New York 1969, p. 290. "A long list of distinguished jurists and writers on international law including Charles De Visscher, Sir Robert Jennings and Professor George Schwarzenberger have lent their support to this principle", Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), Judgement of 10 October 2002, *ICJ Reports 2002*, § 135 (p. 582), dissenting opinion of Judge Ajibola.

23 See: i.a.: Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador / Honduras; Nicaragua (intervening), Judgement of 11 September 1992, *ICJ Reports 1992*, p. 565 (§ 345); Civil Aeronautics Board and al. v. Island Airlines Inc., District Court (Hawaii), Judgement of 8 October 1964, 35 ILR, p. 79; Re Ownership of the Bed of the Strait of Georgia and Related Areas, British Columbia Court of Appeal, Judgement of 25 June 1976, 73 ILR, p. 202; Raptis and Son v. State of South Australia (High Court), Judgement of 27 June 1977, 69 ILR, p. 66 [Stephen J., Judge].

24 Sir Robert JENNINGS, *supra* note 20, p. 27 [italics added].

25 BROWNLIE Ian, *supra* note 12, p. 166.

26 Sir Robert JENNINGS, *supra* note 20, p. 27.

the critical date than to a remoter past.[27] Furthermore, as rightly underlined by an opponent to this theory, historical consolidation refers more to a process (i.e. duration)[28] in time than to an (instantaneous) act in a precise point of time, thence its kinship with the notion of "critical period".[29]

B. Its Tormented Jurisprudential Life

The Court's most recent statement in this regard seems at first glance unquestionable. Indeed, it seemed to reject Nigeria's argument based on "historical consolidation", arguing that it "has never been used as a basis of title in other territorial disputes, whether in its own or in other case law"[30]. It declared furthermore, on a more general basis, that:

> "nothing in the Fisheries Judgment suggests that the "historical consolidation" referred to, in connection with the external boundaries of the territorial sea, allows land occupation to prevail over an *established treaty title*. Moreover, the facts and circumstances put forward by Nigeria with respect to the Lake Chad villages concern a period of some 20 years, which is in any event far too short, even according to the theory relied on by it."[31]

What is all then about? Now, first of (and above) all, even those who support this theory acknowledge that it cannot prevail "over an established treaty title", since the latter has primacy over sheer effectiveness as we have just underlined. On the contrary, this "theory" or "doctrine" does play its full role in cases where a competing (formal) title has not been fully established or where it has been eroded or weakened due to the titular State's acquiescence or failure to timely react, thence the correlative and opposite notion, much less famous, of "historical weakening of title" …

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27 More generally with regard to the length of time, it must be observed that "every material situation calls for its own solution, based on the balancing of competing claims and depending on the area. Title [based on historical consolidation] may be proved even without reference to the period of time during which sovereignty had coalesced over the territory in dispute", Dissenting opinion of Judge Koroma appended to the Court's judgement in Land an Maritime Boundary case, *supra* note 22, p. 485 (§ 28). This seems to be akin to the formation of a general rule of customary international law as depicted by the ICJ in the North Sea Continental Shelf cases (Federal Republic of Germany/Netherlands/Denmark), Judgement of 20 February 1969, *ICJ Reports 1969*, p. 44 (§ 74).

28 KOHEN Marcelo, L'influence du temps sur les règlements des conflits territoriaux, in: *Le droit international et le temps*, Paris 2001, p. 144.

29 DISTEFANO GIOVANNI, supra note 1, p. 406-407.

30 ICJ, Land and Maritime Boundary Case, *supra* note 22, p. 352 (§ 65).

31 *Loc.cit.* (emphasis added). In fact, one of the members of Court wisely affirmed that "The claim of Nigeria based on historical consolidation is not its invention and is far from being a mere theory", dissenting opinion of Judge Ajibola, *supra* note 22, p. 581 (§ 134).

Therefore, we are not prone – unlike some prominent authors[32] – to reckon that the Court has thereby completely and definitively wiped out this theory from the toolbox of the international lawyer in the field of territorial disputes. Less drastically, the Court has specified this theory's operative scope as well as its relation vis-à-vis *established* legal titles. In so doing, it may be maintained that the ICJ has not radically departed from what it affirmed in the 1951 Fisheries Case[33]. To the contrary, the Court seized this occasion to elucidate its thought regarding one of the most intriguing and yet elaborated theories it has ever referred to.[34]

Besides, it may be argued that this theory has not been faring well among some scholars on account of its incorrect use or abuses, which has led to miscomprehensions or even to an erroneous construction according to which a title can be established *by* mere elapse of time. Or alternatively, that *in* time a formal (i.e. conventional) title can be eroded and ultimately be extinguished by conflicting effectivités.

It must be borne in mind that a formal title is but one of the recognized means by which a State can acquire sovereignty of a territory and as such does not exhaust all the other means and, foremost, it does not coincide with the title itself. In this regard and with a view to establishing title to sovereignty, international tribunals have often relied on State's conduct, i.e. acquiescence, estoppel, subsequent practice to a territorial treaty, (lack of) protest, etc., which may well give rise to a legal title, even though it is not "formal" insofar as it is not based on or conveyed by a treaty.[35]

This is what Judge Koroma had arguably in mind when he wrote that this kind of situations is made up of a:

> "complex of interests and relations being continuous and extending over many years plus acquiescence. Historical consolidation also caters for a situation where there has been a clear loss or absence of title through abandonment or inactivity

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32 KOHEN Marcelo, La relation titres/effectivités dans le contentieux territorial à la lumière de la jurisprudence récente, 108 RGDIP 2004, 561-596.

33 See in this regard § 220 of the Court's Judgement in the Land and Maritime Boundary Case (*supra* note 22), where it does not seem that the Court adamantly refuted the theory of historical consolidation.

34 In this respect, the Court's developments in the Case Concerning Kasikili / Sedudu Island (Judgement of 13 December 1999, *ICJ Reports 1999*, §§ 47-80, p. 1075-1096) appear to be less clear-cut than those enunciated in the Land and Maritime Boundary Case, *supra* note 22, §§ 71-81 (p. 355-358).

35 See i.a.: DISTEFANO Giovanni, La sentence arbitrale du 9 octobre 1998 dans l'affaire du différend insulaire entre le Yémen et l'Erythrée, 103 RGDIP 1999, p. 863-883; DISTEFANO Giovanni, *supra* note 3, p. 49-51.

> on the one side, and an effective exercise of jurisdiction and control, continuously maintained, on the other".[36]

In brief, if a formal (i.e. treaty) title has not been established[37] then this means that another (competing) title has emerged through *historical consolidation* hence eroding and ultimately extinguishing it. To this effect, it must be proved the "acquiescence" of the former titular vis-à-vis initially "contra legem acts" of the other State. On the contrary, if such an abandonment (conveying State's consent to relinquish its title) cannot be proved during the critical period vis-à-vis the other State, then the latter's effectivités[38] remain indeed *contra legem* and thus they have to bow before the established (treaty) title.

Hence, "historical consolidation" of title may well constitute:

> "a valid basis for territorial title, that is to say that proven long use, coupled with a complex of interests and relations … can have the effect of attaching a territory to a given State. In my opinion, founded on the jurisprudence of the Court [references are accordingly cited], historical consolidation, if supported by the requisite evidence, can be a solid and valid means of establishing territorial title in international law".[39]

Conclusion

This "complex" of States' conducts – conveniently tagged under the formula "historical consolidation of title" – may ultimately evidence their respective consent to relinquish title and intention to acquire it over a given territory so that the validity of the territorial mutation is established in Law. Yet, and it must be ceaselessly repeated, on the condition that the evidential facts lend support to the existence of such a consent – irrespective of the form of its expression – by the State holding the formal title. If that, as it seems, is the right construction of historical consolidation, then, regardless of its actual usefulness and "label"[40], it does not seem at variance with the famous and oft-cited Heffter's

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36 ICJ, Land and Maritime Boundary case, *supra* note 22, p. 485 (§ 26)

37 ICJ, Land and Maritime Boundary case *supra* note 22, p. 415 (§ 223).

38 The "principle [of historical consolidation] has evolved over the years, side by side with *effectivités*", Land and Maritime Boundary case, *supra* note 22, § 135 (at 582), dissenting opinion of Judge Ajibola.

39 ICJ, Land and Maritime Boundary case, *supra* note 22, § 8 (at 476), dissenting opinion of Judge Koroma.

40 *Loc.cit.* In this respect SIR ROBERT JENNINGS noted that: "the idea of historical consolidation is something more than a terminological reform. It opens the door to a mode of acquiring title that is, or

"Hundert Jahre Unrecht ist noch kein Tag Recht".[41] Indeed, according to the famous German jurist, acquiescence – which can be equated to historical consolidation (and of which it is surely one of its constitutive elements) – is ranked among valid "modes" of acquisition of title to territory: it conveys State's "tacit renunciation"[42] to title against another State's claims and assertive conducts.[43]

A final remark must be made; as it has been shown in the previous pages, Time is one of the two (factual) dimensions, alongside space,[44] within which State (and thus human) activity takes place. By way of consequence, time and space are not recognized by public international law as vesting or divesting facts likely per se to create, extinguish or modify territorial titles. In other words, certain States' acts or facts to this effect must be seen against the backdrop of Time, since they are deemed by public international law to engender such legal effects on title to territorial sovereignty.[45] Grotius had already vividly grasped the true function of time as one of the dimensions of human thought and activity:

> "For though time is the great agent, by whose motion all legal concerns and rights may be measured and determined, yet it has no effectual power of itself to create an express title to any property."[46]

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at least may become, subtly different from what is found in the old learning about occupation and prescription", *supra* note 20, p. 25.

41 The following gloss supplemented this proverb: "However, one must reckon at the same time [he was in fact referring to 'tacit renunciation' as a valid means of acquiring territory] that a century of unjust (invalid) possession does not suffice to wash out its original vices", HEFFTER AUGUST WILHELM, *Das Europäische Völkerrecht der Gegenwart*, Berlin, 1867 (5th ed.), p. 30 (§ 12). The German legal thinker inspired himself from a German proverb (in which the word "Stunde", i.e. hour, replaced "tag", i.e. day: SIMROCK KARL, Die deutschen Sprichwörter, Frankfurt 1846, Entry n° 10730, p. 509.

42 HEFFTER August Wilhelm, *supra* note 41, § 12, p. 29.

43 "HEFFTER'S (§ 12) dictum, 'Hundert Jahre Unrecht ist noch kein Tag Recht' is met by the fact that it is not the operation of time alone, but the co-operation of other circumstances and influences which creates the title by prescription", so wisely commented OPPENHEIM LASSA, *International Law. A Treatise*, Volume I, New York 1912 (2nd ed.), p. 311, § 243 (footnote 1).

44 In the light of the aforesaid, it's not at all surprising that, reverting completely the perspective (from the object to the subject), time and space are, according to KANT, the two spectacles through which reality is observed. De mundi sensibilis atque intelligibilis forma et principiis, §§ 14.3 & 15. Both of them are, according to the German philosopher, "intuitions" or a priori categories of the mind (*The Critique of Pure Reason*, 2nd part, §§ 4.2 & 4.7).

45 DISTEFANO Giovanni, *L'ordre international entre légalité et effectivité*, Paris 2002, p. 244-313; KOHEN Marcelo, *Possession contestée et souveraineté territoriale*, Paris 1997, p. 127-154.

46 GROTIUS Hugo, *The Law of War and Peace*, (1648), Book 2, Chapter IV.I Translated by A.C. CAMPBELL 1814). GALILEO used to admonish, with regard to the role of determination and measurement played by Time: "Omnia metire quaecumque licet et immensa ad mensuram tempestive redige".

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