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6. Do people have rights in boundaries' delimitations?

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Rivers and lakes have historically provided a clear and obvious geographical feature by which to mark the boundary between the territories of two or more States.[3] They typically constitute so-called "natural boundaries." At the same time, the use of waterways as territorial boundaries raises complexities not attached to many land-based or even maritime boundaries. River or lake boundaries are mainly created by consent of the bordering States and expressed either in treaty or in arbitral awards and judgments. Unlike geometric limits, however, reliance on international rivers and lakes can lack precision and involve difficulties in implementing technical standards,[4] giving rise to divergent views from riparian States even after boundaries have been ostensibly "determined." Moreover, human intervention and natural phenomena can contribute to the ongoing transformation of the underlying hydromorphology of international rivers and lakes.[5] Furthermore, boundary delimitation is often complicated

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[3] For an analysis on waterways as boundaries, *see* L. Caflisch, *Règles générales du droit des cours d'eau internationaux*, 219 R.C.A.D.I. 62, 62–103 (1989).

[4] States may choose from a number of measures to mark the boundary of shared water resources, including choosing the *thalweg* (corresponding to the deepest channel of a river), relying on the median line, or placing the boundary along one of the riverbanks. *See* A. Querol, *Rethinking International Rivers and Lakes as Boundaries*, *in* L. Boisson de Chazournes, Salman M.A. Salman, Water Resources and International Law 101, 101–110 (The Hague Academy of International Law, Nijhoff, Leiden/Boston, 2005); M. Forteau, *Délimitation à la rive, au thalweg, au milieu du chénal*, *in* B. Aurescu, A. Pellet, Actualité du droit des fleuves internationaux, Acte des journées d'étude des 24 et 25 octobre 2008 (Pedone, Paris, 2010) at 29–39.

[5] On the natural changes to rivers and the effects these changes may have on boundaries, see: A. Pellet, *Les problèmes posés par l'alluvionnement*, *in* B. Aurescu,

by factors particular to water-based boundaries. Shared bodies of water, no less than domestic waters, often have a role in irrigation, transportation, communication, hydropower and fishing, not to mention numerous household and community uses. As a consequence, in the context of disputes surrounding boundaries along or near water sources, States have attached high priority to resource questions going well beyond strictly delimiting the geographical extent of sovereignty. Navigational rights and use and access to shared water resources have all been the basis of claims before international tribunals.

River and lake boundaries are characterized by an unavoidable fluidity relating to the ongoing potential of alterations in the geography of freshwater resources. However, access to and use of water resources are essential for human life and socioeconomic development of individuals and communities. Beyond physical geography, then, the role of lakes and rivers in territorial delimitation also relies substantially on questions of human geography. It is in regard to this necessity that the relationship between individuals and watercourse boundaries comes into play. Yet one might ask how this relationship has been taken into account in international practice. This chapter attempts to explore several issues—not all of them unique to water resources—raised by the answers to this question provided to date by judges and arbitrators. The analysis will focus particularly on the interests of individuals in having access to freshwater resources and the manner in which judges or arbitrators have dealt with those interests in the resolution of boundary disputes. To date, the role of individuals in international law has been mainly analyzed through the lens of international human rights and criminal law. International water law is being transformed, taking into account public participation and access to information rights in the regulation on shared water resources.[6] Yet rights of individuals and communities regarding freshwater resources have rarely been examined in the context of boundary delimitation questions, despite increasing reference to the practices of local riparian populations of international rivers by State Parties to international boundary disputes.

The aim of this chapter is to understand how the outcome of boundary disputes can be colored, conditioned or even determined by the water-related interests of riparian populations, though the analysis is not limited to water-related issues. The discussion is divided into two sections: the first

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A. Pellet, Actualité du droit des fleuves internationaux, Acte des journées d'étude des 24 et 25 octobre 2008 (Pedone, Paris, 2010), at 53–60.

[6] *See generally* L. Boisson de Chazournes, *Le droit international de l'eau – Tendances récentes*, 2 Annuaire brésilien du droit international 137, 137–150 (2008).

addresses public rights (i.e. State rights), while the second addresses the rights of individuals. Obviously, respect for the principle of *uti possidetis juris* is a keystone of modern boundary delimitation related to new States, but an important collection of principles other than those classically referenced in waterways delimitation has also been invoked and in some cases taken into account. Examples include arguments related to the ethnic or linguistic composition of the relevant population, or the wishes thereof, particularly when referenda were decided by the States concerned as the basis for the outcome. The principle of self-determination has also been invoked, generally without success. The second substantial section focuses on private rights—those held by the individuals themselves. The right of option between nationalities following boundary modifications is explored as a general example, followed by an analysis of the protection granted to post-delimitation property rights. As a variation on this principle, the text canvasses the willingness of the judge or the arbitrator to maintain and continue existing rights to access and use of water resources. For example, fishing rights have often been included in treaties and long-established practices that are the basis of bilateral customs existing in this area.[7] As will be elaborated, water access guarantees and even sovereignty claims might be buttressed by human rights responsibilities, particularly those connected to the right to water, though no State Party has yet relied on such an argument to ground its claims in any territorial dispute.

PUBLIC RIGHTS AND SOVEREIGNTY

A key source of title in territorial delimitation of new States is the *uti possidetis juris* principle. The principle—which basically requires the territory of a successor State to be coincident with that of the prior regime—was first applied in Latin America, where the administrative divisions of the Spanish Empire were deemed to constitute the territories for the newly independent States. It was subsequently adopted broadly during twentieth-century decolonization, purposely followed in the creation of a majority of African States, and endorsed in a 1964 resolution of the Organization of African Unity (today African Union).[8] As the International Court of Justice (ICJ) judgment of 8 October 2007 recalls,

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[7] *See Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 2009 I.C.J. 213, para. 141 (July 13).

[8] African Union, "Border Disputes Among African States," Resolution of the General Assembly, July 1964, AHG/Res. 16(I).

"[t]he Court has recognized that 'the principle of *uti possidetis* has kept its place among the most important legal principles' regarding territorial title and boundary delimitation at the moment of decolonization (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 567, para. 26*)."[9]

In some cases, States have relied on the right to self-determination to justify their positions in territorial disputes. As will be elaborated below, however, international practice provides few examples where the right of self-determination is a relevant rule to be applied to solve those disputes. Boundary disputes are rather governed by *uti possidetis juris* or treaties. However, in many cases, relevant treaties or the pre-existing territorial title on which *uti possidetis* would be founded are not clear, and additional elements are needed to make the determination. It is in this regard that the presence of individuals and human activities or State use of natural resources is advanced in arguments by States Parties to the dispute.

The Right of Peoples to Self-determination

As a matter of politics, there is a clear argument that individuals and communities should be granted an opportunity to have their say with regard to the territory in which they live. Others have even argued that any modification of the sovereignty attached to a territory without the consent of the inhabitants would be contrary to the principle of self-determination.[10]

The right of self-determination has been a common element of arguments in territorial disputes, often deployed by both sides. For example, some States have identified this right in the expression of ethnic criteria. This was, for example, the thesis of Mali before the ICJ to affirm that the region called the "four villages" was under its sovereignty.[11] In the same vein, this principle has been invoked by States wanting to take advantage of the ostensible nationality of the individuals inhabiting a disputed territory. This strategy was, for example, used by El Salvador in the case concerning the *Land, Island and Maritime Frontier Dispute*.[12] Yet the ICJ

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[9] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), 2007 I.C.J. 706, para. 151 (October 8).

[10] A. Cassese, *Self-Determination Revisited*, *in* International Law in an Evolving World, Liber Amicorum in Tribute to Professor Eduardo Jiménez de Aréchaga (FCU, Montevideo, 1994), at 229.

[11] Memorial of Mali, *Frontier Dispute (Burkina Faso/Mali)*, Vol. I at 75 (October 3, 1985).

[12] Oral Submissions of El Salvador, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, C4/CR 91/33 at 69 (May 29, 1991).

has never adopted an argument founded on the right of self-determination or taken into account nationality or ethnic composition in its decisions regarding boundary disputes. These cases also suggest that the right to self-determination does not arise on the basis of ethnic and nationality criteria alone. The boundary of a State constitutes the territorial space in which the right of peoples to self-determination is limited.

The "Human Factor" as a Basis for Delimitation

States have developed arguments of a "human nature" in support of territorial titles in border disputes. These arguments have also been presented as "*effectivités*" in support of legal title over disputed territories.[13]

The human factor as a valid legal criterion in any circumstance

In the pleadings regarding the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, the Parties agreed that *uti possidetis juris* should form the basic framework for the resolution of the dispute, based on boundaries existing in 1821 (the year Central America gained independence).[14] However, the Parties also argued for interpreting or complementing this principle with the concurrent application of other rules, which until this dispute, had been considered incompatible with *uti possidetis* principle. El Salvador particularly relied on arguments turning on local practice and behaviors.[15] It asked the Court to consider the situation of the human population living in the disputed areas. The arguments

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[13] In the *Frontier Dispute* case, the Chamber of the ICJ closely examined the relationship between *uti possidetis* and "*effectivités*," providing an outline of, "in general terms, what legal relationship exists between such acts and the title on which the implementation of the principle of *uti possidetis* is grounded. For this purpose, a distinction must be drawn amongst several eventualities. Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivité* can then play an essential role in showing how the title is interpreted in practice." *Frontier Dispute* (Burkina Faso/Mali), 1986 I.C.J. (December 22), at para. 63.

[14] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), 1992 I.C.J. 351 (Judgment of September 11, 1992).

[15] M.G. Kohen, *L'uti possidetis revisité: l'arrêt du 11 septembre 1992 dans*

of a human nature developed by El Salvador in relation to its frontier rights were grounded primarily on two considerations: the "drama of overpopulation" facing a country in which land was already scarce, and the fact that the country possesses comparatively scarce natural resources.[16] Essentially, El Salvador's argument was that land was of *particular value* to its inhabitants because of not only the agricultural nature of its economy, but also the relative scarcity of agricultural land.[17] Beyond claiming an undisputable historical entitlement, El Salvador pleaded that title over the territories claimed by Honduras was bolstered or aided by reasons of *crucial human necessity*, combining arguments by which sovereignty might be founded on the provision of services to a population with arguments by which sovereignty arises from the very existence of an otherwise unmet need in the population of the disputed territory.[18] In this regard, El Salvador therefore claimed in its memorial:

> [I]n this case the supplementing of the doctrine of *uti possidetis juris* by arguments of a human nature is a reinforcement which is indispensable for the obtaining of justice in order to ensure that the duly considered judgment is appropriate for the destiny and necessities of the persons whose lives are bound up in the matter.[19]

Regardless of whether the argument is understood to be based on local needs or on its having met that need, it is clear that it seeks to establish a clear link between the legitimacy of territorial title and the fate of the population residing in that territory. It is true that the arguments presented by El Salvador regarding the human nature of "*effectivités*" did not concern shared or disputed water resources, but the argument could easily have important implications for such situations, insofar as clean, fresh water can be just as scarce as arable land, if not more so. Indeed, access to scarce water resources can represent a "crucial human necessity" (especially in arid regions) and this access, relying on human necessity, might evidence legal title over a territory. In the *Land, Island and Maritime Frontier Dispute*, El Salvador pleaded that the application of legal titles should be balanced with "other probatory means and arguments of a juridical,

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l'affaire El Salvador/Honduras, 97 Revue générale de droit international public 941 (1993).

16 Memorial of El Salvador, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Vol. 1 at para. 7.8 (June 1, 1988).

17 *Id.* at para. 7.10.

18 *Id.* at para. 7.16.

19 *Id.*

historical, or human nature, or of whatever other character, admitted under international law, that the Parties may produce."[20]

However, in the result, the Chamber drew a clear separation between the existence of a title and the presence of nationals in a disputed territory. The presence of one State's citizens, the Court held, could not be used as evidence of a title, or to claim the emergence of a new title: "the Chamber's task is to declare what areas are, and what are not, already part of the one State and the other. If Salvadorians have settled in areas of Honduras, neither that fact, nor the consequences of the application of Honduran law to their properties, can affect the matter."[21]

The *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras is the first case in which States have developed arguments regarding the "human factor" as a basis for territorial delimitation. The Chamber discarded these arguments. However, the "human factor" and the impact of this aspect on boundary delimitation have been addressed in cases in which a judge or arbitrator is entitled to decide *ex aequo et bono*.

The human factor and the application of equity

If the El Salvador/Honduras dispute was ultimately resolved essentially with reference to *uti possidetis iuris*, the Brčko Arbitration Award between the Federation of Bosnia-Herzegovina (Federation) and the Republika Srpska (RS) provides an example in which the status of a disputed territory was resolved with reference to considerations of the local population, on the basis of equity. The Dayton Peace Accords had provided for the establishment of an "Inter-Entity Boundary Line" (IEBL) between the Federation and RS throughout Bosnia and Herzegovina. Having failed to reach agreement during negotiations in Dayton on the allocation of the Brčko area, the two entities composing Bosnia and Herzegovina agreed to binding arbitration of this disputed portion of the IEBL. Unlike the *compromis* in the *Land, Island and Maritime Frontier Dispute*, the Dayton Peace Accords had mandated the Arbitral Tribunal to decide the boundary lines on the basis of "relevant legal *and equitable* principles"[22]

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[20] Oral Submissions of El Salvador, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, C4/CR 91/33 at 49 (May 29, 1991). Mr. Hight referring to the statements of Professor Prosper Weil, and President Jiminéz de Aréchaga.

[21] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), 1992 I.C.J. para. 97 (Judgment of September 11, 1992).

[22] The Tribunal noted: "at a minimum, that equitable considerations be used to render an award that gives effect to considerations of fairness, justice and

(emphasis added). Although both the Federation and RS sought exclusive control, the Tribunal ultimately decided to place the area under international administration. The town of Brčko became a special district of Bosnia and Herzegovina, no longer within the exclusive political control of either entity. Consideration of the ethnic diversity of the area was an obvious motivation of the final award. International oversight was considered the only way to assure that the multiple ethnic groups inhabiting the area could coexist peacefully and equitably. However, conceiving this territorial entity not as a part of one of the two entities, but as a separate unit, makes the case of Brčko problematic and the attribution of that part of the territory a vital question for each of the entities.[23]

Brčko municipality was one of Bosnia's wealthiest communities. Prior to the outbreak of hostilities in 1992, the Brčko port was one of only two Bosnian ports along the Sava River—the largest tributary of the Danube River—and was Bosnia's only multi-modal (rail, road, water) transportation center.[24] The Bosnians pointed out their interest in the North-South transportation lines and the port on the Sava, without which Bosnia would be isolated and landlocked.[25] In their view, the Brčko port was the only transportation center with the capacity to serve the transportation needs of the Federation's industrial and trade sectors. RS also argued the strategic and commercial importance of the port in the Sava. In this regard, the local authorities tried to pre-empt the arbitration process throughout 1996 by not only resettling displaced Serbs but also offering transit rights to the

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reasonableness. In territorial disputes, international tribunals have identified as relevant such particular 'principles' as, inter alia: (1) the consideration of the factual context of the dispute – the unique political, economic, historical and geographical circumstances surrounding the dispute – and the balancing of the interests of the disputants in light of these factors; and (2) a set of equitable doctrines associated with fairness, such as the doctrine of 'unclean hands,' by which the inequitable conduct of one of the parties may be taken into account in the decision. Whatever the cited principles, however, international tribunals have typically stressed that the importance of equity in the deliberative process lies not in the formal application of specific 'equitable principles' but in the ultimate achievement of an 'equitable result'." *Arbitration for the Brčko Area* (Republika Srpska/ The Federation of Bosnia-Herzegovina), Award of February 14, 1997, at para. 88 (footnotes omitted), *available at* http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5327.

[23] K. Oellers-Frahm, *Restructuring Bosnia-Herzegovina Case-study Bosnia-Herzegovina: a Model with Pit-Falls*, 9 Max Planck Yearbook of International Law 214, 214–15 (2005).

[24] *Brčko* at para. 44.

[25] International Crisis Group, Brčko: What Bosnia Could Be (Report No. 31, 1998), at 3.

port on the Sava River.[26] In light of the strong interests of both Parties, the Tribunal specified some aspects of the international supervision of Dayton implementation in the Brčko area in relation to access to the port on the Sava river. The Tribunal noted that:

> Since revitalization of the Sava River port in Brčko is of paramount interest to both parties, all land now publicly or socially owned within the port area shall be placed under the exclusive control of the Bosnia and Herzegovina Transportation Corporation (an entity established under GFAP Annex 9, Article II (1)). Both parties are directed to use their best efforts—and the Supervisor is invited and encouraged to guide such efforts—to attract public and private investment (e.g., through leasing space) to revive the port through physical reconstruction, river dredging, and other appropriate measures.[27]

This finding of the Tribunal shows the strategic and commercial importance of the port for both Parties in the dispute. In order to achieve an "equitable result" the Tribunal invited both entities to attract public and private investment to develop the activities of this port. In the delimitation of a territory, the application of equity can be a door to the protection of public rights. The human dimension of these rights can be taken into account in the delimitation of boundaries in cases in which equity is applied.

Such results are not limited to cases governed exclusively by equity, nor to relatively less formal *ad hoc* arbitration. International tribunals have also resorted to equitable considerations in the delimitation of both maritime and land boundaries, although at different levels. While an "equitable solution" is part and parcel of the applicable rule on maritime delimitation of those areas such as the continental shelf or the economic exclusive zone,[28] equity plays a rather subsidiary role in land delimitation. When there is no evidence as to where a boundary line lies, an international tribunal may decide to resort to equity. In the Burkina Faso/Mali *Frontier Dispute*, for example, the Chamber of the ICJ considered whether it is possible to invoke equity even though the Chamber could not decide *ex aequo et bono*, as the Parties had not requested that it do so. It decided that it was appropriate to have regard to equity *infra legem* in the interpretation and application of law.[29] It was not surprising that, in a region characterized

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[26] *Id.*

[27] *Brčko* at para. 104(B)(7).

[28] Articles 74 and 83 of the United Nations Convention on the Law of the Sea.

[29] *Frontier Dispute* (Burkina Faso/Mali), 1986 I.C.J. (December 22), at paras. 27–28.

by the scarcity of water resources, the points of reference for the disputed area were watering places (i.e., the pools of Soum and In Abao).[30]

The disputed area between Burkina Faso and Mali includes the Béli, the largest (intermittent) watercourse in the region. The river originates in the eastern slopes of the Hombori Mountains and flows to the southeast before joining the Niger River outside the disputed area. In the dry season the river is reduced to a broken chain of 11 pools.[31] Considerations of equity *infra legem* were used to delimitate the Soum pool, a major temporary pool that dries out seasonally. According to the Chamber, the parties failed to submit evidence as to where the boundary runs in that area. The Chamber concluded that the Soum pool had to be divided in an equitable manner[32] in such a way as to divide its area—as maximized during the rainy season—equally between the two States. Although the Chamber claimed that it was relying only on equity *infra legem*, it is arguable that the Chamber was actually making use of equity *praeter legem*. In fact, while equitable principles are allowed for in the 1982 Convention on the Law of the Sea, this is not the case for the delimitation of shared fresh waters. Although the concept of equity is greatly emphasized in the regulation of the uses of international watercourses,[33] this was the first time that the concept had been used in the delimitation of a shared water resource.

Beyond the human factor that can be claimed as basis for delimitation, human presence or activity can also be claimed as "*effectivités*."

Human Presence or Activity as Evidence of "*Effectivités*"

Some States have referred to the activities of private individuals to develop claims regarding the exercise of State authority over a territory or a maritime zone. The activities relied on by States have included hunting, fishing, agriculture and uses of natural resources for both commercial and subsistence purposes. The general aim of establishing such "*effectivités*" is as evidence of historic rights and title. The approach to private activities has been developed in several international decisions since the nineteenth century.

As a starting position, the limited impact of activities undertaken

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30 *Id*. at 659, para. 17 (Separate Opinion of Judge Abi-Saab).

31 *Id.* at para. 16.

32 The Court noted with regard to the Soum pool, that "it must recognize that Soum is a frontier pool; and that in the absence of any precise indication in the texts of the position of the frontier line, the line should divide the pool of Soum in an equitable manner." *Id*. at para. 150.

33 *See*, *e.g.*, Art.5 of the 1997 UN Watercourses Convention.

by private individuals on disputed territory was well demonstrated in a case relating to control and sovereignty over the Island of Aves. The Netherlands' basic claim to the island was founded on the ongoing exploitation of marine resources by Dutch inhabitants of the neighboring islands, including catching turtles and collecting eggs. The Netherlands argued that these activities were incontestable evidence of its sovereignty over Aves.[34] These arguments were nonetheless rejected: the Award (rendered by Queen Isabel II of Spain) found that the occupation of a territory by private individuals, not acting on behalf of the government, and pursuing their own private interests, does not constitute sovereign possession by their government.[35]

The important question for understanding the salience of "*effectivités*" in boundary and territorial disputes then becomes *when* exactly a private activity or undertaking remains private and individual, and when it can be considered to have been sanctioned, empowered or adopted by the State with whom those individuals claim nationality. The issue was addressed by the ICJ *Fisheries* case of 1951.[36] The case focused on the legality of a unilateral boundary decision by Norway, rather than a border dispute *per se* but it nonetheless provides a useful illustration of the ICJ's approach to "*effectivité*s" as justification for, or evidence of, sovereignty. The basis of the case was a claim by the United Kingdom contesting a 1935 decree by Norway, delimiting the northern extent of the country using straight baselines. The United Kingdom asked the ICJ to determine whether or not this delimitation was in conformity with international law. Norway pleaded the activities of fishermen as evidence of its historic title, or at least of its right to delimit its fisheries zone in this manner.

One of the arguments Norway deployed in defense of its position was

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[34] *Arbitral award relating to the issue of control and sovereignty over Aves Island*, raised between Venezuela and the Kingdom of the Netherlands, *R.S.A.*, Vol. XXVIII, 115–24 (June 30, 1865). In particular it was concluded that: "De temps immémorial, les habitants des îles hollandaises de Saba et de Saint-Eustache se sont livrés à l'île d'Aves à la pêche de la tortue et à la récolte des œufs des oiseaux, faisant ainsi sur elle les seuls actes d'appropriation pratiquement possibles; s'ils n'y ont pas procédé à un établissement fixe, c'est que la nature s'y oppose. Tirer d'un territoire toute l'utilisation qu'il comporte, c'est incontestablement s'en rendre maître." Cited in De Lapradelle and Politis, A., Recueil des Arbitrages Internationaux, Vol. II (Pedone, Paris, 1923), at 410.

[35] De Lapradelle and Politis at 413. The Award found that "l'occupation matérielle de [l'île] par des personnes privées, qui n'agissent pas au nom de leur gouvernement, mais obéissent à un intérêt personnel, ne constitue pas une possession."

[36] *Fisheries case* (Norway/United Kingdom), 1951 I.C.J. 116 (December 18).

the claimed abundance of fish in the area, which had been exploited from time immemorial by Norwegian fishermen living along the Northern coast. According to Norway, this zone was necessary to safeguard the interests of these communities.[37] The Court pointed out that "[s]uch rights, founded on the *vital needs of the population* and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and responsible."[38] The decision of the ICJ found that the method in Norway's decree was not contrary to international law and that the use of straight baselines was legal, having long since benefited from general acceptance.

Fishing activities have also been presented as evidence of the exercise of State authority in a number of more recent cases concerning the determination of sovereignty over islands.[39] The rule seems to remain that human presence or activities cannot alone constitute evidence of the exercise of State authority over a territory. Yet these situations can act as a "catalyst"—to use the term employed by Professor Roberto Ago[40]—of the powers of a State, or the absence of this power. When individuals

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[37] *Id.* at 127, 142.

[38] *Id.* at 142 (emphasis added).

[39] In the case on *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Court referred to the traditional activities of Indonesian fishermen in the waters around Ligitan and Sipadan, noting that, "activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority." *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), 2002 I.C.J. (Judgment of December 17, 2002), at para. 140. In another case on *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Malaysia argued that, from the nineteenth century onwards, the Orang Laut, a nomadic people of the sea, had engaged in fishing and piratic activities in the straits of Singapore and particularly around the island of Pedra Branca/Pulau Batu Puteh. The Court held that "the nature and degree of the Sultan of Johor's authority exercised over the Orang Laut who inhabited the islands in the Straits of Singapore, and who made this maritime area their habitat, confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh." *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), 2008 I.C.J. (May 23), at para. 75.

[40] He used this term referring to the actions of individuals against aliens saying that they can "act as a catalyst for the wrongfulness of the conduct of the State organs which have not taken the necessary steps to prevent the occurrence of such an action." Fourth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, *YILC*, 1972, Vol.II, p.97, footnote 120. The underlying idea of both uses of the term is that the private activities in question therefore form the first link in a chain of activities that can be attributed to the State.

carry out activities related to the uses of natural resources, a State, thereby having (or pretending to have) ownership of these resources, can react to these private acts. In this way, the activities of individuals can indicate the sovereignty or the exercise of sovereign rights with respect to the resources where these activities have been performed. The analysis of Judge Vogt concerning the acts of Norwegian hunters and fishermen in Eastern Greenland seems to coincide with this reasoning. He pointed out that the acts of these fishers and hunters did not evidence Norwegian sovereignty over this area but instead evidenced the absence of the *corpus possessionis* by Denmark.[41] In his separate opinion attached to the decision on *Minquiers and Ecrehos* case, Judge Levi Carneiro used similar reasoning.[42] Thus, in addition to acting as a "catalyst" for adopted State activity over a territory, the activities of private individuals in territory can be probative in determining the *corpus possessionis* of a State or the absence of its possession.

To return to the application of these issues to water-based boundary disputes, a hypothetical case can be imagined in which the use of water resources by individuals could in much the same way act as a "catalyst" of the exercise of State authority over the sections of a river—or of the absence of another State's authority over them. It might be argued that certain disputed parts of a river have been used since time immemorial to provide food to local populations and support their economic livelihoods as a source of income.[43] The activities carried out by fishermen could represent vital rights and interests for a riparian State and be an important element of the economic development of the State.[44] All these aspects

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[41] *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53, at 103 (April 5).

[42] *Minquiers and Ecrehos* (France/United Kingdom), 1953 I.C.J. Reports (November 17) (individual opinion of Judge Levi Carneiro), at 104–105.

[43] As noted in international reports, most inland fisheries are used for subsistence and local consumption. Fisheries also play an important role in the economic development of developing countries. In this regard, a United Nations report of the World Water Assessment Program notes that: "At national levels inland fisheries contribute to GDP through multiplier effects and generate tax revenues and foreign exchange. In Bangladesh benefits from inland fisheries represented 80% of export earnings and about 50% of daily animal protein intake. Most fish exporters have well established aquaculture industries. In Tanzania mainland fisheries generated $6.9 million in taxes, 97% from export taxes, and in Uganda the Nile perch from Lake Victoria accounted for 17% of the value of exports in 2002." UN World Water Development Report, Water in a Changing World (2009), at 121. *See also* Marine Resources and Fisheries Consultants, Fisheries and Livelihoods (Policy Brief No. 4), *available at* http://www.mrag.co.uk/.

[44] UN World Water Development Report, *supra* note 43, at 121.

could support a claim on the "*effectivités*." On the other hand, the acts of a concerned State would be necessary elements to prove the exercise of sovereignty over the waterway.

Maritime delimitation

Fishing activities have also been considered as relevant circumstances in cases of maritime delimitation. These activities can be a relevant factor or circumstance in constructing an equitable result.

One of the earliest cases, the Award on the *Grisbadarna* case of October 23, 1909, mentioned several human activities among the factors supporting the establishment of a fisheries zone. These factors are: that lobster fishing had been carried on for a much longer time, to a much larger extent, and by a much larger number of Swedish fishers; that Swedish fishermen had been the first in the placing of beacons, the measurement of the sea and the installation of a light-boat to ensure the safety of navigation; that fishing activities played a more important role for the inhabitants of Koster (Sweden) than Hvaler (Norway); and that the Swedish fishermen had used the fisheries in a more effective way.[45] In the *Grisbadarna* case, the Tribunal used the activities carried out by Swedish fishers as evidence to delimit the fisheries zone.

In maritime delimitation disputes the claims of States regarding human activities have been accepted in some rare cases by international courts. However, evidence of explicit and purposeful State action has been necessary to support these claims. In the *Fisheries* case, for example, it was not only the history of fishing in the territory, but the licenses to fish and hunt granted by Norway to its nationals over the centuries which played a key role in proving that the disputed waters were under exclusive Norwegian sovereignty.[46]

The changes in territorial delimitations can affect the rights of private individuals. The case law of international courts and tribunals has considered these impacts and has sought to protect them.

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[45] Case on *Grisbadarna* (Sweden/Norway), *R.S.A.*, Vol. XI, pp. 147–66. English translation in Case-law on Maritime Delimitation. Digest and Commentaries 15–16 (R. Kolb ed., Martinus Nijhoff, The Hague, 2003).

[46] *Fisheries* case (United Kingdom v. Norway), 1951 I.C.J. 142 (December 18).

PRIVATE RIGHTS RELATED TO THE INDIVIDUALS THEMSELVES

Beyond public rights, changes in territorial limits can also affect private rights. An example in point is private rights acquired under domestic laws regarding property and the nationality of individuals. The uses of water resources could also be affected by territorial modifications. For example, legal access to water resources or fishing rights could be limited by boundary changes. Given these potential impacts, the analysis of international practice seems to suggest that individual, private rights are to be protected throughout the process of boundaries delimitations.

The Right to a Nationality

While entitlements to nationality have a fraught and complicated history stretching back to the birth of the nation-state, perhaps the earliest expression of a universally recognized right of all individuals to a nationality was its embodiment in Article 15 of the Universal Declaration of Human Rights; since then, this rights' interaction with issues of State succession has been the subject of a significant study by the International Law Commission.[47] Indeed, the right and the question of nationality is at stake whenever there is a change in territorial sovereignty,[48] and presumably, therefore, whenever there is a delimitation of previously unclear territorial title. The right to a nationality aims, among other things, to protect the individual against any detrimental effects resulting from changes in territorial sovereignty. This right is significantly expressed in the right of option: enabling individuals to opt for the nationality of the concerned States. International practice gives examples on the right of option; peace treaties concluded after the First World War, for example, included a capacity for individuals living in certain border territories to choose their post-delimitation nationality.[49] In the process of territorial changes, providing individuals with a right of option tries to alleviate some of the hardship connected to a change in control over territory. In contrast to the

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[47] *See*, *e.g.*, Second report on "State succession and its impact on the nationality of natural and legal persons," by Mr. Vaclav Mikulka, Special Rapporteur, *YILC*, 1996, vol. II(1).

[48] *See* Article 20, "Draft Articles on Nationality of Natural Persons in Relation to the Succession of States," *YILC*, 1999, vol. II(1), at 41.

[49] Second report on "State succession and its impact on the nationality of natural and legal persons," by Mr. Vaclav Mikulka, Special Rapporteur, *YILC*, 1996, vol. II(1), at 139–40.

right of self-determination, which is a collective right only applicable to human groups qualified as "peoples" in the sense of international law, the right to option is an institution granted to protect the will of an individual. While not directly related to water, the right of option provides a simple illustration of a limitation on State sovereignty following the settlement of a boundary dispute as it relates to the interests of individuals in or near the disputed territory. Other types of individual rights have to be protected. This is the case of the rights acquired under existing laws on real estate.

Vested Rights

In its advisory opinion on *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, the Permanent Court of International Justice (PCIJ) recognized the right of the German settlers in (newly) Polish territory to continue to hold and cultivate the lands that they previously occupied. Despite containing no specific clause on private rights, the 1919 Versailles Treaty of Peace—by which Germany recognized the independence of Poland and renounced all rights and title over its territory—the PCIJ held unequivocally that pre-existing individual property rights must be respected even following a transfer of political sovereignty over that territory.[50]

In the *Land, Island and Maritime Frontier Dispute* case, the Chamber also referred to the concept of acquired rights in the context of territorial delimitation. It noted that:

> the situation may arise in some areas whereby a number of the nationals of the one Party will, following the delimitation of the disputed sectors, find themselves living in the territory of the other, and property rights apparently established under the laws of the one Party will be found to have been granted over land which is part of the territory of the other. The Chamber has every confidence that such measures as may be necessary to take into account of this situation will be framed and carried out by both Parties, in full respect for acquired rights, and in a humane and orderly manner.[51]

In other words, general international law requires that, without prejudice to particular exceptional situations, vested rights in property not be

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[50] The Court says: "Private rights acquired under existing law do not cease on a change of sovereignty." *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, 1923 P.C.I.J. (ser. B) No. 6, at 36 (Advisory Opinion of September 10).

[51] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), 1992 I.C.J. (Judgment of September 11, 1992), at para. 66.

extinguished as a result of territorial change. The obvious question for our purposes thus becomes how far this protection of privately vested rights extends and, specifically, whether it extends to individual rights to the use of water resources, a question that becomes particularly pressing given the significant impact that territorial delimitation—intended to cover both land and waterways—could have on such rights.

Access to Water and Uses of Water Resources

Whether it follows from the same principle that requires maintenance of title over land ownership, the answer to the question seems to be in favor of continuing rights to use water sources and their attendant resources, independent of border or sovereignty. Indeed, the extension and continuation of water resource use and access rights seem to draw on equitable principles only incidentally connected to an international rule requiring non-interference in private property rights. One source for protecting and continuing access and use rights draws from a recognition of conventional and customary practices. Examples can be found both in the decisions of the Boundary Commission between Eritrea and Ethiopia[52] and in the *Frontier Dispute* between Benin and Niger.[53] It may also be argued, however, that a principle expecting continuation of rights to access water resources during boundary disputes may be grounded in human rights law. The growing recognition of a human right to water[54] could play a significant role in supporting the claims of a State. These dimensions of the legal treatment of the question are addressed in the subsequent sections.

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[52] Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, 41 *ILM* 1057.

[53] *Frontier Dispute (Benin/Niger),* 2005 I.C.J. (July 12), at para. 90.

[54] See UN Committee on Economic, Social and Cultural Rights, General Comment No.15, The Right to Water (Arts 11–12, International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11, 26 Nov 2002, *available at* http://www.unchr.ch/html/menu2/6/gc15.doc; UN Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, UN Doc E/CN.4/Sub.2/2005/25, Jul 2005, *available at* http://www2.ohchr.org/english/issues/water/docs/Sub_Com_Guisse_guidelines.pdf; UN Human Rights Council (UNHRC), Decision 2/104 (Nov 2006), *available at* http://www2.ohchr.org/english/issues/water/docs/HRC_decision2_104.pdf; UNGA Resolution A/RES/64/292 (Jul 2010), *available at* http://www2.ohchr.org/english/issues/water/iexpert/resolutions.htm; UNHRC, Res A/HRC/RES/15/9 (Sep 2010), *available at* http://www2.ohchr.org/english/issues/water/iexpert/resolutions.htm.

Conventional rights

River resource use rights have been included in territorial treaties stretching back several decades; numerous examples can be found in agreements concluded with Indian tribes in the United States of America during the nineteenth century. The agreement with the Yakama Tribe of 9 June 1855 provides:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.[55]

Similar ancestral rights to fish have also been acknowledged to indigenous communities in Canada.[56]

The establishment of a boundary on the shoreline may be accompanied by the concession of "compensatory" rights. In the case of non-navigable watercourses, they may consist of fishing privileges, as found for instance in Article 8 of the Agreement of 1 July 1912 on the Boundary between Guinea and Sierra Leone.[57] Another example is Article 9 of the Agreement between Great Britain and Belgium of 22 November 1934 concerning water rights on the boundary between Tanganyika and Rwanda-Urundi, providing that: "Any of the inhabitants of the Tanganyika Territory or of Ruanda-Urundi shall be permitted to navigate any river or stream forming the common boundary and take therefrom fish and aquatic plants and water for domestic purposes and for any purposes confirming with their customary rights."[58]

Use and access rights have not been limited to cases where the body of water forms a boundary; customary rights have also been expressly

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[55] Art.3 of the Treaty with the Yakama Tribe, June 9, 1855, 12 Stat. 951, *available at* http://digital.library.okstate.edu/kappler/vol2/treaties/yak0698.htm. *See also* Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.

[56] *See R. v. Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 (Supreme Court of Canada), *available at* http://canlii.ca/t/1fsvj.

[57] Protocol of 1 July 1912 between Great Britain and France on the Definitive Demarcation of the Frontier between French Guinea and Sierra Leone, 216 CTS 217.

[58] Agreement regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi, London, 22 November 1934, 190 LNTS 106.

recognized even in cases in which the negotiated boundary line left the water source completely within the territory of one of the neighbors. The Protocol concluded between Great Britain and France on 1 July 1912 provides in Article 8: "In the part of the Moa included between cairns XV and XVI the river and the islands belong entirely to France. The inhabitants of the two banks have, however, equal rights of fishing in this part."[59]

Rights to use the waters of an international watercourse and its resources can also result, as is the case below, from local customs based on long-established practices.

Customary rights

International case law also provides examples in which continued use and access rights have been founded in the existence of customary practice alone. One example is found in the final decision of the Commission charged with delimiting the boundaries between Eritrea and Ethiopia. After having decided that river boundaries should be determined by reference to the location of the main channel during the dry season, the Commission clearly held that: "[r]egard should be paid to the customary rights of the local people to have access to the river."[60]

The Benin-Niger *Frontier Dispute* also raised issues regarding the rights of individuals to continue using water resources after the boundaries had been established. The ICJ had been asked to decide on the method of delimitation of the Niger and Mekrou Rivers, as well as specifying which State owned a number of islands in the Niger River, with Lété being the most important.[61] Benin contended that the boundary lay on the left bank of the Niger River, on the basis that France, as the colonial power, had decided to delimit the boundaries between the two colonies using the riverbank; Niger, on the other hand, pleaded in favor of using the river's main channel. During colonial times, the peoples inhabiting the two sides of the river had lived in and used the resources of the basin without concern for the territorial division between the two colonies. The commitment of Benin to cooperate in the management of shared water resources,

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[59] 9 Martens NRG (3rd) 805.

[60] Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, 41 *ILM* 1057; Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, 41 *ILM* 1057, 1116 at para. 7.3.

[61] Indeed, Benin described Lété as being "the heart of the dispute." Counter-Memorial of Benin, *Frontier Dispute (Benin/Niger),* Vol. I at 3–5 (May 28, 2004).

especially with the participation in the *Autorité du Bassin du Niger*, was claimed as evidence of the engagement of Benin to allow and protect the common uses of the Niger River.[62]

While the river was under the territorial jurisdiction of Benin, its waters were used by the inhabitants of both banks. A regime of common utilization of the river was ensured in order to safeguard the colony of Niger and the Nigerian inhabitants.[63] Benin noted that the rights of utilization of the waters of the Niger River were considered as acquired rights of the local population of the Nigerian bank and Benin underlined that its territorial claim should not be understood as an interference with these continued use rights.[64] As a result of the use of the method of delimitation at the riverbank, the island of Lété and other islands on the Niger River would belong to Benin. However, Benin would continue to protect the customary rights acquired by the inhabitants of Niger to use the waters of the River and their rights in certain islands.[65]

The Chamber of the ICJ rejected the arguments regarding a delimitation of the river on the left bank and retained the main channel as the boundary between the two States. It affirmed that:

> the boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya, the boundary passes to the left of these islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river and Niger has title to the islands between that boundary and the left bank of the river.[66]

Moreover, the Chamber pointed out that the attribution of the islands "is without prejudice to any private law rights which may be held in respect of those islands."[67]

Grazing and agriculture rights held by the inhabitants of one State on

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[62] According to Benin, "l'engagement du Bénin au sein de l'A.B.N. (Autorité du Bassin du Niger) [est] la preuve de la volonté du Bénin de permettre l'exploitation commune du fleuve." *Id.* at para. 2.16.

[63] *Id.* at para. 2.159.

[64] *Id.* at para. 2.182 & 3.4; *see also Reply of Benin, Frontier Dispute (Benin/Niger)*, Vol. I at para. 0.13 (December 17, 2004). *See also* C5/CR2005/1, 7 March 2005, para. 1.23 (M. Biaou).

[65] Counter-Memorial at 137, para. 3.4. *See also* Counter-Memorial at 104–105, para. 2.182; Reply at 5, para.0.13; 67–68, para. 3.54. *See also* C5/CR2005/1, 7 March 2005, p. 20, para.1.23 (M. Biaou, Republic of Benin).

[66] *Frontier Dispute* (Burkina Faso/Mali), 1986 I.C.J. (December 22), at para. 103.

[67] *Id.* at para. 119.

the land of neighboring States have also been recognized in international practice, including in the *Kasikili/Sedudu Island* case concerning the rights of the Masubia tribe over the island of Kasikili-Sedudu in the Chobe River. In February 1996, Botswana and Namibia signed a *compromis* which asked the Court to "determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili-Sedudu Island, and the legal status of the island."[68] The treaty itself established the spheres of influences between Great Britain and Germany in the main channel of the Chobe River. The task was therefore to determine the location of the main channel, where the boundary lay, and to decide the sovereignty and legal status of the Kasikili/Sedudu island. After having decided that the main channel lay north of the Kasikili/Sedudu,[69] the Court affirmed Botswana's sovereignty over the island. However, the Court examined the subsequent practice of Botswana and Namibia in the interpretation of the treaty. Indeed, in many cases the key for solving territorial disputes is the interpretation of a boundary treaty or of a treaty that defines the legal position of a concerned territory. In these circumstances, individual practice could be helpful to determine the subsequent practice of a treaty that is part of the context in the interpretation of treaties.[70]

Moreover, Namibia argued that the subsequent conduct of both parties indicated that the main channel was the southern channel and, as a consequence, that the island was under the sovereignty of Namibia. One of the arguments in support of this claim was the presence of the Masubia tribe on the island; their continued, exclusive and uninterrupted occupation, the exercise of jurisdiction over the island and the continued silence of Botswana showed that the island was in the territory of Namibia.[71]

However, the Court concluded that there was no link between this occupation and the territorial claims of the Caprivi authorities (Namibia). It was "not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border."[72] As a result, the Court confirmed the conclusions that the

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[68] Article 1 of Special Agreement between Botswana and Namibia, 15 February 1996, reproduced in *Kasikili/Sedudu Island* (Botswana/Namibia), 1999 I.C.J. (December 13), at para. 2.

[69] *Id.* at para. 41.

[70] Article 31(3) of the Vienna Convention on the Law of Treaties.

[71] *Kasikili/Sedudu Island (Botswana/Namibia)* at para. 71.

[72] *Id.* at para. 64.

boundary lay in the Northern channel of the Chobe and, consequently, that Kasikili/Sedudu belongs to Botswana.

Finally, Namibia claimed the acquisitive prescription as a subsidiary title for her territorial sovereignty.[73] Again, the presence of the Masubia tribe was at the heart of the debates; once again the Court rejected the argument, saying:

> [E]ven if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island à *titre de souverain,* i.e., that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence shows that the Masubia used the Island intermittently, according to the seasons and their needs, for exclusively agricultural purposes; this use, which began prior to the establishment of any colonial administration in the Caprivi Strip, seems to have subsequently continued without being linked to territorial claims on the part of the Authority administering the Caprivi.[74]

Thus, the presence of Masubia tribe was considered as derivative of a kind of private title rather than as evidence of a territorial title. Such a conclusion contradicts opposite views that were held by individual judges in other cases. For example, in the context of the *Minquiers and Ecrehos* case, judge Levi Carneiro concluded that:

> I have in mind the fact that the limits of the Portuguese and Spanish possessions in South America, which had been strictly laid down in the Treaty of Tordesilhas, were exceeded by persons from Brazil in search of gold and emeralds, and that, although these persons were frequently disappointed in their expectations and their ranks decimated by fever, they achieved the *uti possidetis* for Brazil and greatly increased her territory. Such individual actions are particularly important in respect of territories, situated at the border of two countries which both claim sovereignty in that region.[75]

Thus, while it appears that the activities of private individuals cannot be the basis of State authority over a concerned territory as such, they could be evidence of the absence of *corpus possessionis* of a State over a territory.

Customary fishing rights were also recognized in the decision regarding

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[73] "According to Namibia, four conditions must be fulfilled to enable possession by a State to mature into a prescriptive title: 1. The possession of the . . . state must be exercised *à titre de souverain.* 2. The possession must be peaceful and uninterrupted. 3. The possession must be public. 4. The possession must endure for a certain length of time." *Id.* at para. 94.

[74] *Id.* at para. 98.

[75] *Minquiers and Ecrehos* (France/United Kingdom), 1953 I.C.J. (November 17), at 104–05.

Navigational Rights and other Related Rights in the San Juan River.[76] The practice of the residents of the Costa Rican bank of the San Juan consisted of catching fish from the bank and from boats, using nets in some cases. This activity was generally performed for subsistence purposes alone and has carried on for as long as the region has been inhabited.[77] Indeed, this practice entirely corresponds with the regime applied to the San Juan since the colonial period.[78] Coupled with the complete lack of application of internal regulations with respect to fishing, Costa Rica claimed (successfully) that this practice had given rise to a local, customary rule.[79] The Court recognized the existence of a bilateral customary right, according to which riparians from the Costa Rican bank have the right to fish for subsistence purposes from the bank of the river.[80]

Such recognition of fishing rights has much in common both with neighboring-State grazing and agriculture rights addressed in the *Kasikili/Sedudu Island* case above[81] and with a more general customary right to river access recognized in the *Eritrea/Ethiopia* Arbitral Award.[82] These examples illustrate that inhabitants of border regions have a right of access to the territory of neighboring States and even the right to exploit certain resources, albeit in a very limited way, as is the case of subsistence fishing in the San Juan River.

However, problems can arise with respect to national regulations that derogate from rights recognized by a treaty or stemming from local customary practices. This situation was examined in the *Question relating to the North Atlantic Coast Fisheries* case of 7 September 1910. The Treaty of 1818 between the United States and Great Britain conceded to the inhabitants of the United States the liberty to take fish in certain British territorial waters on the North Atlantic Coast. The case turned on the right of Great Britain to enact national fisheries regulations contrary to the fishing rights granted in the 1818 Treaty. The United States argued that the right

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[76] The riverbank of Nicaragua constitutes the boundary in the San Juan River.

[77] Memorial of Costa Rica, Dispute regarding Navigational Rights and Related Rights (Costa Rica v. Nicaragua), July 13, 2009, at para. 4.128.

[78] CR 2009/3, March 3, 2009, at para. 23.

[79] *Id.* at para. 41.

[80] *Dispute regarding Navigational and Related Rights* (Costa Rica/Nicaragua), 2009 I.C.J. (July 13), at para. 141.

[81] *Kasikili/Sedudu Island* (Botswana/Namibia), 1999 I.C.J. (December 13), at para. 74.

[82] Eritrea/Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, April 13, 2002, 41, *ILM* 1057, 1116 at para. 7.3.

of regulation was limited by the Treaty. The Arbitral Tribunal agreed in part, holding that:

> The exercise of that right [to regulate fishing practices] by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein, granted to the inhabitants of the United States *in that such regulations must be made bona fide and must not be in violation of the said Treaty*. Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, are therefore reasonable and not in violation of the Treaty.[83] (Emphasis added.)

It was therefore decided that the exercise of the right of regulation must be in good faith and in accordance with the 1818 Treaty. While Great Britain's right to regulate was saved, its exercise of that right was limited. Thus, beyond grounding an ongoing individual right, treaty or customary practice can also become a permanent limitation upon the capacity of a State to exercise its sovereign powers to regulate local practices.

Human rights grounds?

The human right to food provides an interesting perspective on many of the issues confronted in water-related boundary disputes. Consider, for example, the determination of fishing rights in the *Dispute regarding Navigational and Related Rights* case. Costa Rica successfully argued for the recognition of a customary right of riparians to engage in subsistence fishing from the bank of the disputed river.[84] The Court's decision founded the customary right on the previously undisputed and long-established nature of the practice. The decision is more than compatible with the recognition of the human right to food. Not only did Costa Rica highlight in both its written and oral submissions the subsistence and family-supporting nature of these activities, but the Court's decision explicitly limited the customary right to non-commercial subsistence fishing. In its General Comment on Article 11 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) stated that

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[83] Award of the Tribunal of Arbitration in *Question Relating to the North Atlantic Coast Fisheries*, The Hague, 11 *UNRIAA* 172, 189 (September 7, 1910).

[84] *Dispute regarding Navigational and Related Rights (Costa Rica/Nicaragua)*, at para. 141.

"[t]he obligation to *respect* existing access to adequate food requires States parties *not to take any measures that result in preventing such access*."[85] Obviously, refusing to grant the subsistence fishing right could have prevented access to food for the Costa Rican riparians and thereby infringed their right to food understood in this way. While neither the submissions nor the decision discussed the importance of the fishing rights to these populations in terms of human rights, there is certainly some question as to whether the argument would have been successful if the claimed customary right was more expansive. More importantly, the details of the case provide a set of facts which clearly give rise to important human rights responsibilities for both States Parties.

Beyond the right to food, human rights could add other dimensions to the determination of legal issues surrounding shared water resources in border areas, particularly by way of the emerging recognition of a universal human right to water. This right provides that States have specific duties *vis-à-vis* their own populations to ensure access to sufficient and safe drinking water. Beyond the need to have access to water resources for domestic and personal uses, water is required for a range of different purposes, including food production, hygiene and cultural practices. Internationally shared water resources can often be an important source of water for any or all of these purposes.

Ensuring access to sufficient and safe water is also an indispensable element in the realization of many other human rights. Indeed, in its 2002 General Comment on Articles 11 and 12 of the ICESCR, the ESCR Committee expressed the inextricable link of the human right to water to both the human right to food and the human right to health.[86] Even before this recognition, the right to water had been consistently addressed by the ESCR Committee during its consideration of States Parties' reports.[87] The right to water clearly falls within the category of universal guarantees that States must take into consideration in all circumstances, particularly since it is one of the most fundamental conditions for survival and a life of dignity.

One of the obligations stemming from the respect of the right to water is to refrain from activities that deny or limit equal access to water resources. In this regard, the ESCR Committee stated that:

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[85] Committee on Economic, Social and Cultural Rights, General Comment 12, 12 May 1999, doc. E/C.12/1999/5, para.15 (emphasis added).

[86] Committee on Economic, Social and Cultural Rights, General Comment 15, 26 November 2002, doc. E/C.12/2002/11, para. 3.

[87] *Id*. at para.5.

> The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, *inter alia*, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation [. . .].[88]

In regions with scarce water resources, the respect of traditional arrangements for water allocation could also be a significant aspect of respect for the right to water. In the context of a territorial dispute, a riparian State could defend a claim for ongoing river or lake access by its citizens (if not a free-standing territorial claim) based on its obligation to ensure its population's access to safe drinking water.

To date, no State has raised a human rights argument in defense of its position in a border dispute. As human rights discourse and principles increasingly pervade the law of international watercourses (an area of law long considered as regulating inter-State relations alone), human rights might receive increasing attention from States interested in referring to those rights while advancing their territorial claims. Contrary to common perceptions, a State's sovereign and territorial rights need not be in conflict with its human rights responsibilities: indeed, they can support each other, while buttressing the important essential interests of individuals in a disputed area.[89]

CONCLUSION

The presence of individuals in a disputed territory and the right of self-determination are not necessarily two sides of the same coin. The right of self-determination is not ascribed to individuals or even to particular communities, but to "peoples," in the sense international law attributes to this term. Current norms of international law, based in human rights principles or otherwise, do not confer local populations a right to contribute to boundary-making decisions, whether or not those boundaries include watercourses.

Thus, in contemporary international law, the inhabitants of a territory do not have an automatic right to determine the sovereignty of that ter-

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[88] *Id*. at para. 21.

[89] P.-M. Dupuy, *Le droit à l'eau: droit de l'homme ou droit des Etats?*, *in* Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum, L. Caflisch (M.G. Kohen ed., Martinus Nijhoff, Leiden, 2007), at 714–15.

ritory. The fact that the individuals do not have this right does not leave them as mere objects of international law. In numerous cases, frontier residents benefit from rights connected to the territory. People inhabiting border areas often enjoy regimes allowing them to use natural resources located on the other side of the boundary. These situations generally result from practice recognized by treaty, but can also be the product of longstanding customary practices giving rise to bilateral customary rights. Since the custom on the uses of water resources is granted on a basis of necessity, it is not difficult to find the existence of a contemporary right in this domain.

Beyond the numerous sources of law identified above grounding watercourse boundary rights for both neighboring States and inhabitants living at the frontier, considerations of equity may also play a relevant role in extending and protecting the same interests. Although equity has until now played a particularly important role in maritime delimitations, it is not excluded from being strengthened by a judge or an arbitrator in land-(and freshwater-) based boundary determination, particularly in cases in which the extent of the territorial title is not clear. There are already precedents in this regard, including the decision relating to Soum pool in the *Frontier Dispute*.[90] The Chamber of the Court—facing the difficulty of finding evidence regarding the territorial delimitation during the colonial period—applied the principle of *uti possidetis* and equally and equitably shared the pool between Burkina Faso and Mali in a manner that would satisfy the future vital water needs of the population inhabiting the frontier areas.

Use of water resources, irrespective of sovereignty and access rights, raises separate and important issues, particularly when the water source in question serves vital human needs. These rights have been consistently accepted by longstanding case law. In this vein, the ICJ recognized the right of the inhabitants of the Costa Rican bank to fish in the San Juan River as the result of enduring practices giving rise to a local customary right.[91] On the other hand, this right would be subject to any regulatory measures taken by a riparian State on the condition that these measures are in *bona fide* and are not in violation of customary practices or treaties. Territorial disputes have integrated considerations on the uses of water resources relying on customary or traditional arrangements. Territorial regimes on border areas generally allow individuals to use

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[90] *Frontier Dispute* (Burkina Faso/Mali), 1986 I.C.J. (December 22).

[91] *Dispute regarding Navigational and Related Rights* (Costa Rica/Nicaragua), 2009 I.C.J. (July 13), at para. 141.

shared water resources, as illustrated in the *Frontier Dispute* between Benin and Niger.

Human rights could support the rights of individuals to use shared water resources in border areas. In this regard, one might wonder whether the juxtaposition of territorial rights and human rights on the use of water resources could increase the risks of conflict or emphasize territorial disputes. This would certainly be a paradoxical result, given that one of the ways to achieve international peace and security is the promotion and encouragement of the respect for human rights.[92] States, both downstream and upstream, can use the same justifications to argue their rights and duties regarding their populations in disputed areas. The right to water is not a prerogative of the individuals of one side of a river over another, but entitles every individual to have access to sufficient and safe water. The rights of both States and individuals can complement each other in the settlement of territorial disputes.

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92 *See* U.N. Charter art. 1.

PART II

The promotion of water cooperation through universal, regional and local regimes