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# TERRITORIAL INTEGRITY AND THE “RIGHT” TO SELF-DETERMINATION: AN EXAMINATION OF THE CONCEPTUAL TOOLS

Joshua Castellino\*

## INTRODUCTION

The determination and demarcation of fixed territories and the subsequent allegiance between those territories and the individuals or groups of individuals that inhabit them is arguably the prime factor that creates room for individuals and groups within international and human rights law.<sup>1</sup> In this sense, “international society”<sup>2</sup> consists of individuals and groups that ostensibly gain legitimacy and *locus standi* in international law by virtue of being part of a sovereign state.<sup>3</sup> For example, although it has been argued that notions of democratic governance have become widespread (or even a norm of customary international law),<sup>4</sup> this democracy—in order to gain international legitimacy—is assumed to be expressed within the narrow confines of an identifiable territorial unit.<sup>5</sup> While this state-centered model has been eroded by international

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1. See BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 2 (2001) (examining the process through which this “legitimacy” is validated in international law). See also JAMES L. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS* 47 (Hersch Lauterpacht & C.H.M. Waldock eds., 1958) (explaining the nexus between the individual and the state, defined on the basis of a fixed “territorial compartment”).

2. See HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 74–94 (2d ed. 1995).

3. See Vernon Van Dyke, *The Individual, the State and Ethnic Communities in Political Theory*, in WILL KYMLICKA, *THE RIGHTS OF MINORITY CULTURES* 31 (1st ed. 1995); Vernon Van Dyke, *Human Rights and the Rights of Groups*, 18 *AM. J. POL. SCI.* 725 (1974). See, e.g., Cindy L. Holder & Jeff J. Comtassel, *Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*, 24 *HUM. RTS. Q.* 126 (2002).

4. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT’L L.* 46 (1992).

5. See generally Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT’L L.* 177 (1991) (explaining the importance of the territorial state, especially the clash between self-determination and territorial integrity).

criminal law developments that eliminate the state action requirement,<sup>6</sup> nationality remains central to personal identity within the international system.<sup>7</sup>

The acquisition of defined and fixed territoriality is prerequisite to the recognition of statehood.<sup>8</sup> The quest for recognition has widespread manifestations in contemporary society, from indigenous peoples who seek control over the destiny of their ancestral lands to struggles for self-determination in places such as Kosovo, Iraq, the Basque Country, and many others.<sup>9</sup> Since states are primarily entrusted with the privilege of norm creation in international law, the emphasis on territoriality affects many who would lay claim to such recognition.<sup>10</sup> However, the notion of territoriality itself remains contested in international law. The implication

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6. The rapid growth of international criminal law since the signature of the Rome Statute of the International Criminal Court has established that an individual can be held accountable for his or her actions beyond the veil of the state. *See* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (Philippe Sands ed., 2003). *See generally* LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM (2002); WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2d ed. 2001) (elaborating on the court and its activities); THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee ed., 1999); THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); M. Cherif Bassiouni, *Historical Survey: 1919–1998*, in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT I (1998).

7. *See generally* Simon Caney, *Individuals, Nations and Obligations*, in NATIONAL RIGHTS, INTERNATIONAL OBLIGATIONS 119–38 (Simon Caney, David George & Peter Jones eds., 1996). *Cf.* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) (arguing against a strict linkage between territory and identity).

8. *See* Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, T.S. 881 [hereinafter Montevideo Convention].

9. *See* MORTON H. HALPERIN & DAVID J. SCHEFFER WITH PATRICIA L. SMALL, SELF-DETERMINATION IN THE NEW WORLD ORDER (1992); ALEXIS HERACLIDES, THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS (1991). *See also* LUIS NÚÑEZ ASTRAIN, THE BASQUES: THEIR STRUGGLE FOR INDEPENDENCE (Meic Stephens trans., 1997) (discussing the Basque claim to self-determination); DENISA KOSTOVICOVA, KOSOVO: THE POLITICS OF IDENTITY AND SPACE (2005) (discussing the claim to statehood in Kosovo); KERIM YILDIZ, THE KURDS IN IRAQ: THE PAST, PRESENT AND FUTURE (2004) (discussing the claim of the Kurds in the context of Iraq).

10. *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2d ed. 2006) (1979); R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (1963); OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA (2000); NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW (1994); Ruth Lapidoth, *Sovereignty in Transition*, 45 J. INT'L AFF. 325 (1992).

of this contest is most visible in the treatment of the right to self-determination.<sup>11</sup>

To ascertain the manner in which the legal treatment of territory affects groups seeking self-determination, this Article seeks to identify the international legal regime that governs the treatment of territory, trace its evolution and purpose, and unpack the doctrinal tools that lie at the foundation of territoriality in international law. By analyzing the interpretation of these norms by international judicial bodies, this Article will question the validity and measure the effectiveness of their application.

This analysis will illustrate the dichotomy between the right to self-determination and the issue of land rights. In order to retain its legitimacy, international law must reconceptualize the doctrines of territoriality and self-determination. This Article posits that this can be achieved by reconciling the traditional state-centered approach, which views self-determination as an issue about the legitimacy of the state,<sup>12</sup> with the human rights approach, which views self-determination<sup>13</sup> as a foundational right on which the edifice of human rights can be built.<sup>14</sup>

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11. See generally ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* (1990); Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 857 (1994).

12. See, e.g., *supra* note 11 (illustrating that Antonio Cassese, Hurst Hannum, and Martti Koskenniemi are overtly concerned with the international process-oriented issues of state formation).

13. See generally PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 58–59 (“In any assessment of who or what is indigenous, the nature of self-organisation should be borne in mind, and group aspirations to a certain set of rights.”); S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* 3 (Pekka Aikio & Martin Scheinin eds., 2000); Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International & Comparative Law*, 34 N.Y.U. J. INT’L L. & POL. 189, 190 n.4 (2001); Martin Scheinin, *The Right to Self-Determination Under the Covenant on Civil and Political Rights*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* 179 (Pekka Aikio & Martin Scheinin eds., 2000). The more contemporary works of S. James Anaya, Martin Scheinin, Benedict Kingsbury, and Patrick Thornberry express greater concern over internal processes or democratic entitlement issues vis-à-vis state formation.

14. See generally *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* (Pekka Aikio & Martin Scheinin eds., 2000) (examining the ways in which indigenous peoples’ right to self-determination is expressed and received in various fora); Michael Holley, *Recognizing the Rights of Indigenous Peoples to Their Traditional Lands: A Case Study of an Internally Displaced Community in Guatemala*, 15 BERKELEY J. INT’L L. 119 (1997) (examining the Mayan claim to their traditional lands); W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89

This Article is divided into five main analytical parts. Part I explains the importance of the territorial state and the notion of territory in international law. Part II briefly outlines the laws governing the acquisition of territory in international society, identifies their historical antecedents, and provides a brief exposé of the methods legitimized by these doctrines. Against the more theoretical backdrop of Part II, Part III plots the development of the doctrinal tools that govern issues of territoriality in international law, tracing the reemergence of: (1) the doctrine of *uti possidetis juris*, with its attendant concept of the “critical date,” and (2) the principle of *terra nullius*, exemplified by the Creole emancipation from European rule. Part IV then reflects on the extent to which international tribunals have subsequently developed these doctrinal tools, with a focus on their treatment by the International Court of Justice (“ICJ”). Lastly, Part V examines how the international laws governing territoriality can impact the right to self-determination.

#### I. STATEHOOD, TERRITORIAL RIGHTS, AND SELF-DETERMINATION

The sovereign state is enshrined at the heart of the international legal system, where it functions as the primary actor in international law and politics.<sup>15</sup> In recognition of the rights of sovereign states, article 2(7) of the United Nations (“U.N.”) Charter enunciates:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall

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AM. J. INT'L L. 350 (1995) (analyzing how the right to self-determination is being expressed in various domestic jurisdictions); Glen St. Louis, *The Tangled Web of Sovereignty and Self-Governance: Canada's Obligation to the Cree Nation in Consideration of Québec's Threat to Secede*, 14 BERKELEY J. INT'L L. 380 (1996) (raising the self-determination question in the specific context of Québec).

15. See JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL “NATIONAL” IDENTITY 75–108 (2000). See also J.A. Andrews, *The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century*, 94 L.Q. REV. 408 (1978) (providing insight into how the state was perceived in the context of colonization); David Armstrong, *Globalization and the Social State*, 24 REV. INT'L STUD. 461 (1998) (discussing the impact of globalization on the state); J. Samuel Barkin & Bruce Cronin, *The State & the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107 (1994) (analyzing the pressures on the sovereign state as a concept and actor in international society).

not prejudice the application of enforcement measures under Chapter VII.<sup>16</sup>

Article 1 of the Montevideo Convention on the Rights and Duties of States of 1934 sets out the key attributes of sovereignty: “[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”<sup>17</sup> Though each of these concepts is problematic,<sup>18</sup> “a defined territory” remains fundamental to the recognition of statehood and the trappings of sovereignty that accompany it.<sup>19</sup>

To identify such fixed territory, international law uses the doctrinal tools of *uti possidetis juris* and its older companion principle *terra nullius*. Despite ancient origins in Roman law,<sup>20</sup> the periodic restatement of the doctrine of *uti possidetis juris* perpetuates its salience in the international law governing territory.<sup>21</sup>

The doctrine of *uti possidetis juris* guarantees the rights of existing stakeholders to the land,<sup>22</sup> and posits “that new States will come to inde-

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16. U.N. Charter art. 2(7). See also 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 148–163 (Bruno Simma, Hermann Mosler & Andreas Paulus eds., 2002) (discussing the interpretation of article 2(7)).

17. Montevideo Convention, *supra* note 8, art. 1.

18. See CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL “NATIONAL” IDENTITY, *supra* note 15, at 77–89. See also Charles G. Fenwick, *The Inter-American Conference for the Maintenance of Peace*, 31 AM. J. INT’L L. 201 (1937) (providing a more detailed exposé of the issues germane to the Montevideo Convention).

19. See TITLE TO TERRITORY (Malcolm Shaw ed., 1986). See generally SIBA N’ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 185–96, 205–06 (1996) (addressing sovereignty in the context of decolonization in Africa).

20. See generally H.F. JOLOWICZ & BARRY NICOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 259–63 (3d ed. 1972) (discussing the possessory interdicts).

21. See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178 (1998) (discussing more recent enunciations of the doctrine of *uti possidetis juris* in the context of the Badinter Commission). See also Peter Radan, *Post-Succession International Orders: A Critical Analysis of the Workings of the Badinter Commission*, 24 MELB. U. L. REV. 50 (2000) (providing a detailed analysis of the Commission, its working, and its impact on the disintegration of the state of Yugoslavia).

22. See Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRIT. Y.B. INT’L L. 97, 97–101 (1996). See generally Kaiyan H. Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 49 BRIT. Y.B. INT’L L. 119, 126–27 (1983); Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT’L L. 590 (1996).

pendence with the same boundaries that they had when they were administrative units within the territory or territories of one colonial power."<sup>23</sup> The centrality of "order" to the propagation of international law cannot be underestimated, least of all at a time of transition when the fear of chaos and insurgence is uppermost in the new rulers' minds.<sup>24</sup> While Hugo Grotius did not refer to the doctrine of *uti possidetis juris* in *De Pacis Juris Bella*, his tacit support can be gleaned from his emphasis on the concept of order, which he considered to be a prime requirement within international law.<sup>25</sup>

The doctrine itself traces its roots directly to the *jus civile* in the Roman law norm of *uti possidetis ita possidetis*, which forms the basis of the modern doctrine.<sup>26</sup> Translated, *uti possidetis ita possidetis* reads, "as you possess, so you possess."<sup>27</sup> This possessory interdict was available to a *praetor* to prevent the "disturbance of the existing state of possession of immovables, as between two individuals."<sup>28</sup> Thus, it was a tool to promote and maintain order.<sup>29</sup> According to the *jus civile*, the object of the interdict was to recognize the status quo in any given dispute involving immovable property,<sup>30</sup> and was therefore designed to protect existing arrangements of possession without regard to the merits of the dispute.<sup>31</sup> Nevertheless, possession had to be acquired from the other party *nec vi, nec clam, nec precario*, i.e., without force, secrecy, or permission.<sup>32</sup>

23. Shaw, *supra* note 22, at 97.

24. See generally ORDER & JUSTICE IN INTERNATIONAL RELATIONS (Rosemary Foot, John Lewis Gaddis & Andrew Hurrell eds., 2003) (discussing the importance of order).

25. See BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 4 (1986); Rosalyn Higgins, *Grotius and the Development of International Law in the United Nations Period*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 267 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1992).

26. See generally JAMES MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME 89–212 (Henry Goudy & Alexander Grant eds., 3d ed. 1916); JOLOWICZ & NICOLAS, *supra* note 20, at 259–63 (discussing the possessory interdicts).

27. Joshua Castellino & Steve Allen, *The Doctrine of Uti Possidetis: Crystallization of Modern Post-Colonial Identity*, 43 GERMAN Y.B. INT'L L. 205, 205 (2000).

28. John Bassett Moore, *Memorandum on Uti Possidetis: Costa Rica-Panama Arbitration 1911*, in THE COLLECTED WORKS OF JOHN BASSETT MOORE 328, 328 (1944).

29. In the late Republic, the *Praetor Urbanus* was responsible for the administration of *jus civile* and the *Praetor Peregrinus* held the same position with regard to *jus gentium*. See MUIRHEAD, *supra* note 26, at 219.

30. See W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 205–08 (3d ed. 1963). This passage also discusses the extent to which *res nullius* can come under private ownership through *occupatio*, or occupation. See *id.*

31. See JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS 5 (2003).

32. See JOLOWICZ & NICOLAS, *supra* note 20, at 259 n.2; MUIRHEAD, *supra* note 26, at 315–39.

These restrictions on the acquisition of property by prescriptive claims were generally developed to ensure that the *de facto* possessor exercised his or her claim to the property as of right, and was thereby open to challenge by other interested parties.<sup>33</sup>

In contrast, the principle of *terra nullius* has limited contemporary significance.<sup>34</sup> Initially employed to designate territory that was empty and

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33. See BUCKLAND, *supra* note 30, at 205–08.

34. The doctrine of *uti possidetis juris* has been referred to as recently as 1992 in the Badinter Commission's treatment of the disintegration of Yugoslavia. See Matthew C.R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333 (1995); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992). Moreover, *uti possidetis juris* has continued salience in the ICJ's docket of contentious cases. See Territorial and Maritime Dispute (Nicar. v. Colom.) (Dec. 13, 2007), available at <http://www.icj-cij.org/docket/files/124/14305.pdf> (last visited Feb. 5, 2008); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.) (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008); Frontier Dispute (Benin/Niger), 2005 I.C.J. 90 (July 12); Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El. Sal. v. Hond.), 2002 I.C.J. 392 (Dec. 18); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2001 I.C.J. 575 (Oct. 23); Kasikili/Sedudu Island (Bots./Namib.), 1999 I.C.J. 1045 (Dec. 13); Request for Interpretation of Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nig. v. Cameroon) 1999 I.C.J. 31 (Mar. 25); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea intervening), 1998 I.C.J. 275 (June 11); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 1994 I.C.J. 112 (July 1); Territorial Dispute (Libya/Chad), 1994 I.C.J. 6 (Feb. 3); Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14); Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), 1992 I.C.J. 351 (Sept. 11); Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12); Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554 (Dec. 22); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libya), 1985 I.C.J. 192 (Dec. 10); Continental Shelf (Libya/Malta), 1985 I.C.J. 13 (June 3); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246 (Oct. 12); Continental Shelf (Tunis./Libya), 1982 I.C.J. 18 (Feb. 24); Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3 (Dec. 19); Fisheries Jurisdiction (F.R.G. v. Ice.), 1973 I.C.J. 56 (Feb. 3); Fisheries Jurisdiction (U.K. & N. Ir. v. Ice.), 1973 I.C.J. 3 (Feb. 2); North Sea Continental Shelf (F.R.G./Den.), 1969 I.C.J. 3 (Feb. 20); North Sea Continental Shelf (F.R.G./Neth.), 1969 I.C.J. 3 (Feb. 20); Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15 (Dec. 2); South West Africa (Eth. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21); South West Africa (Liber. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21); Temple of Preah Vihear (Cambodia v. Thai.), 1961 I.C.J. 17 (May 26); Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18); Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209 (June 20); Right of Pas-



therefore free for colonization,<sup>35</sup> *terra nullius* gradually took on racist overtones.<sup>36</sup> In 1975, the ICJ applied *terra nullius* to a territory in which the people who inhabited it were not “socially and politically organized.”<sup>37</sup> The ICJ provided legal sanction to a radically expanded definition of *terra nullius*—from its original meaning as “blank territory,” to an understanding that encompassed territory that was not empty or void of inhabitants.

This broad definition of *terra nullius* served historically to legitimize the acquisition of large tracts of land throughout the nineteenth and early twentieth centuries and had a particularly adverse effect on indigenous

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sage over Indian Territory (Port. v. India), 1957 I.C.J. 125 (Nov. 26); *Minquiers and Ecrehos* (Fr./U.K.), 1953 I.C.J. 47 (Nov. 17); *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); *Dispute Regarding Navigational and Related Rights of Costa Rica on the San Juan River* (Costa Rica v. Nicar.) (Application Instituting Proceedings) (Sept. 29, 2005), available at <http://www.icj-cij.org/docket/files/133/8268.pdf> (last visited Feb. 5, 2008); *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.) (Application Instituting Proceedings) (Sept. 16, 2004), available at <http://www.icj-cij.org/docket/files/132/1697.pdf> (last visited Feb. 5, 2008); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malay./Sing.) (Special Agreement) (July 24, 2003), available at <http://www.icj-cij.org/docket/files/130/1785.pdf> (last visited Feb. 5, 2008); *Maritime Delimitation Between Guinea-Bissau and Senegal* (Guinea-Bissau v. Sen.) (Application Instituting Proceedings) (Mar. 12, 1991), available at <http://www.icj-cij.org/docket/files/85/6843.pdf> (last visited Feb. 5, 2008); *Antarctica* (U.K. v. Chile) (Application Instituting Proceedings) (Mar. 16, 1956), available at <http://www.icj-cij.org/docket/files/27/10783.pdf> (last visited Feb. 5, 2008); *Antarctica* (U.K. v. Arg.) (Application Instituting Proceedings) (May 4, 1955), available at <http://www.icj-cij.org/docket/files/26/9065.pdf> (last visited Feb. 5, 2008).

The principle of *terra nullius* has had continued significance in the limited context of ownership of the Antarctic and outer space. See Philip C. Jessup & Howard J. Taubenfeld, *Outer Space, Antarctica, and the United Nations*, 13 INT'L ORG. 363, 363 (1959) (“Such is the case with both Antarctica and with outer space. In both instances the absence of an indigenous population and the present inability to exploit what might be called natural resources serve to distinguish them from historical examples like that of Africa in the nineteenth century.”); Friedrich Kratochwil, *Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System*, 39 WORLD POL. 27 (1986) (discussing how resource regimes created by the Antarctic Treaty carefully avoided territorial issues between states laying claim to the land); Peter A. Toma, *Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic*, 50 AM. J. INT'L L. 611 (1956) (“[N]otably after the second World War, claims and counterclaims to sovereignty over these bleak lands have been numerous.”).

35. See Tomáš Bartoš, *Uti Possidetis. Quo Vadis?* 18 AUSTL. Y.B. INT'L L. 37, 44 (1997).

36. See CASTELLINO & ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 230–33.

37. *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 39 (Oct. 16).

communities.<sup>38</sup> Once land was acquired, boundary lines were drawn to demarcate ownership between settlers.<sup>39</sup> These boundaries were eventually recognized as territorial demarcations on the basis of which valid statehood—and its accompanying right of territorial integrity—could be awarded.<sup>40</sup> The system was then buffered from change in a period of transition by the doctrine of *uti possidetis juris*, which sought to maintain order by freezing the boundaries.<sup>41</sup>

The cumulative effect of the two doctrines of *terra nullius* and *uti possidetis juris* has been to create rigid geographic entities in a relatively short period of time, within which dialogue based on ownership of territory had to be framed.<sup>42</sup> To validate and legitimize an acquisition, international law brings into play the intertemporal rule, which buffers actions committed in previous eras from the scrutiny of more modern norms and principles.<sup>43</sup> In this way, international law is precluded from raising legal questions and seeking self-correction with regard to the well-documented woes of colonialism.<sup>44</sup>

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38. See S.J. ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004) (locating the position of indigenous peoples within international legal discourse). See, e.g., Michael Asch, *From Calder to Van Der Peet: Aboriginal Rights and Canadian Law, 1973–96*, in *INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA & NEW ZEALAND* 428 (Paul Havemann ed., 1999) (examining the impact of case law and legislation concerning indigenous people in Canada); Willem Assies, *Indigenous Peoples and Reform of the State in Latin America*, in *THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLES AND REFORM OF THE STATE IN LATIN AMERICA* 15 (Willem Assies, Gemma van der Haar & André J. Hoekema eds., 1998) (examining cases studies concerning indigenous peoples in South America).

39. See C.H. Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century*, in *AFRICAN INTERNATIONAL LEGAL HISTORY* 27 (A.K. Mensah-Brown ed., 1975) (illustrating this process in the African context).

40. See, e.g., *PARTITIONED PEOPLES: RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES 1884–1984* (A.I. Asiwaju ed., 1985) (examining the implication of territorial divisions on African identities and nations).

41. See Bartoš, *supra* note 35, at 41 (“The essence of *uti possidetis* is to secure respect for the territorial boundaries of a newly independent State at the moment when independence from a colonial power is achieved.”).

42. See Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, *supra* note 22 (discussing the impact of the doctrine on state creation); Ravi L. Kapil, *On the Conflict Potential of Inherited Boundaries in Africa*, 18 *WORLD POL.* 656 (1966); Jesse S. Reeves, *International Boundaries*, 38 *AM. J. INT'L L.* 533 (1944).

43. See CASTELLINO & ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 234–35.

44. See EDWARD McWHINNEY, *CONFLICT AND COMPROMISE: INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE* 26–27, 65–66 (1981) (discussing self-correction in the context of territoriality in international law and the *Western Sahara Case*). See also ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND*

The international regime was reinforced by domestic legal regimes. Laws governing private property were simply not extended to annexed territories.<sup>45</sup> An infamous statement by Winston Churchill in 1937 captures the phenomenon in relation to the Palestinian claim to land:

I do not agree that the dog in a manger has the final right to the manger even though he may have lain there for a very long time. I do not admit that right. I do not admit for instance, that a great wrong has been done to the Red Indians of America or the black people of Australia. I do not admit that a wrong has been done to these people by the fact that a stronger race, a higher-grade race, a more worldly wise race to put it that way, has come in and taken their place.<sup>46</sup>

The statement reflects the racist underpinnings of the colonial impulse, which was justified by recourse to law and artificially created title deeds.<sup>47</sup>

Objective analyses of the temporal rule demonstrate that rigid application of the rule effectively precludes domestic courts from resolving questions over native titles<sup>48</sup> and reduces the principle into the hand-

NEGOTIATING HISTORICAL INJUSTICES (John Hopkins Univ. Press 2001) (2000); KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW (1966) (documenting the laws that governed the Anglophone territories); William J. Aceves, *Actio Popularis: The Class Action in International Law*, U. CHI. LEGAL F. 353 (2003); William Bradford, "With a Very Great Blame on Our Hearts": *Reparations, Reconciliation, and an American Indian Plea for Peace With Justice*, 27 AM. INDIAN L. REV. 1 (2002); Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619 (2001) (showing the difficulty of achieving reconciliation in the American Indian context); Byoungwook Park, *Comfort Women During World War II: Are U.S. Courts a Final Resort for Justice?*, 17 AM. U. INT'L L. REV. 403 (2002) (analyzing the possibility of raising such issues before American courts); World Conference Against Racism (Aug. 31, 2001–Sept. 7, 2001), <http://www.un.org/WCAR> (discussing reparations for racial discrimination).

45. See CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 229–38.

46. Arundhati Roy, Lannan Reading and Conversation: Come September (Sept. 18, 2002) (quoting Winston Churchill's statement in 1937), *transcript available at* <http://www.lannan.org/docs/arundhati-roy-020918-trans-read.pdf>. An early discussion concerning the treatment of native indigenous populations in the Americas arose and has been referred to as the Las Casas-Sepúlveda Controversy (1550–1551). See JEAN-CLAUDE CARRIÈRE, THE CONTROVERSY OF VALLADOLID (Richard Nelson trans., Dramatist Play Service 2005) (capturing the issues in a play by Jean-Claude Carrière, which is set in a sixteenth-century Spanish monastery).

47. See CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 229–38.

48. See Taslim O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285 (1980). See generally Matthew Chapman, *Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection*, 26 ANGLO-AM. L. REV. 357 (1997); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Com-*

maiden of the imperial states and their global conquests, accentuating the need to reexamine the legal system that legitimized these practices.

The right to self-determination has engaged a wide range of jurists. However, despite the volumes written from various disciplinary perspectives, the right to self-determination remains an essentially contested right with several meanings attributable to it. Koskenniemi sought to distinguish “romantic self-determination” from “classical self-determination.”<sup>49</sup> However, even this broad-based analysis does not fully encompass the aspirations that the term conjures up, nor does it address the extent to which international law should play a role in catering to these aspirations. As a result, the more that is written about self-determination, the more it seems to evade consensus.

Most authorities agree that the right to self-determination derives from the Enlightenment era, where Jacobean followers saw the right to determine their collective destiny as an extension of the individual liberties each individual was assumed to have.<sup>50</sup> The right arguably came to prominence in international society through America’s declaration of independence from the British Crown and the rising up of the French Revolution under of the slogan of *liberté, égalité, fraternité* in the last few decades of the eighteenth century.<sup>51</sup>

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*parative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999) (discussing a legacy of conquest of various indigenous peoples).

49. See Koskenniemi, *supra* note 11, at 249–53. The “classical school” is based on patriotic values and on a Hobbesian reading of international society—where a nation is a collection of individuals linked by a decision undertaken through a specific process, yielding the fruit of a mechanism that would enable it to participate in the daily affairs of an entity. See *id.* at 249. On the other hand, the “romantic” or secessionist model views the nation as something more fundamental than merely a decision-making procedure. See *id.* at 250. It is therefore less concerned with procedural aspects of how popular will is expressed and more concerned with the objective to which this will is exercised and whether it pertains to an appropriate manifestation of an authentic community. See *id.*

50. See KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 91–109 (2002) (discussing the origin of the discourse). See also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992) (discussing the founding principles of self-determination in the context of democratic entitlement); Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3 (Catherine Brölmann, René Lefebvre & Marjoleine Zieck eds., 1993) (examining the doctrine in a modern and problematic context).

51. Franck, *The Emerging Right to Democratic Governance*, *supra* note 4 (illustrating the impact of the American declaration of independence on the doctrine of self-determination). See generally EDWARD DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY (1950) (regarding the American Revolution); THE FRENCH IDEA OF FREEDOM: THE OLD REGIME AND THE DECLARATION OF RIGHTS OF 1789 (Dale Van Kley ed., 1994) (discussing the French Revolution).

Inspired by these events, the Creoles sought to forge independent states out of the administrative territories created under Spanish and Portuguese rule in South America.<sup>52</sup> In severing their ties to Madrid and Lisbon, the Creoles established the basis for the modern states of Latin America, and unwittingly contributed to the creation of a model that would henceforth be used in decolonization.<sup>53</sup>

In the aftermath of World War I, U.S. President and former professor of political science Woodrow Wilson resuscitated the right to self-determination, suggesting that it would be a useful indicator for recognizing the democratic consent of smaller entities and nations.<sup>54</sup> He determined the will of the people through a string of plebiscites in territories whose fates remained in the balance after the defeat of the Austro-Hungarian and Ottoman empires.<sup>55</sup>

Subsequently, self-determination reemerged on the international stage in yet another guise during the period of decolonization. Despite use of the term in the U.N. Charter<sup>56</sup> and the strength of two particularly

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52. See HERMAN G. JAMES & PERCY A. MARTIN, *THE REPUBLICS OF LATIN AMERICA* 79–109 (1923) (explaining the Creole motivations in seeking independence). See also *WHAT JUSTICE? WHOSE JUSTICE? FIGHTING FOR FAIRNESS IN LATIN AMERICA* (Susan Eva Eckstein & Timothy P. Wickham-Crowley eds., 2003) (providing a contemporary take on the success of the Creole motivations).

53. JAMES & MARTIN, *supra* note 52 at 79–109 (discussing the modalities of this change and the impact on future decolonization processes).

54. See SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 135–78 (1996).

55. See WOODROW WILSON, *THE NEW DEMOCRACY: PRESIDENTIAL MESSAGES, ADDRESSES, AND OTHER PAPERS* (1913–1917) (Ray Stannard Baker & William E. Dobbs eds., 1926); Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 *INT'L & COMP. L.Q.* 99 (1994).

56. See U.N. Charter art. 1(2) (“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace . . .”). In addition, article 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

strongly worded General Assembly resolutions,<sup>57</sup> the meaning of self-determination remained contested<sup>58</sup> until General Assembly Resolution 1541 (XV).<sup>59</sup> The General Assembly explained that self-determination was a decolonization process that could result in: (1) secession of a territory to form a new state; (2) association of a territory with an existing state; or (3) integration of a territory into an already existing state.<sup>60</sup> As a result, self-determination became the vehicle of choice for the decolonization process, even though it treated an emerging unit's territory as co-extensive with boundaries established during colonial rule.<sup>61</sup>

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c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Id.* art. 55.

57. See G.A. Res. 1514 (XV), at 67, U.N. Doc. A/4684 (Dec. 14, 1960) ("All people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.") [hereinafter G.A. Res. 1514 (XV)]; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter G.A. Res. 2625 (XXV)].

58. See Koskenniemi, *supra* note 11. See also DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION (2002) (providing a more thorough and contemporary analysis of self-determination).

59. See G.A. Res. 1541 (XV), U.N. Doc. A/Res/1541 (XV) (Dec. 15, 1960) [hereinafter G.A. Res. 1541 (XV)]. G.A. Res. 1541 (XV) was adopted at the 15th session of the U.N. General Assembly as a companion resolution to G.A. Res. 1514 (XV). *Id.* See also W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 115–28 (1977) (discussing the resolutions).

60. See G.A. Res. 1541 (XV), *supra* note 59, at 29. See also G.A. Res. 2625 (XXV), *supra* note 57, at 124 ("The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."). See also RUPERT EMERSON, SELF-DETERMINATION REVISITED IN THE ERA OF DECOLONIZATION 28–30 (Harvard Univ. Occasional Papers in International Affairs, No. 9, 1964) (discussing G.A. Res. 1514). See generally U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (prepared by Héctor Gros Espiell) (commenting on self-determination within the U.N.); U.N. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/Rev.1 (1981) (prepared by Aureliu Cristescu) (commenting on self-determination within the U.N.).

61. See G.A. Res. 1541 (XV), *supra* note 59, at 19. See generally G.A. Res. 1514 (XV), *supra* note 57, at 67 ("[A]ll peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory . . ."); G.A.

The right to self-determination was transformed from an indicator of political process to a right in law when it was included as the foundational right in article 1 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR").<sup>62</sup> However, despite this primacy, the land rights ownership component was not made explicit.<sup>63</sup>

The inclusion of the right to self-determination in the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations further reflected the ascent of self-determination in public international law.<sup>64</sup> Many classify the right to self-determination as a norm of *jus cogens*, even though the phrasing of the Declaration itself clearly limits application of the doctrine to decolonization, with certain other caveats over territorial integrity that leave the real application relatively ambiguous.<sup>65</sup>

Despite these points of consensus, vital questions remain: (1) whether the right to self-determination has any validity in post-colonial international society;<sup>66</sup> (2) who is entitled to claim a right to self-determination;

Res. 2625 (XXV), *supra* note 57, at 123 ("[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of this Charter.").

62. See International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

63. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE 14-16* (1991) (discussing the initial reluctance to accept self-determination as a legal rather than a political right due to its vague and undefined nature). See generally SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* (2000).

64. See G.A. Res. 2625 (XXV), *supra* note 57, at 123. See also Ian Sinclair, *The Significance of the Friendly Relations Declarations*, in *THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST* 1 (Vaughan Lowe & Colin Warbrick eds., 1994) (explaining the importance of the 1970 Declaration); Patrick Thornberry, *The Principle of Self-Determination*, in *THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST* 175 (Vaughan Lowe & Colin Warbrick eds., 1994) (giving insight into the inclusion of self-determination as one of the identified principles).

65. See G.A. Res. 2625 (XXV), *supra* note 57. See generally Sinclair, *supra* note 64 (explaining the importance of the 1970 Declaration).

66. "Colonization" appears to refer to European subjugation of non-European peoples. "Decolonization" is therefore the process whereby European countries ceded this dominance over non-European peoples. These concepts, narrowly defined, do not directly extend to the context of indigenous peoples. See F. VAN LANGENHOVE, *THE QUESTION OF*

and (3) how the legal norm may need to be tempered to the political realities.<sup>67</sup>

## II. THE THEORY AND LAW GOVERNING THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW

To understand the legal framework governing the acquisition of territory, it is worthwhile to recall the historical antecedents fundamental to the development of *jus gentium*, or the law of nations, itself.<sup>68</sup> In assessing Greek and Roman contributions to the development of international law, MacIver stated in 1926:

The Greeks made very important advances in the science of law, but they never attained to the consistent doctrine or the logical practice which the Romans built up. To begin with, they did not possess . . . a term corresponding to the Roman *ius*, the ordered system of which an individual *lex* is merely an example. . . . Moreover, the universality of law was far from being recognized. . . . The idea that law has a common application to all persons within a political territory was alien to the Greeks. The idea of a universal *ius gentium* was not yet born.

...

It was Rome that liberated the universality of law, that transcended the sophistic antithesis between nature and convention, and that first embodied in one comprehensive and unified code the distinctive order of the state.<sup>69</sup>

For MacIver, the first real departure point for the emergence of *jus gentium* occurred when Rome liberated itself from the famous Twelve Tablets.<sup>70</sup> While Rome may have premised the liberation on the need to preserve the special rights of Roman citizens in distinction to aliens,<sup>71</sup> the

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ABORIGINES BEFORE THE UNITED NATIONS: THE BELGIAN THESIS (1954) (discussing the Belgian Thesis and its relation to indigenous peoples).

67. See CASTELLINO, *INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL "NATIONAL" IDENTITY*, *supra* note 15, at 43.

68. For a historical analysis of the development of international law in the context of title to territory, see GEORG SCHWARZENBERGER, *1 INTERNATIONAL LAW* 289–309 (3d ed. 1957) and GEORG SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 43–59 (1962).

69. R.M. MACIVER, *THE MODERN STATE* 103–05 (1926).

70. See MUIRHEAD, *supra* note 26, at 89–97. The Twelve Tablets were inscribed in stone as the first form of codified Roman law after a study of the laws of Greece and Greek cities of Italy. *See id.* at 89–90. They became the basis of *jus civile* in Rome and were applicable to all Roman citizens. *See id.* at 82.

71. See MACIVER, *supra* note 69, at 106.



principles under the jurisdiction and judgment of the *Praetor Peregrinus* gradually took on a complexity that made them superior in many respects to *jus gentium*.<sup>72</sup> However, like much colonial law, *jus gentium* developed in the intellectual circles of the capital and was accepted as universal simply by virtue of its having been so deemed.<sup>73</sup>

It is important to understand these origins of *jus gentium* in order to understand the doctrines that have subsequently become fundamental constraints governing the treatment of territory under international law. These doctrines originated in a distinct cultural context that is not the same in all the diverse communities across the globe. As a result, the doctrines inevitably fail to take into account complexities that are particularly germane to notions of identity and territory. *Oppenheim's International Law* highlights the lack of unanimity among members of the international community vis-à-vis the modes of territorial acquisition. This, however, is attributed to the fact that the concept of state territory has changed considerably from the times of Grotius, through the Middle Ages, and to contemporary society.<sup>74</sup> Therefore:

[T]he acquisition of territory by a state normally means the acquisition of *sovereignty* over such territory. In these circumstances the Roman law scheme of "modes" concerning the acquisition of private property are no longer wholly appropriate.<sup>75</sup>

Irrespective of the distinction between historical acquisition of territory—based more on private modes of acquisition—and contemporary acquisition of territory—occurring under greater international scrutiny—the modes of acquisition remain the same in the annals of public international law.<sup>76</sup>

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72. *See id.* at 107.

73. *See id.* at 106; Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century*, *supra* note 39, at 35–36, 61–63. Also like the colonial law that was to follow in later centuries, distinctions were made between the rights of citizens and the rights of subjects. *See id.* Perhaps the most explicit example of these distinctions concern the system of capitulations that were put in place to safeguard the rights of citizens of the metropolitan states (i.e., the colonizing state) when working abroad. *See id.*

74. OPPENHEIM'S INTERNATIONAL LAW, PEACE 678–79 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM'S INTERNATIONAL LAW, PEACE].

75. *Id.* at 679.

76. *See* IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPAEDIA* (1979) (providing an authoritative and comprehensive view of the theory and practice behind the acquisition of African territory and boundaries in public international law). Compared to territorial acquisition, territory can be lost through six modes—the corresponding five modes of acquisition and, in addition, the loss of territory

- (1) Cession: A state acquires territory through transfer of sovereignty by the "owner state;"<sup>77</sup>
- (2) Occupation: A state appropriates territory over which another state is not sovereign;<sup>78</sup>
- (3) Accretion: A state acquires territory through natural or artificial formations, without violating another state's sovereignty;<sup>79</sup>
- (4) Subjugation: A state acquires territory through conquest and subsequent annexation, where war-making is a sovereign right, and not illegal;<sup>80</sup>

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through revolt or dereliction. *See also* OPPENHEIM'S INTERNATIONAL LAW, PEACE, *supra* note 74, at 716–18.

77. *See* JENNINGS, *supra* note 10, at 16–19; J.H.W. VERZIJL, 3 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 11–13 (1970). *See also* OPPENHEIM'S INTERNATIONAL LAW, PEACE, *supra* note 74, at 679–82 (explaining that cession may take different forms, including the sale of territory, as occurred in Alaska in 1867 and the Danish West Indies in 1916). One example of a cession is the giving of Bombay by the Portuguese to the British in 1661 as part of the dowry of Catherine of Braganza, who married Charles II. *See* Anthony Farrington, *Trading Places: The East India Company and Asia*, 52 HIST. TODAY 40, 40 (2002).

78. *See generally* ARTHUR S. KELLER, OLIVER J. LISSITZYN & FREDERICK J. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400–1800 (1938); NORMAN HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 146–49 (1944).

79. *See* OPPENHEIM'S INTERNATIONAL LAW, PEACE, *supra* note 74, at 696–98. Accretion would include the construction of embankments, breakwaters, and dykes while also covering the augmentation of territory through natural processes such as alluvions, deltas, emerging islands, and abandoned river beds. *Id.*

80. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112–22 (1963). *See also* Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El. Sal. v. Hond.), 2002 I.C.J. 392 (Dec. 18) (illustrating a modern revision claim based on avulsion). El Salvador's revision claim was based on the avulsion of the river Gaoscorán, in addition to the Carta Esférica and the report of the 1794 *El Activo* expedition. *Id.* at 401. To open revision proceedings, all the conditions contained in article 61 of the Statute of the ICJ need to be fulfilled. *See* Statute of the International Court of Justice art. 61, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933. The application must be based on "discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown . . . not due to negligence." *Id.* art. 61(1). In addition, the application must be made within six months after the new fact is discovered and within ten years after the original judgment. *Id.* art. 61(4)–(5). In the application for revision of the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the Chamber found that El Salvador's request for revision did not satisfy the conditions set down in article 61 on the basis that the facts alleged were not new facts in the sense intended by article 61. Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the

(5) Prescription: A state acquires territory through continuous and undisturbed exercise of sovereignty over the territory.<sup>81</sup>

Of these modes of acquisition, the two that merit further discussion in terms of the doctrinal tools governing territoriality—especially in examining the nexus between self-determination and territoriality—are occupation and subjugation.

“Occupation,” as discussed in this context, is considered an original mode of acquisition, and is therefore different from the mode whereby a state takes control of a territory by military force.<sup>82</sup> Rather, occupation must be performed by the state while serving a state function, or the state must acknowledge the act upon performance.<sup>83</sup> Occupation has two essential elements: possession and administration.<sup>84</sup> First, the territory in question must be *terra nullius*, or unoccupied by a state, at the moment of possession.<sup>85</sup>

The only territory which can be the object of occupation is that which does not already belong to any state, whether it is uninhabited, or inhabited by persons whose community is not considered to be a state; for individuals may live on a territory without forming themselves into

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El. Sal. v. Hond.), 2002 I.C.J. at 409–11.

81. See OPPENHEIM'S INTERNATIONAL LAW, PEACE, *supra* note 74, at 705–08 (reflecting the views of leading international jurists in the historical evolution of this concept).

82. See *id.* at 686–87. Interestingly, the discussion of occupation during times of war is contained in an altogether separate volume of these legal annals. See OPPENHEIM'S INTERNATIONAL LAW, DISPUTES, WAR AND NEUTRALITY (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

83. OPPENHEIM'S INTERNATIONAL LAW, PEACE, *supra* note 74, at 687.

84. *Id.* at 688. “Real” occupation is differentiated from “fictitious” occupation with the former labeled “effective” occupation. *Id.*

85. The possession element is reflected in recent Australian case law. See, e.g., *Mabo v. Queensland II* (1992), 175 C.L.R. 1 (Austl.) (discussing the status of Australian territory and its relationship to the aboriginal populations that lived on it at the time of colonization, in the specific context of a case raised by Eddie Mabo). The reasoning in this case was central to the overturning of 200 years of precedent. See ESSAYS ON THE *MABO* DECISION (1993); Julie Cassidy, *Observations on Mabo & Ors v. Queensland*, 1 DEAKIN L. REV. 37 (1994); Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387, 408–10 (2002) (capturing a discussion that began when the U.N. Committee for the Elimination of Racial Discrimination took objection to Australia's Native Title Act); Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1204–05 (1993) (providing an analysis of the impact of the *Mabo* decision); Gerry Simpson, *Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence*, 19 MELB. U. L. REV. 195 (1993). See also PETER BUTT & ROBERT EAGLESON, *MABO, WIK & NATIVE TITLE* (3d ed. 1998) (1993) (providing a plain English explanation of the court's reasoning).

a state proper exercising sovereignty over such territory. The territory of any state however is obviously not a possible object of occupation; and it can only be acquired through cession or, formerly, by subjugation.<sup>86</sup>

Thus, individuals may live on a territory without organizing themselves into proper states that exercise sovereignty over the territory. Therefore, the relatively objective criterion concerning occupation, i.e., *terra nullius*, has been altered by a subjective element that considers the kind of social and political organization that may exist within a territory. This reading of the doctrine of occupation has dominated cases concerning territoriality in international law. For example, in the *Western Sahara Case*, the ICJ determined that the Saharawis were not “socially and politically organized,”<sup>87</sup> and therefore were not occupants of the western part of the Sahara.<sup>88</sup>

Even when possession by the occupying state has been recognized, the occupying state must also establish administration over the entire territory.<sup>89</sup> Thus, for an occupation to be an effective title-generating acquisition, “it is necessary that . . . [the occupying state] should take the territory under its sway (*corpus*) with the intention of acquiring sovereignty over it (*animus*).”<sup>90</sup> There must be some degree of settlement, accompanied by a formal act that announces the act of occupation and the determination to extend sovereignty over the territory.<sup>91</sup> The second element then flows from the first; the occupying state must establish a form of administration that reveals the occupying state’s exercise of sovereignty in the territory. The failure to extend administrative regimes over the territory would bring into question the effectiveness of the occupation and, in theory, would leave the territory open to acquisition by other sovereigns.<sup>92</sup>

In many circumstances, twentieth century colonial flags were raised over newly demarcated territories without effective control over all inhabitants,<sup>93</sup> and thus acquisition of inhabited territory based on a subjec-

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86. OPPENHEIM’S INTERNATIONAL LAW, PEACE, *supra* note 74, at 687 (internal citations omitted).

87. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 39 (Oct. 16).

88. *See id.* at 83–102 (separate opinion of Judge Ammoun).

89. OPPENHEIM’S INTERNATIONAL LAW, PEACE, *supra* note 74, at 688–89.

90. *Id.* at 689. This notion itself derives directly from the Roman law governing private property. *See generally* W.W. BUCKLAND & A. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON OUTLINE 70 (2d ed. 1952).

91. OPPENHEIM’S INTERNATIONAL LAW, PEACE, *supra* note 74, at 689.

92. *See id.*

93. *See* KORMAN, *supra* note 54, at 41–66 (discussing the rights of so-called European states and “barbarian” political communities.). Robert Jackson has advanced a simi-

tive determination of the inhabitants' society was compounded by a failure to respect the conditions necessary to generate titular or possessory rights. While it could be argued that the colonization of Africa and, to a lesser extent, of Asia<sup>94</sup> occurred in the shadow of the dubious rule adopted by the Berlin West Africa Congress of 1899, which permitted claims to contiguous territories based on possession of the coast, the action in the Americas clearly predates this rule.<sup>95</sup>

Subjugation, the other principal means of acquisition, occurs through conquest and subsequent acquisition, where war is a sovereign right. To acquire a territory through subjugation: (1) the conquering power must establish conquest, (2) the state of war must have ended, and (3) the conquering power must formally annex the territory.<sup>96</sup> This method of acqui-

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lar point in a more contemporary context, suggesting that many states in Africa could be considered quasi-states on very similar grounds. See Robert Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 J. INT'L AFF. 17 (1992). Jackson's work on this issue in the context of the African state was controversial. See GROVOGUI, *supra* note 19, at 182-84. However, it has salience in terms of indigenous peoples who live in isolation and are therefore only notionally subjects of the territorial states that claim jurisdiction over them. The classic examples of this are the indigenous peoples in the Amazon. See Gavney Moore & Maria Carmen Lemos, *Indigenous Policy in Brazil: The Development of Decree 1775 & the Proposed Raposa/Serra do Sol Reserve, Roraima, Brazil*, 21 HUM. RTS. Q. 444 (1999); Maria G. M. Rodrigues, *Indigenous Rights in Democratic Brazil*, 24 HUM. RTS. Q. 487 (2002).

94. For a treatise on the colonization of Asia, see HARRY G. GELBER, *NATIONS OUT OF EMPIRES: EUROPEAN NATIONALISM AND THE TRANSFORMATION OF ASIA* (2001) (linking the events taking place in Europe with their impact in Asian colonization and concluding with some well thought-out ironies).

95. See *infra* notes 77-79 and accompanying text. See also THE SCRAMBLE FOR AFRICA: DOCUMENTS ON THE BERLIN WEST AFRICAN CONFERENCE AND RELATED SUBJECTS 1884/1885 (R.J. Gavin & J.A. Betley eds., 1973); Antony Allott, *Boundaries in Africa: A Legal and Historical Survey*, in *AFRICAN INTERNATIONAL LEGAL HISTORY* 69 (A.K. Mensah-Brown ed., 1975).

96. OPPENHEIM'S INTERNATIONAL LAW, PEACE, *supra* note 74, at 699. Subjugation is explained as follows:

At no period did conquest alone and *ipso facto* make the conquering state the territorial sovereign of the conquered territory, even though such territory came through conquest for the time being under the sway of the conqueror. Conquest was a mode of acquisition only if the conqueror, after having firmly established the conquest, and the state of war having come to an end, then formally annexed the territory. If a belligerent conquered part of the enemy territory and afterwards made the vanquished state cede the conquered territory in the treaty of peace the mode of acquisition was not subjugation but cession. Such a treaty of cession, however, would now be qualified by article 52 of the Vienna Convention on the Law of Treaties . . . .

*Id.* (internal citations omitted).

sition predominated in Latin America, but was not otherwise frequently employed. Title by subjugation was rare because the conquering power typically enforced a treaty of cession and article 10 of the League of Nations Covenant outlawed war waged for territorial acquisition.<sup>97</sup> While not suggesting that wars occurring before the passage of article 10 of the League of Nations Covenant were legal,<sup>98</sup> many jurists appear to assume that such events are beyond blame since they are subject to the intertemporal rule of law.<sup>99</sup> Although the tendency to borrow principles from domestic law has pervaded and developed much of international law,<sup>100</sup> respect for property, central to property law regimes in colonial states, was not extended to cover the acquisition of territories beyond the metropolitan state.<sup>101</sup> It has been suggested that the signing of treaties ceding subjugated territories would only now be qualified by article 52 of the Vienna Convention on the Law of Treaties, which invalidates any treaty produced through the threat or use of force in violation of international law.<sup>102</sup>

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97. *Id.* See also League of Nations Covenant art. 10.

98. See Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 589 (Malcolm D. Evans ed., 2d ed. 2006). See generally CHRISTINE GRAY, INTERNATIONAL LAW & THE USE OF FORCE 24–50 (2000).

99. Literature on international law is surprisingly silent on the aftermath of colonization. While there are considerable sources that comment on the self-determination aspect of this process, very few seek to examine the impact of this principle on the domestic polities created. This is perhaps justifiable because it is a greater concern for human rights literature. However, even a glance at the index pages of human rights journals shows that relatively scant attention is paid to the extent to which effective political participation, or true decolonization, has actually occurred within post-colonial states. In sharp contrast, in the 1960s international society scrutinized decolonization almost as intensely as the current development of modern international criminal law.

100. See *infra* Part III.A (discussing the injection of *jus civile* principles into *jus gentium* in the context of the origins of the doctrine of *uti possidetis juris*).

101. See generally CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 29–56. It could be argued that the development of domestic property regimes, along with international law principles as framed here, would have prevented the acquisition of territory through wars. If such wars were nonetheless waged, any unequal or unfair treaties of cession would be similarly invalidated based on domestic contract law, which frames the laws governing treaties.

102. See Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331. Article 52 of the Vienna Convention on the Law of Treaties is titled “Coercion of a State by Threat or Use of Force,” and states: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embedded in the Charter of the United Nations.” *Id.* In the context of colonization, colonial powers could argue that the entity coming under colonization was not a state, and therefore beyond the remit of such protection. However, this defense, and the argument that the Vienna Convention of 1969 differs from the standard prevailing at the

### III. THE EMERGENCE AND IMPACT OF THE DOCTRINES OF *UTI POSSIDETIS JURIS* AND THE PRINCIPLE OF *TERRA NULLIUS*

Though the principle of *terra nullius* was derived from *jus gentium* and has been inscribed in the annals of international law, it came to prominence in the context of the European expansion into the Americas.<sup>103</sup> This episode in human history also contributed to the evolution of the doctrine of *uti possidetis juris*.<sup>104</sup> However, *uti possidetis juris* was borrowed from *jus civile* rather than *jus gentium*.<sup>105</sup> *Uti possidetis juris* became the cornerstone of the right to self-determination in the aftermath of the Creole struggle, in which the Creoles, of European descent, sought Latin American emancipation from the aegis of colonial rule from Madrid and Lisbon.<sup>106</sup>

Alejandro Alvarez, writing in the early part of the last century, expressed the relationship between Europe and the states of the New World, while also revealing the racism that underpinned the project:

Europe is formed of men of a single race, the white; while Latin America is composed of a native population to which in colonial times was added in varying proportions an admixture of the conquering race and emigrants from the mother country, negroes imported from Africa, and the creoles, that is those born in America but of European parents. Out of this amalgamation of races (the aborigines, the whites, and the negroes, together with the creole element), the Latin-American continent presented an ethnical product which was no less peculiar than its physical environment. The resultant *colonial society* . . . is completely *sui generis*; in it the whites, born in the mother country, although in the minority, exercised the control and guided a multitude which was in great part illiterate and ignorant.<sup>107</sup>

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time of colonization, remain unconvincing in light of the intent of the drafters. See generally THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 361–69 (1978).

103. See generally BEATRIZ PASTOR BODMER, *THE ARMATURE OF CONQUEST: SPANISH ACCOUNTS OF THE DISCOVERY OF AMERICA 1492–1589* (Lydia Longstreth Hunt trans., Stanford Univ. Press 1992) (1983).

104. See CARLOS A. PARODI, *THE POLITICS OF SOUTH AMERICAN BOUNDARIES* 5–8 (2002) (outlining the genesis of the application of the doctrine to the Americas).

105. See Bartoš, *supra* note 35, at 39. See generally COLEMAN PHILLIPSON, *1 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 69–72 (1911) (explaining *jus civile* and *jus gentium*).

106. See generally MARIANO PICÓN-SALAS, *A CULTURAL HISTORY OF SPANISH AMERICA FROM CONQUEST TO INDEPENDENCE* (Irving A. Leonard trans., Univ. of Cal. 1962) (1944).

107. Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT'L L. 269, 271 (1909) (reflecting the prevalent attitudes of the time).

Nearly one hundred years later, the fault lines identified by Alvarez persist in the form of “preferential hiring and credit practices, racial profiling by law enforcement agencies and insufficient allocation of government resources in the public sector.”<sup>108</sup> With some important token exceptions in Brazil, Cuba, and Venezuela, the indigenous and African-American populations make up the poorest strata of the region’s national societies.<sup>109</sup> These populations grapple with limited access to key socioeconomic rights, such as education, health, and employment.<sup>110</sup> African-American populations are additionally disadvantaged because many emerging states fail to recognize them as distinct minorities.<sup>111</sup>

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108. See MAURICE BRYN, MINORITY RIGHTS GROUP INT’L, STATE OF THE WORLD’S MINORITIES 2007: EVENTS OF 2006, at 62 (2007).

109. See *id.* This is consistently recorded in state reports that are submitted to the Committee on the Elimination of Racial Discrimination (“CERD”) and the Human Rights Committee (“HRC”). See U.N. Comm. On the Elimination of Racial Discrimination [CERD], *Eighteenth Periodic Reports of States Parties Due in 2004: Venezuela*, U.N. Doc. CERD/C/476/Add.4 (Oct. 7, 2004) (regarding Venezuela); U.N. CERD, *Seventeenth Periodic Reports of States Parties Due in 2002: Brazil*, U.N. Doc. CERD/C/431/Add.8 (Oct. 16, 2003) (regarding Brazil); U.N. CERD, *Thirteenth Periodic Report of States Parties Due in 1997: Cuba*, U.N. Doc. CERD/C/319/Add.4 (Oct. 7, 1997) (regarding Cuba). See also U.N. CERD, *Concluding Observations of the Committee for the Elimination of Racial Discrimination: Venezuela*, U.N. Doc. CERD/C/VEN/CO/18 (Mar. 27, 2007); U.N. CERD, *Concluding Observations of the Committee for the Elimination of Racial Discrimination: Brazil*, U.N. Doc. CERD/C/64/CO/2 (Apr. 28, 2004) (reiterating CERD’s concern as expressed in its previous concluding observations of “the persistence of deep structural inequalities affecting black and mestizo communities and indigenous peoples”); U.N. CERD, *Concluding Observations of the Committee for the Elimination of Racial Discrimination: Cuba*, U.N. Doc. CERD/C/304/Add.60 (Feb. 10, 1999).

110. See BRYN, *supra* note 108, at 62.

111. See *id.* at 63 (“[T]his is essentially a reflection of their *de facto* invisibility as a population group.”). None of the national constitutions of Bolivia, Brazil, Mexico, Peru, Venezuela, Argentina, Chile, and Paraguay recognize African descendants living in America as distinct cultural groups. See *id.* Interestingly, the indigenous autonomous regime in Oaxaca, Mexico is one of the first to provide such recognition for the community, officially recognizing Afro-Mexicans as a distinct group. See generally Alejandro Anaya-Muñoz, *Multicultural Legislation and Indigenous Autonomy in Oaxaca, Mexico*, in INTERNATIONAL LAW AND INDIGENOUS PEOPLES 225 (Joshua Castellino & Niamh Walsh eds., 2005).

More recently, advocacy groups have made a concerted effort to push for such recognition, and there has been increased political participation. African-American groups are beginning to exert some pressure on governments to remedy the lack of recognition in Venezuela, Bolivia, Costa Rica, Ecuador, Honduras, and Peru. See BRYN, *supra* note 108, at 63. In 2002, Brazil appointed four Afro-Brazilian national ministers. *Id.* In 2004, three Afro-Peruvians were elected to the Congress of Peru. In 2005, Suriname voters elected eight Afro-descendant Maroon representatives, including three cabi-



European entry into South America was facilitated by the expanded understanding of *terra nullius* characteristic of the colonial era, which was premised on the notion that the indigenous peoples inhabiting the continent were not socially and politically organized.<sup>112</sup> However, in their attempted emancipation from European influence, the Creoles formed an intellectual élite.<sup>113</sup> The Creoles who struggled for the right to self-determination relied on their European values and education, and were inspired by eighteenth century philosophical writings.<sup>114</sup> This élite mobilized and took advantage of the setbacks to Spain in its bid for independence in the Napoleonic Wars.<sup>115</sup> In asserting and achieving their independence, the new Creole élite maintained that their actions were a natural consequence of their individual liberty, giving them the right to form sovereign states.<sup>116</sup> This "right" was distinguished from a struggle for civil liberties; in their eyes, the struggle was instead an act of international war.<sup>117</sup>

The Creole action does not really fit within the theoretical modes of acquisition described in the previous section. Rather, it could be argued that the Creole emancipation of South American territories was constituted under the norm of freedom from subjugation. No new territory was acquired; it was merely the ousting of a previous regime by its subjects.<sup>118</sup> The international law precedent was captured in *jus resistendi ac*

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net positions. *Id.* Afro-Ecuadorians have also gained more visibility in Ecuadorian politics. *Id.*

However, the risk of racial profiling remains high. *Id.* at 65–66. Moreover, there is significant incarceration of African-American populations across the region, *id.*, and incarcerated African-Americans are at higher risk of torture. *See, e.g., id.* (discussing a U.N. Special Rapporteur's report on torture in Brazilian prisons). *See also* U.N. ECOSOC, Comm'n on Hum. Rts., *Civil and Political Rights, Including the Questions of Torture and Detention*, U.N. Doc. E/CN.4/2001/66/Add.2 (Mar. 30, 2001) (prepared by Nigel S. Rodley). Furthermore, African-Americans are often more affected in times of conflict than the rest of the population. *See, e.g., id.* at 66–67 (explaining the effects of conflict in Colombia, Guyana, Trinidad, the Dominican Republic, and the Bahamas).

112. *See, e.g.,* Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16). *See also* CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 66–67; *supra* notes 37–38 and accompanying text.

113. *See* MARK A. BURKHOLDER & LYMAN L. JOHNSON, COLONIAL LATIN AMERICA 196 (3d ed. 1998).

114. *See generally id.* at 195–98 (discussing the Creole motivations).

115. *See* D.A. BRADING, CLASSICAL REPUBLICANISM AND CREOLE PATRIOTISM: SIMÓN BOLÍVAR (1783–1830) AND THE SPANISH AMERICAN REVOLUTION I (1983).

116. *See* Alvarez, *supra* note 107, at 274–75.

117. *See id.*

118. *See generally* PARODI, *supra* note 104 (outlining how the Creoles saw the need to create boundaries as a crucial part of the ousting of the old regime and the ushering in of the new).

*secessionis*, i.e., the right of resistance and the right of secession.<sup>119</sup> While it is questionable whether this principle provides an adequate basis for the Creole action, the Creole action must nevertheless be distinguished from the French Revolution, from which the Creoles drew inspiration.<sup>120</sup> While the French Revolution was a struggle to establish *liberté, égalité, fraternité* among all French subjects,<sup>121</sup> Latin American decolonization should be viewed as a triumph of territoriality over identity.<sup>122</sup> Further, this model of self-determination—rather than the French or American Revolutions, which are often touted as precursors of modern self-determination—truly became the *modus operandi* of modern decolonization.<sup>123</sup>

The doctrine of *uti possidetis juris* and the principle of *terra nullius* were invoked following the Creole emancipation as the newly emerging regimes sought to consolidate the territory within their jurisdiction, while sending out a clear message against *reconquista*.<sup>124</sup> The Creoles worked together to create a strong legal buttress against further European interest on the continent, despite two fundamental challenges: (1) the difficulty of boundary demarcation between the emerging states (the intracontinental threat to territory); and (2) the threat that parts of the territory that were not effectively occupied by the new sovereigns could fall prey to

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119. See NEUBERGER, *supra* note 25, at 4 (regarding *jus resistendi ac secessionis*).

120. See generally Alvarez, *supra* note 107, at 274–75 (discussing the Creole action).

121. See Joshua Castellino, *Liberty, Fraternity and Equality: The Dubious Fruits of "National" Self-Determination in International Law*, 1 TURKU L.J. 1 (1999) (discussing the relationship between the French Revolution and the international notion of self-determination). See generally EDMUND BURKE, *FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE* (Daniel E. Ritchie ed., 1992) (illustrating the guiding spirit of the French Revolution); Charles Tilly, *Revolutions and Collective Violence*, in 3 *HAND BOOK OF POLITICAL SCIENCE, METROPOLITICAL POLITICAL THEORY* 483 (Fred I. Greenstein & Nelson W. Polsby eds., 1975) (discussing what constitutes a revolution).

122. In the U.N. decolonization process, the closest triumph would be the attempt by the Ian Smith regime in Southern Rhodesia (precursor to the modern Zimbabwe) to seize power from the British. See also *In re Southern Rhodesia* [1919] A.C. 211 (P.C. 1918). The English Court of Appeals' application of *terra nullius* to indigenous peoples was based on the notion of native peoples that were "so low in the scale of social organization" that "it would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them." *Id.* at 234–34.

123. See generally A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION: A STUDY OF THE UNITED NATIONS PRACTICE* (1973).

124. That is, against being colonized again. See Alvarez, *supra* note 107, at 290, 310–12.

external interest and conquest (or the intercontinental threat to territory).<sup>125</sup>

*A. The Doctrine of Uti Possidetis Juris: A Sword Against Intra-Continental Territorial Rivalries*

In response to the first challenge, the newly emerging states sought to demarcate geographical boundaries within their constitutions, so they could rely on codified law in any subsequent challenge.<sup>126</sup> Through this process, it was believed that title could be extended to parts of the state that may or may not have been under effective control, but were believed to be integral to the new state. Fully aware that territorial disputes were likely to arise, the newly emerging states also attempted to create genuine cooperation among the new community of states in the form of regional defense and cooperation pacts.<sup>127</sup>

The adoption of the doctrine of *uti possidetis juris* was fundamental to these agreements in terms of understanding the territorial regimes that were inherited by the new sovereigns.<sup>128</sup> The Creole adoption of the doc-

125. *See id.*

126. *See* BURKHOLDER & JOHNSON, *supra* note 113, at 315–39 (detailing how this codification manifests itself in the context of each of the emerging states).

127. *See, e.g.,* Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), 1992 IC.J. 351, 357 (Sept. 11) (discussing the Constitution of El Salvador 1981); Charles G. Fenwick, *The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro*, 36 AM. J. INT'L L. 169, 183 (1942) (“[T]he Meeting of Foreign Ministers had been called primarily with the object of discussing practical measures to be taken for continental defense.”); Josef L. Kunz, *Guatemala vs. Great Britain: In re Belice*, 40 AM. J. INT'L L. 383 (1946) (discussing a treaty that established the frontiers between British Honduras and Guatemala in 1859); *The First Pan-American Scientific Congress*, 2 AM. POL. SCI. REV. 441, 442 (1908) (identifying territorial boundaries as one theme of the congress); William Manger, *The Pan American Union at the Sixth International Conference of American States*, 22 AM. J. INT'L L. 764 (1928).

128. The interim nature of this co-operation is particularly visible in the recent volume of cases concerning territoriality and contested boundary delimitations in the context of South America. *See* Territorial and Maritime Dispute (Nicar. v. Colom.) (Dec. 13, 2007), available at <http://www.icj-cij.org/docket/files/124/14305.pdf>; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.) (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008); Dispute Regarding Navigational and Related Rights of Costa Rica on the San Juan River (Costa Rica v. Nicar.) (Application Instituting Proceedings) (Sept. 29, 2005), available at <http://www.icj-cij.org/docket/files/133/8268.pdf> (last visited Feb. 5, 2008); Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El. Sal. v. Hond.), 2002 I.C.J. 392 (Dec. 18); Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), 1992 IC.J. 351 (Sept. 11); Arbitral Award

trine of *uti possidetis juris* in terms of international property resolved issues of *jus gentium* by recourse to a norm developed in *jus civile* that sought to arbitrate between individuals.<sup>129</sup> Thus, the notion of national territory was reduced to the realm of a contest between two individuals to private property. In a further misinterpretation of the original doctrine, the distinction between *uti possidetis de jure* and *uti possidetis de facto* was lost.<sup>130</sup> Under *jus civile*, disputed property was considered to be in the incumbent's *de facto* possession while a determination of the *de jure* claim to that property's title was undertaken.<sup>131</sup> Thus, *uti possidetis de facto* merely recognized the incumbent's actual possession of the property, which may or may not have been later deemed *uti possidetis de jure*, depending on the resolution of the dispute. Thus, *uti possidetis de facto* was merely a position in abeyance of the Roman *praetor's* final decision.<sup>132</sup>

The Creole adoption of the doctrine of *uti possidetis juris*, however, did not contain such a nuanced interpretation. Rather, it treated the territory within the inherited boundaries as being within the *de facto*, as well as *de jure*, possession of the new incumbent. In so doing, the doctrine established the all-important notion of the "critical date,"<sup>133</sup> which became the cut-off point that crystallized possession of a territory and determined the identity of its *de jure* possessor.<sup>134</sup> The critical date has be-

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Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18).

Cases over claims to the Antarctic by South American states, while not directly relevant, nonetheless show the extent to which these states envision the notion of territoriality. See *Antarctica (U.K. v. Chile) (Application Instituting Proceedings)* (Mar. 16, 1956), available at <http://www.icj-cij.org/docket/files/27/10783.pdf> (last visited Feb. 5, 2008); *Antarctica (U.K. v. Arg.) (Application Instituting Proceedings)* (May 4, 1955), available at <http://www.icj-cij.org/docket/files/26/9065.pdf> (last visited Feb. 5, 2008).

It is instructive to note that in each of the cases, the parties either explicitly or implicitly accepted the importance of the *uti possidetis juris* line. Indeed, it could be argued that the entrenchment of the doctrinal package in modern jurisprudence concerning territoriality derives from this large-scale acceptance of the application of the doctrine in times of transition.

129. See generally CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 29–89 (discussing Roman property regimes and the Creole action in Latin America).

130. See Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, *supra* note 22, at 100.

131. Ratner, *supra* note 22, at 592–93.

132. See Castellino & Allen, *The Doctrine of Uti Possidetis: Crystallization of Modern Post-Colonial Identity*, *supra* note 27, at 209.

133. For an early articulation of this principle, see L.F.E. Goldie, *The Critical Date*, 12 INT'L & COMP. L.Q. 1251 (1963).

134. Frontier Dispute (Burk. Faso v. Mali), 1996 I.C.J. 554, 586–87 (Dec. 22).

come a central feature in territorial disputes between states, and its modern interpretation follows the line first articulated by Judge Huber in *Island of Palmas (or Miangas) (United States v. Netherlands)*<sup>135</sup> nearly a century after its first use in Latin American decolonization:

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, conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical.<sup>136</sup>

When read in conjunction with the critical date—determined in the case of the Creole emancipation as the departure of the colonial ruler—the *de jure* title to the new territories was handed over to the new incumbents based on the administrative lines drawn by the departing colonial regimes. The new sovereign exercised sovereignty over the territory, and the claim of any aspirant sovereign was dismissed as being disruptive of the peace.<sup>137</sup> This constituted a clear deviation from the Roman law *diktat*, which merely estopped aspirant claims until they could be analyzed.<sup>138</sup> Instead, the doctrine of *uti possidetis juris* is more akin to the children's playground justice of "finder's keepers,"<sup>139</sup> or its more sophisticated legal sobriquet, "possession is nine-tenths of the law."<sup>140</sup>

The interpretation of the doctrine of *uti possidetis juris* in its current guise offers the international community a useful bulwark for the protection of order.<sup>141</sup> The ICJ and other judicial bodies<sup>142</sup> have consistently

135. *Island of Palmas (or Miangas) (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

136. *Id.* at 839. See also *Legal Status of the South-Eastern Territory of Greenland Case (Nor. v. Den.)*, 1932 P.C.I.J. (ser. A/B) No. 53 (Aug. 3) (an early interpretation illustrating the ICJ's subsequent articulation of the idea).

137. See JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 10.

138. See *id.*

139. See *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722) (the leading case on the "finder's keepers" rule).

140. See generally CHARLES C. CALLAHAN, *ADVERSE POSSESSION* (1961); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1919).

141. See BULL, *supra* note 2, at 4. Bull defines order as an arrangement of life that promotes given goals and values. Three goals essential to order are: (1) security against

used the doctrine in cases concerning territoriality. With its clear emphasis on maintaining the status quo, the doctrine of *uti possidetis juris* can be used to restrict conflict and consolidate *de facto* positions in a moment of transition or at the end of hostilities, even sanctifying them with the grant of territorial sovereignty.<sup>143</sup> The fate of territories can be judicially determined on the grounds of physical evidence of possession at the critical date, rather than on more complicated factors, such as contested histories, tribal affiliations, or social cohesion within a territorial unit.<sup>144</sup>

However, the inevitable result is that the critical date, usually an arbitrary point based on when the colonial ruler departed, becomes the determining factor for modern statehood,<sup>145</sup> even though the emerging state's territory may have been unified by a colonial power through the belligerent use of force for a limited period of time.<sup>146</sup> No flexibility is

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violence, (2) assurance that promises are maintained, and (3) stable possession of property. *See id.*

142. Most notably, the Badinter Arbitration Committee was first set up to arbitrate between the different Yugoslav Republics, but ended up as the body charged with the dissolution of the state. *See generally* STEVE TERRETT, *THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION* (2000); Peter Radan, *Secession and Self-Determination: The Case of Slovenia and Croatia*, 48 *AUSTL. J. INT'L L.* 183 (1994); Radan, *Post-Succession International Orders: A Critical Analysis of the Workings of the Badinter Commission*, *supra* note 21.

143. *See* John Agnew, *Mapping Political Power Beyond State Boundaries: Territory, Identity and Movement in World Politics*, 28 *MILLENNIUM J. INT'L STUD.* 499 (1999). *See generally* HELEN GHEBREWET, *IDENTIFYING UNITS OF STATEHOOD AND DETERMINING INTERNATIONAL BOUNDARIES* (2006).

144. *See* CASTELLINO & ALLEN, *TITLE TO INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 119–55 (analyzing ICJ jurisprudence). *See also* Joshua Castellino, *Territoriality and Identity in International Law: The Struggle for Self-Determination in the Western Sahara*, 28 *MILLENNIUM J. INT'L STUD.* 523 (1999).

145. *Cf.* Nuno Sérgio Marques Antunes, *The Eritrea-Yemen Arbitration: First Stage—The Law of Title to Territory Re-Averred*, 48 *INT'L & COMP. L.Q.* 362, 363–65 (1999) (evidencing an entity, Eritrea, that was designated as separate by a colonial ruler, and subsequently became a separate sovereign state despite earlier history that may show greater links between it and an adjoining state or unit).

146. *See, e.g.*, *Western Sahara, Advisory Opinion*, 1975 *I.C.J.* 12, 45 (Oct. 16) (exploring the veracity of this claim and the distinction between a religious versus temporal claim that lies at the heart of the dispute). The precursor to the modern state of Morocco, the Sherifian State, was an expansive non-territorially based state that laid claim (at least in terms of religious *Shari'a* law) to much of the Maghreb. *See* Joshua Castellino, *National Identity & the International Law of Self-Determination: The Stratification of the Western Saharan "Self,"* in *ACCOMMODATING NATIONAL IDENTITY: NEW APPROACHES IN INTERNATIONAL AND DOMESTIC LAW* 257, 270–81 (Stephen Tierney ed., 2000). In any case, under the modern norm of the human right to self-determination, it would seem that the residents of the territory have the right to determine their political future. The difficulty inevitably lies in understanding who the eligible constituents are.

attached to the critical date; if the critical date could be challenged, there would be disagreements as to the importance of particular events, dates, and ultimately the fate of the territory.<sup>147</sup> Permitting such challenges runs the risk of opening up a continuously available process, which could act as an incentive to legitimize the use of force and subsequent occupation. Thus, the doctrine of *uti possidetis juris*, in conjunction with a restricted determination of a critical date, has ultimately yielded a process that is believed by international jurists to support the necessary preconditions for order.<sup>148</sup>

The salient effect of the doctrine of *uti possidetis juris* is best captured in the ICJ's opinion in *Frontier Dispute (Burkina Faso v. Mali)*:

[T]he essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries may be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>149</sup>

The single point in time at which this boundary was framed assumed grave importance, since no subsequent change would be recognized unless it had the consent of the incumbent powers.<sup>150</sup> Nevertheless, all boundaries are constructed, and are in some sense artificial.<sup>151</sup> Consequently, one approach to resolving the legitimacy of territorial boundaries would be to examine the manner in which some of these critical dates were decided, and to test their validity vis-à-vis, for example, the patently unequal acquisitory treaties between the colonizer and the indigenous community.<sup>152</sup> However, any attempt to redress and question these notions comes up against the intertemporal rule of law.

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147. See, e.g., Kathleen Cavanaugh, *Rewriting Law: The Case of Israel and the Occupied Territories*, in *NEW LAWS, NEW WARS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 227 (David Wippman & Matthew Evangelista eds., 2005) (explaining that the discussion around conflict can in and of itself become the biggest obstacle for its resolution).

148. See *infra* Part IV. See generally BODMER, *supra* note 103 (regarding the Spanish conquest in the Americas); PICÓN-SALAS, *supra* note 106, at 27–42.

149. *Frontier Dispute (Burk. Faso v. Mali)*, 1996 I.C.J. 554, 566 (Dec. 22).

150. Ratner, *supra* note 22, at 608.

151. S. WHITTEMORE BOGGS, *INTERNATIONAL BOUNDARIES: A STUDY OF BOUNDARY FUNCTIONS AND PROBLEMS* 74–93 (1940) (discussing South American boundaries). See also Reeves, *supra* note 42, at 541–45.

152. See Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century*, *supra* note 39.

Thus, the doctrinal tools governing title to territory—*terra nullius* and *uti possidetis juris*—on their face have significant merit. The justification for *uti possidetis juris*, for instance, is easy to see, especially in the context of the return to peace after cessation of hostilities and in the importance it gives to the consent of the disputing parties to a settlement that deviates from the status quo. While there is little doubt that such consent involves difficult negotiations, it is certainly preferable that such negotiations do take place, rather than resolutions through force. Crucially, in the context of indigenous peoples' land rights, had the doctrine of *uti possidetis juris* functioned effectively from the start, indigenous land rights would have been adequately protected. The granting of de facto possessory rights to existing territory holders would have precluded annexation by colonial powers and would have seen legitimacy properly ascribed to existing populations, in denial of *terra nullius*.

*B. The Principle of Terra Nullius: A Shield Against Inter-Continental Territorial Rivalry*

As discussed above, the principle of *terra nullius* was an important principle in *jus gentium* and was an important part of international law. In the discussion among jurists about the manner in which territory could be acquired, there was a general consensus that only *terra nullius*, or uninhabited territory, could be subject to acquisition.<sup>153</sup> As was seen in the articulation of the law governing occupation, the principle of *terra nullius* expanded from a doctrine denoting blank, unoccupied territory based on the objective existence or inexistence of inhabitants upon a territory, to a subjective analysis of the social quality of habitation that determined whether or not a territory was considered *terra nullius*.

The principle that only territory considered *terra nullius* could be occupied failed to protect the lands of indigenous and tribal peoples from colonial occupation. In many circumstances, this territory was acquired through subsequent cession—using unequal and even fraudulent treaties—subjugation, and, in some instances, quasi-prescription claims.<sup>154</sup> Arguably, all of this was animated by a racist belief that some kinds of

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153. See ANDREW BORKOWSKI & PAUL DU PLESSIS, TEXTBOOK OF ROMAN LAW 182–83 (3d ed. 2005).

154. See U.N. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Indigenous Peoples & Minorities, *Indigenous Peoples and Their Relationships to the Land*, ¶¶ 21–32, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (prepared by Erica-Irene A. Daes).



possession merited title-generating rights while others did not.<sup>155</sup> Indeed, this was plausibly the central feature underpinning the categorization of indigenous territory as *terra nullius*: while peoples may have existed on the land, the relationship they exercised towards it was insufficient to suggest individual ownership, i.e., title-generating activity.

*Terra nullius* did not figure as predominantly in jurists' discussions of other acquisitions of colonial property outside the Creole context.<sup>156</sup> Elsewhere, there was an assumption that the spread of Christianity, commerce, and civilization could only benefit the peoples coming under European subjugation.<sup>157</sup> This is especially surprising since the Creole resuscitation of the principle of *terra nullius* was achieved prior to the second wave colonization of African and Asian territories.<sup>158</sup> The Creole invocation of the doctrine of *terra nullius* was largely in response to the fear among the new incumbent sovereigns that parts of their newly acquired territory were not effectively occupied, and could fall prey to *re-conquista*.<sup>159</sup>

If the doctrine of *uti possidetis juris* acted as a sword against territorial claims from within the continent by other new sovereigns,<sup>160</sup> a separate shield was necessary to put in place a regime that would forestall any external threat to the states in the New World. The principle of *terra nul-*

155. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 19–34 (2004) (discussing the historical backdrop of indigenous peoples' role in international society and positivism in international law).

156. See generally CHARLES HENRY ALEXANDROWICZ, *THE EUROPEAN-AFRICAN CONFRONTATION* 12 (1973) (highlighting the European-African confrontation); ERIC AXELSON, *PORTUGAL AND THE SCRAMBLE FOR AFRICA 1875–1891* (1967) (emphasizing the Portuguese role in colonization of Africa); J.C. ANENE, *SOUTHERN NIGERIA IN TRANSITION* (1966) (revealing the extent to which the boundaries cut across pre-existing communities); J.C. ANENE, *THE INTERNATIONAL BOUNDARIES OF NIGERIA 1885–1960* (1970); S.E. CROWE, *BERLIN WEST AFRICAN CONFERENCE 1884–1885* (Negro Univ. Press 1970) (1942) (for an insight into the proceedings and discussions on territory and identity); A.O. CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* (1967); *PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES 1884–1984*, *supra* note 40 (illustrating the impact of the colonial boundaries on African national identities); Simeon E. Baldwin, *The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World*, 1 AM. J. INT'L L. 565 (1907); Victoria Brittain, *Colonialism and the Predatory State in the Congo*, 236 NEW LEFT REV. 133 (1999) (highlighting the nature of the state).

157. See BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 11–12, 25–38 (1992).

158. See generally RUPERT EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF ASSERTION OF ASIAN AND AFRICAN PEOPLES* (4th ed. 1967).

159. See Alvarez, *supra* note 107, at 277–78.

160. See *supra* Part III.A.

*lius* became a reliable ally in this quest.<sup>161</sup> While not new to modern public international law, the principle had fallen into relative abeyance as colonial powers determined the geographic extent to which they wished their political sphere of influence to spread.<sup>162</sup> Elsewhere, new sovereigns simply took action to achieve this, without recourse to the principle of *terra nullius*.<sup>163</sup> While many occupations were achieved ostensibly through treaties of cession,<sup>164</sup> the fraudulent manner of their agreement and subsequent “validation” was unlikely to pass muster if challenged in domestic courts.<sup>165</sup> Fortunately for the imperial powers, most domestic courts of colonial powers simply did not exercise jurisdiction over activities that occurred in other parts of the realm, and consequently, concerted legal challenges did not really materialize.<sup>166</sup> In this way, law became subservient to the political interests of colonial powers, and fueled the intense competition for territories without regard for indigenous peoples.<sup>167</sup>

This expanded interpretation of *terra nullius* assisted colonial expansion, and brought within its scope vast swathes of inhabited territory.<sup>168</sup> In one sense, it was ostensibly the “failure” of incumbents to organize themselves into recognizable political units to the imperial powers’ satisfaction that justified the occupation and acquisition of territories. This creative interpretation fueled competition among the imperial powers and led to a distasteful episode of history referred to euphemistically as the “Scramble for Africa,”<sup>169</sup> which was instigated by King Leopold of Bel-

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161. See Jörg Fisch, *Africa as Terra Nullius: The Berlin Conference and International Law*, in BISMARCK, EUROPE, AND AFRICA 347 (Sig Förster, Wolfgang J. Mommsen & Ronald Robinson eds., 1988).

162. See CROWE, *supra* note 156, at 11–91.

163. See generally *id.*

164. See OPPENHEIM’S INTERNATIONAL LAW, PEACE, *supra* note 74, at 679–86.

165. See generally IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES (1992).

166. See generally LAND RIGHTS, ETHNO-NATIONALITY AND SOVEREIGNTY IN HISTORY (Stanley L. Engerman & Jacob Metzger eds., 2004).

167. See Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779 (2004) (highlighting the considerations that the ICJ took into account while revealing the extent to which the issue of indigenous peoples—more specifically the identity of the peoples—was not a significant factor). Of the eight factors isolated, only one—culture—could be said to be directly attributable to group identity. See *id.*

168. See KORMAN, *supra* note 54, at 1–93.

169. See generally AXELSON, *supra* note 156; THE SCRAMBLE FOR AFRICA: DOCUMENTS ON THE BERLIN WEST AFRICAN CONFERENCE AND RELATED SUBJECTS 1884/1885, *supra* note 95; THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA (1991).

gium's quest for personal property<sup>170</sup> in the heart of Africa.<sup>171</sup> In the process, territories inhabited by non-European peoples became vulnerable in law to occupation and annexation.<sup>172</sup>

The process just described was slightly different in Latin American states, however, since the Creole interpretation of *terra nullius* declared that all American territory was considered occupied territory, and the incumbent sovereigns exercised effective control over the lands and populations of the continent, north and south.<sup>173</sup> This declaration concerning American territory made important points that effectively undermined the international perception of *terra nullius*.<sup>174</sup>

First, the announcement implied effective control of all territory within the continent, even though there were vast swathes of territory inhabited by peoples unaware of any change in sovereignty.<sup>175</sup> These "non-contact" populations were never asked for their consent, were never subjugated, and certainly did not bear any allegiance to the newly proclaimed sovereigns exercising power in their name.<sup>176</sup> The new sovereigns claimed to be the sovereign occupiers of territories without effectively demonstrating the two essential elements—namely, possession and administration—that would cement the occupation, and thereby, title.<sup>177</sup>

Second, the Creole declaration of independence, while based on notions of individual liberty and ideals from the Enlightenment,<sup>178</sup> never-

170. See Mumbanza Mwa Bawele, *Afro-European Relations in the Western Congo Basin c. 1884–1885*, in BISMARCK, EUROPE, AND AFRICA 469 (Sig Förster, Wolfgang J. Mommsen & Ronald Robinson eds., 1988).

171. This is captured in the classical literary text, JOSEPH CONRAD, *HEART OF DARKNESS* (Alfred A. Knopf 1993) (1902).

172. See MARC FERRO, *COLONIZATION: A GLOBAL HISTORY* 104–62, 186–210 (1997) (illustrating the vulnerability of non-European society to European colonization and discussing the "vision of the vanquished"). See also WILLIAM B. COHEN, *THE FRENCH ENCOUNTER WITH AFRICANS: WHITE RESPONSE TO BLACKS, 1530–1880* (1980) (addressing the particular issues that arose in the context of French colonization); ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006) (discussing the vulnerability of Native American property in the United States).

173. See Manger, *supra* note 127.

174. See CASTELLINO & ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 57–89 (alluding to the post facto impact of the declaration); Alvarez, *supra* note 107, at 311.

175. See Moore & Lemos, *supra* note 93; Rodrigues, *supra* note 93.

176. See *supra* note 175. See generally Charles E. Hughes, *Observations on the Monroe Doctrine*, 17 AM. J. INT'L L. 611 (1923).

177. For a similar discussion vis-à-vis African states, see Jackson, *supra* note 93.

178. See PICÓN-SALAS, *supra* note 106 (capturing the inspiration that motivated the Creole action). It is interesting to note that the failure to consult indigenous peoples was not seen as particularly relevant in historic works. See DANA G. MUNRO, *THE FIVE*

theless applied these values selectively, excluding indigenous peoples who were the original possessors of the territories and African-American populations who were moved to the territories as chattel during the slave trade.<sup>179</sup> In contrast to the Creole action, the decolonization of Africa a century and a half later resulted in new states that were formed with secure boundaries drawn by the previous administration's domestic laws,<sup>180</sup> which emphasized state building and internal consolidation of existing territory.<sup>181</sup> The prime rationale for this was the maintenance of order within the continent.<sup>182</sup> Although states in South America continued to nurse territorial grievances against each other,<sup>183</sup> the grievances were premised on disagreements concerning boundary demarcations, unlike the more substantive disagreements typically contested in boundary disputes in contemporary Africa.<sup>184</sup>

The general impact of the principle of *terra nullius* has already been discussed in various legal fora.<sup>185</sup> Like the doctrine of *uti possidetis juris*, the principle of *terra nullius* was originally not only unproblematic, but also contained more than a modicum of respect for existing populations.<sup>186</sup> If a territory was unoccupied, it was conceivably open to claims.

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REPUBLICS OF CENTRAL AMERICA: THEIR POLITICAL AND ECONOMIC DEVELOPMENT AND THEIR RELATION WITH THE UNITED STATES (David Kinley ed., 1918) (providing a succinct analysis of the background to the emergence of the Five Republics but not discussing the issue of consulting indigenous peoples in their formation).

179. See generally HUGH THOMAS, *THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE 1440–1870* (1997).

180. See generally MARTIN MEREDITH, *THE FATE OF AFRICA: FROM THE HOPES OF FREEDOM TO THE HEART OF DESPAIR* (2005) (providing a poignant analysis of each African state's transition of colonialism).

181. See Rupert Emerson, *Nation-Building in Africa*, in *NATION BUILDING* 95 (Karl W. Deutsch & William J. Foltz eds., 1963).

182. See generally *supra* note 141 (defining order).

183. See cases cited *supra* note 128. See generally COMMENTARIES ON WORLD COURT DECISIONS (1987–1996) (Peter H.F. Bekker ed., 1998).

184. See, e.g., *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045 (Dec. 13) (discussing issues concerning the types of occupation and title-generating rights, rather than purely adjudicating on a boundary dispute, in the African context); *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6 (Feb. 3) (discussing issues concerning the types of occupation and title-generating rights, rather than purely adjudicating a boundary dispute, in the African context); Edward Douglas White, *In the Matter of the Arbitration of the Boundary Dispute Between the Republics of Costa Rica & Panama Provided for by the Convention Between Costa Rica and Panama of March 17, 1910*, 8 AM. J. INT'L L. 913 (1914) (explaining the boundary controversy between Costa Rica and Panama). It could also be argued that the Advisory Opinion in the *Western Sahara Case* was also classically in this vein. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 83–102 (Oct. 16).

185. See, e.g., *supra* note 85.

186. See Moore, *supra* note 28, at 328–30.

Claims to such territory could be established through a process of continued occupation, akin to adverse possession,<sup>187</sup> while in other systems, claims could be lodged through a process of formal accession of title deeds.<sup>188</sup> In either situation, accession of property that was bereft of owners was understood as legitimate, in keeping with the large-scale migration of peoples that are significant to human history.<sup>189</sup>

The corruption of the principle of *terra nullius* lies in its interpretation, which was already discernible in its original manifestation in *jus civile*. As captured effectively by Judge Ammoun in his dissenting opinion in the *Western Sahara Case*, the doctrine of *terra nullius* was first interpreted to render all non-Roman territory *terra nullius*, thus implying that only Roman law could create legitimacy and title bearing rights.<sup>190</sup> This was modified in the nineteenth century, when tribes considered uncivilized were not recognized, and as such, the land on which they subsisted was considered *terra nullius* despite their presence.<sup>191</sup> The paradigmatic example of this phenomenon is the imperial powers' naked aggression in their quest for territory in Africa, and their treatment of indigenous peoples' territory.<sup>192</sup> The ramifications of this aggression are central to an effective settlement that would protect the rights of indigenous peoples while also ensuring the competing rights of non-indigenous peoples.<sup>193</sup>

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187. See Ballantine, *supra* note 140. See also JAMES B. AMES, LECTURES ON LEGAL HISTORY (1913) (manifesting the doctrine of adverse possession in English municipal law); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW 29–80 (2d ed. 1898) (discussing the history of seisin).

188. See generally LAND LAW: ISSUES, DEBATES, POLICY (Louise Tee ed., 2002).

189. See generally PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW (Terry Lee Anderson & Fred S. McChesney eds., 2003).

190. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 83–87 (Oct. 16) (separate opinion of Judge Ammoun).

191. See *id.*

192. See J.D. Hargreaves, *The Making of the Boundaries: Focus on West Africa, in PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES 1884–1984*, at 19 (A.I. Asiwaju ed., 1985) (providing a rich analysis of the extent to which boundary regimes were constructed without the consent of the indigenous people who were already the occupants of the territory). See generally 1 COLONIALISM IN AFRICA 1870–1960 (L.H. Gann & Peter Duignan eds., 1969) (discussing the principles and actions during the period in question); John Flint, *Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa*, in BISMARCK, EUROPE, AND AFRICA 69 (Sig Förster, Wolfgang J. Mommsen & Ronald Robinson eds., 1988) (pointing to the commercial aspect under which such appropriation occurred).

193. See S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

## IV. CHALLENGES WITHIN INTERNATIONAL LAW: ICJ JURISPRUDENCE

Having traced the manner in which the doctrines have evolved through history, it is appropriate to highlight the extent to which the ICJ has contributed to a further clarification of the concepts. This Part reflects on the key cases that have been addressed by the court and the specific nuances of these broad doctrines. Specifically, this Part comments on the manner in which the court has resolved four key issues: (1) the issue of *locus standi* in terms of territorial disputes; (2) the importance of documenting a territorial claim—specifically, a comment on the value of maps in this process; (3) an examination of the kinds of actions that indicate title-generating activity; and (4) the importance of the critical date in determining the fate of a given territory. This Part concludes with an overview of how some of these issues are raised in currently pending ICJ cases.

The modern international legal position on *terra nullius* is epitomized by the judgment in the *Western Sahara Case*.<sup>194</sup> Two questions were addressed to the ICJ:

- I. Was Western Sahara (Rio de Oro and Saket El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer to the first question is in the negative,
- II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?<sup>195</sup>

With reference to the first question, the court determined that the Western Sahara was not *terra nullius* before the Spanish arrival on the grounds that, “at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and chiefs competent to represent them.”<sup>196</sup> This determination would seem to favor the indigenous Saharan tribes in the territory; however, the court ruled—with reference to the second question—that a link existed between these tribes and the Sherifian State, the precursor to modern Morocco.<sup>197</sup> King Hassan ultimately used the court’s determination to justify Moroccan occupation of the Western Sahara based on the

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194. *Western Sahara*, 1975 I.C.J. 12.

195. *Id.* at 14.

196. *Id.* at 39.

197. *Id.* at 40. See CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL “NATIONAL” IDENTITY, *supra* note 15, at 233–52 (discussing the merits of the *Western Sahara Case*). See also Malcolm Shaw, *The Western Sahara Case*, 44 BRIT. Y.B. INT’L L. 118 (1978); Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT’L L. 694 (1978).

court's latter conclusion vis-à-vis ties between the Western Sahara and the predecessor state to Morocco.<sup>198</sup>

In the face of imperial powers seeking to nullify indigenous peoples' inherent rights to territory, indigenous peoples and minorities with territorial claims face insurmountable limitations in accessing the ICJ, including the fact that the court can only be accessed by state parties.<sup>199</sup> While the cases before the ICJ have been of an interstate nature, several of them nevertheless discuss the issues of *uti possidetis juris* and *terra nullius* in great detail.<sup>200</sup> In this sense, the *Western Sahara Case* stands out, since it concerned the future of territory that was not in the full possession of either of the two claimants.<sup>201</sup> This exception is explained on the grounds that King Hassan of Morocco sought justification for the planned Green March into the territory.<sup>202</sup> International courts and tribunals have faced other cases that inevitably involve a competition for territory that is occupied de facto—though perhaps not de jure—by one sovereign state.<sup>203</sup>

In this framework, in theory the incumbent within a territory would continue to hold title, with the opponent's claim effectively dismissed ab initio.<sup>204</sup> Nevertheless, courts delve into the question of the de jure title to

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198. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 68 (Oct. 16).

199. See Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 ("Only states may be parties in cases before the Court.").

200. See *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6 (Feb. 3) (separate opinion of Judge Ajibola); *Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, 1992 IC.J. 351 (Sept. 11); *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554 (Dec. 22); *India v. Pak. (Rann of Kutch)*, 50 I.L.R. 2 (Indo-Pak. Western Boundary Case Trib. 1968); *Dubai v. Sharjah (Ct. Arb. 1981)* (dissenting opinion of Judge Bebler). See also CASTELLINO & ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 119–55 (reviewing eight ICJ cases concerning territoriality); CUKWURAH, *supra* note 156, at 190–99 (identifying cases concerning *uti possidetis*).

201. See *Western Sahara*, 1975 I.C.J. 12. See also Shaw, *The Western Sahara Case*, *supra* note 197, at 135–39. The two claimants at the time were Morocco and Mauritania. See *id.* Spain had accepted its need to decolonize, but the nomadic Saharawis were not represented in proceedings. See *id.*

202. See generally TONY HODGES, *WESTERN SAHARA: THE ROOTS OF A DESERT WAR* 210–11 (1983) (outlining the political factors that underlay the reference of this case for the Court's advisory opinion).

203. Such disputes arise in connection with the physical occupation of a particular territory without the establishment or determination of legal title. See, e.g., D.J. HARRIS, *CASES AND MATERIALS IN INTERNATIONAL LAW* 109–10 (5th ed. 1998) (1973) (the situation concerning Manchukuo).

204. See Ratner, *supra* note 22, at 607–16 (discussing the doctrine's practical shortcomings).

territory.<sup>205</sup> However, the courts inevitably focus on a historical date when de facto occupation is deemed to have legitimized continuing territorial claims. Notwithstanding decisions taken by the Permanent Court of International Justice (“PCIJ”)—the ICJ’s predecessor—and other tribunals, the first such dispute before the ICJ was *Sovereignty over Certain Frontier Land (Belgium v. Netherlands) Case* in 1959.<sup>206</sup> In this case, the ICJ focused its attention on the findings of the Mixed Boundary Commission, which sought to preserve the territorial status quo.<sup>207</sup> Taking its lead from these findings, the ICJ set out on the premise that Belgium had sovereignty over the territory as the de facto possessor.<sup>208</sup> Therefore, the court examined whether there had been any subsequent extinguishments of these rights, which could have given rise to an effective Dutch titular claim.<sup>209</sup>

In this context, although the concept of “title” to territory is regularly used in international legal cases,<sup>210</sup> it is difficult to find an adequate legal definition for this term. *Frontier Dispute (Burkina Faso v. Mali)* provides the best elaboration, where rather than a definition of title, the ICJ identified the sources of title as not restricted to documentary evidence alone: “[T]he concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right.”<sup>211</sup>

However, in the context of the right to self-determination, which may include a territorial claim, this explanation remains inadequate. Attributing a specific value to the relationship between a community and territory is difficult. The task of adjudicating between competing claims is next to impossible without engaging prejudices about the value of such a determination, which impacts the result of the judgment. In addition, from the perspective of modern claims to territory, the following salient issues have emerged from the ICJ jurisprudence concerning ownership and possession of contested territory.

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205. See Sumner, *supra* note 167. Several of the eight factors identified by Sumner in his brief note could be considered relevant to the de jure determination of a contested territory. See *id.*

206. *Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*, 1959 I.C.J. 209 (June 20).

207. See *id.* at 214.

208. See *id.*

209. See *id.* at 222.

210. See *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6 (Feb. 3), reviewed by COMMENTARIES ON WORLD COURT DECISIONS (1987–1996), *supra* note 183, at 173–82.

211. *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 564 (Dec. 22).



### A. Claimants to Title to Territory: Locus Standi

Although the ICJ can only examine interstate claims, it has addressed wider questions through its advisory jurisdiction. Cases concerning title to territory that arose in this context include the *Western Sahara Case*,<sup>212</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>213</sup> and the early cases concerning Namibia—*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*<sup>214</sup> and *International Status of South West Africa*.<sup>215</sup> While actions in Namibia and Palestine were mobilized in light of intense public scrutiny of the incumbent states,<sup>216</sup> the dispute in the *Western Sahara Case* arose at the colonial ruler's departure.<sup>217</sup>

In effect, there is little possibility that a case would be raised in the names of indigenous peoples or other non-state claimants to territory. Despite progress that has solidified the role of the individual in international law, interstate dispute mechanisms such as the ICJ are unable to address claims that are not brought by state parties. Although some states may be willing to sponsor certain territorial claims,<sup>218</sup> the nature of the

212. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

213. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9). For authoritative commentary on this case, see *id.* at 211 (separate opinion of Judge Higgins) and David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88 (2005).

214. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 16 (June 21). See also John Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 14 (1972).

215. *International Status of South-West Africa*, Advisory Opinion, 1949 I.C.J. 270 (Dec. 30).

216. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 211 (separate opinion of Judge Higgins); *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. at 17–22; *International Status of South-West Africa*, 1949 I.C.J. 270. See also Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, *supra* note 213 (discussing the Palestinian action); Dugard, *supra* note 214.

217. *Western Sahara*, 1975 I.C.J. 12.

218. See, e.g., MEREDITH, *supra* note 180, at 71–74 (discussing Algeria's reputation in the 1960s as a state that favored movements for self-determination by providing moral and physical support for them). In today's terminology, any such overt or covert support might be described as support for terrorism. Despite the merits of a particular argument, it seems difficult to imagine any legal challenges before the ICJ being brought under this guise.

process and the determination of admissibility operate to prevent many potential claims. Thus, peoples that claim self-determination including title to territory have no option but to seek relief from state structures. In this context, the lesser offer of territorial autonomy is often considered a viable option.<sup>219</sup> However, it fails to address the issue of the claimant's title to territory,<sup>220</sup> and instead offers a negotiated political settlement to the governance of the territory.<sup>221</sup> Two territorial claims in recent years<sup>222</sup> that are notable for their success were nevertheless achieved through international political processes rather than law, involved much bloodshed, and eventually resulted in a U.N.-supported plebiscite.<sup>223</sup> In terms of indigenous peoples and other potential claimants of title to territory, the limited option of the human rights mechanism, addressed below, forms a watered-down and difficult option through which to judicially engage this question at the international level.

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219. See Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307 (2002); HANNUM, *supra* note 11; Jane Wright, *Minority Groups, Autonomy, and Self-Determination*, 19 OXFORD J. LEGAL STUD. 605, 606 (1999) (“[A]utonomy should be regarded as a constructive tool by which the property aspirations of minority groups may be realized.”).

220. The status of self-determination as a right in modern international law is highly dependent on the respective state's political perspective. In applying self-determination to federal states, there is even less information available than in the international domain. The definitive case on the subject is the secession of Québec that came before the Canadian Supreme Court. Reference re Secession of Québec, [1998] 2 S.C.R. 217. Nevertheless, the court expressed concern about the safeguards necessary to protect the rights of indigenous Canadians within Québec. See *id.* at 261–63 (addressing protection of minorities).

221. See generally ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 248–62 (2004).

222. See generally EYASSU GAYIM, THE ERITREAN QUESTION: THE CONFLICT BETWEEN THE RIGHT OF SELF-DETERMINATION AND THE INTERESTS OF STATES (1993) (explaining the history of the struggle in Eritrea); IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UN, THE BALLOT, AND INTERNATIONAL INTERVENTION (2001) (explaining the history of the struggle in Timor-Leste).

It could also be argued that the emergence of the state of Bangladesh was a victory for the use of superior force. See Joshua Castellino, *The Secession of Bangladesh: Setting New Standards in International Law?*, 7 ASIAN Y.B. INT'L L. 83 (2000). See also Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972) (detailing the achievement of Bangladesh's statehood).

223. See S.C. Res. 1246, ¶ 1, U.N. Doc. S/RES/1246 (June 11, 1999) (establishing “the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation”). See generally The Secretary General, *Report of the Secretary-General on the Question of East Timor, delivered to the Security Council and the General Assembly*, U.N. Doc. S/1999/513, A/53/951 (May 5, 1999).

*B. Documenting a Territorial Claim: The Value of Maps*

The ICJ has always been reluctant to accept the strength of maps as evidence of territorial claims. In *Territorial & Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*,<sup>224</sup> the ICJ referred to two prior cases: *Island of Palmas (or Miangas) (United States v. Netherlands)*<sup>225</sup> and *Arbitral Award of the Special Boundary Panel Determining the Frontier between Guatemala and Honduras*.<sup>226</sup> In the former, the Permanent Court of Arbitration stressed that “[a]ny maps which do not precisely indicate the political distribution of territories . . . clearly marked as such, must be rejected forthwith . . . .”<sup>227</sup> In the latter case, the PCIJ found that maps presented by the parties provided only “slight value,” since they did not show the extent to which administrative control was actually exercised.<sup>228</sup>

More recently, the ICJ addressed the issue of the value of maps in *Frontier Dispute (Burkina Faso v. Mali)*<sup>229</sup> and *Territorial & Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*.<sup>230</sup> In the latter, the presentation of maps was merely seen as:

[E]ssentially serv[ing] the purpose of buttressing their respective claims and of confirming their arguments. The Court finds that it can derive little of legal significance from the official maps submitted and the maps of geographical institutions cited; these maps will be treated with a certain reserve.<sup>231</sup>

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224. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), paras. 134, 214 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008).

225. *Island of Palmas (or Miangas) (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

226. *Honduras Borders (Guat v. Hond.)*, 2 R. Int'l Arb. Awards 1309, 1322 (Special Boundary Tribunal constituted by the Treaty of Arbitration between Guatemala and Honduras 1933).

227. *Island of Palmas (or Miangas) (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards at 852.

228. *Honduras Borders*, 2 R. Int'l Arb. Awards at 1325 (“[A]uthenticated maps[] are also to be considered, although such descriptive material is of slight value when it relates to territory of which little or nothing was known and in which it does not appear that any administrative control was actually exercised.”)

229. See *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 582 (Dec. 22). Maps were considered in of themselves indeterminate in constituting territorial title, or “document[s] endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.” *Id.*

230. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.) (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008).

231. *Id.* para. 217.

In that case, the sovereignty over the disputed islands was extended to Honduras based on post-colonial *effectivités*,<sup>232</sup> not based on submitted maps.<sup>233</sup> Although parties to territorial disputes seek to demonstrate their ownership of territory through maps, the maps have rarely been given much credence in the rulings.

Instead, the ICJ has looked to other types of documentary evidence in determining territorial claims, including memos and letters that seek to demonstrate external respect for a territorial claim.<sup>234</sup> The fact that the ICJ has engaged such documentary evidence suggests an intrinsic belief that externally recognized boundaries are valid constructs, even if they were not negotiated based on internal identities. The ICJ, as an upholder of international order, can do little more than ensure that the territorial limits of state sovereignty continue as defined within the state's frontiers at a given time. The ICJ's reliance on documentary evidence also suggests that the legal validity of a title to territory can be gauged against objective criteria. However, in the context of colonization, this remains a particularly problematic test since it inevitably validates both unequal treaties between colonial powers and the colonized<sup>235</sup> and treaties between colonial powers that have agreed to the division of territory through "spheres of influence" politics.<sup>236</sup> The test presupposes the question considered (whether the state exercised effective administrative control over the claimed territory) because it gives credence to memos and correspondence written in a specific context and that recognize the legal status of the territory's inhabitants.<sup>237</sup> This is especially problematic

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232. Post-colonial *effectivités* refers to the efficacy or effectiveness of the extent to which the post-colonial state has performed its function as a state in relation to a given territory. See Bruno Simma & Daniel Erasmus-Khan, *Peaceful Settlement of Boundary Disputes Under the Auspices of the Organisation of African Unity and the United Nations: The Case of the Frontier Dispute between Eritrea and Ethiopia*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1179, 1191 n.39 (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds., 2002).

233. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, para. 227 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008).

234. See *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 49 (Oct. 16) (demonstrating external recognition of sovereignty through treaties, diplomatic correspondence, and letters).

235. See generally BROWNLIE, *supra* note 165.

236. See CROWE, *supra* note 156.

237. See, e.g., *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045 (Dec. 13). The ICJ was forced to examine the veracity of documents offered as interpretative evidence regarding the Anglo-German Treaty of 1890, which had established the respective spheres of influence of the two superpowers. See *id.* at 1049–50. The documents examined included: (1) a 1912 report on a reconnaissance of the Chobe River, produced by the

when the countervailing evidence derives from a matrix of different cultures and traditions, many of which were often misrepresented in cultural anthologies.<sup>238</sup> Inevitably, the ICJ requires the submission of evidence before it can adjudicate a claim, and equally inevitably, the ICJ must make a judgment call upon the value of the evidence presented.<sup>239</sup> As a result, the ICJ is forced to give weight to documentary evidence that may be considered suspect under other circumstances.

### *C. Acts that Establish a Territorial Claim*

A considerable portion of the pleadings in cases concerning title to territory is committed to establishing that effective control was exercised over a particular territory, and that this control treated the claimed territory as part of a unified whole with the rest of the state's territory.<sup>240</sup> This is particularly ironic because post-colonial claimants often insist that the territory they inhabit was *terra nullius* at the time of colonization, a legal fiction that is necessary if the succeeding title is to be considered sound.<sup>241</sup> The ICJ determines the issue, as it did in *Territorial & Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, on the grounds of the effectiveness of existing rule, be it colonial *effectivités* or post-colonial *effectivités*.<sup>242</sup>

When determining the value of presented evidence, the ICJ usually looks for a reliable piece of evidence that indicates the establishment of a right or practice that is germane to the territorial title.<sup>243</sup> Much of the pre-

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Bechunaland Protectorate Police; (2) correspondence and an arrangement between the Eastern Caprivi magistrate and a district commissioner in the Bechunaland Protectorate; and (3) an agreement between Botswana and South African authorities for the Joint Survey of the Chobe. *See id.* at 1076–91.

238. *See* David M. Hart, *The Tribe in Modern Morocco: Two Case Studies*, in *ARABS AND BERBERS: FROM TRIBE TO NATION IN NORTH AFRICA* 425 (Ernest Gellner & Charles Antoine Micaud eds., 1973).

239. *See* JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS*, *supra* note 31, at 150–52.

240. *See id.* at 119–55.

241. *See* *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

242. *See* *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), para. 227 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008).

243. *See* *Land, Island and Maritime Frontier Dispute* (El Sal./Hond.: Nicar. intervening), 1992 I.C.J. 351, 363–64 (Sept. 11) (examining documents of the Spanish Crown and the 1980 General Peace Treaty between the parties); *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554, 568, 582 (Dec. 22) (examining French colonial law and the study of maps to determine their validity); *Sovereignty over Certain Frontier Land* (Belg. v. Neth.), 1959 I.C.J. at 218 (examining the veracity of the work of the Boundary Commission). *See also* Castellino, *National Identity & the International Law of Self-*

sented evidence is based on complicated historical events that are bitterly contested by the parties in the first place.<sup>244</sup> The ICJ is often ill-suited to make such pronouncements and must instead rely on the quality and presentation of the evidence to determine its historical veracity.<sup>245</sup> When examined closely, much of the parties' documentary evidence is remarkably similar and makes for an equally compelling or problematic basis for claiming adequate administration over a disputed territory. The pleadings in the *Western Sahara Case* present a good illustration of this problem.<sup>246</sup> Both Morocco and Mauritania produced evidence to support their territorial claim to the Western Sahara.<sup>247</sup> Morocco based its claim on its succession to the Sherifian State, which allegedly covered Morocco and the territory subsequently deemed the Spanish Sahara.<sup>248</sup> Mauritania based its claim on a complex network of allegiances that could be identified as part of the *Bilad Shinguitti*, which was argued to be the precursor to modern Mauritania.<sup>249</sup> The court ruled on the extent to which any links between the territory and the antecedent states gave rise to a sustainable territorial claim.<sup>250</sup> While the judgment reveals that it is difficult to ascertain the veracity of these claims, King Hassan ultimately read the judgment as supporting Morocco's territorial claim.<sup>251</sup>

Similar difficulties arose in both *Frontier Dispute (Burkina Faso v. Mali)* and *Territorial Dispute (Libya/Chad)*.<sup>252</sup> In *Frontier Dispute (Burkina Faso v. Mali)*, the ICJ identified colonial *effectivités* as "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period."<sup>253</sup> By articulating the principle of colonial *effectivités*, the ICJ established it

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*Determination: The Stratification of the Western Saharan "Self," supra* note 145, at 135 (discussing the Court's examination of a diverse set of documents and practices).

244. See CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 151-52.

245. See HODGES, *supra* note 202, at 210-11. See, e.g., *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6, 16 (Feb. 3); *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. at 620-24.

246. *Western Sahara*, 1975 I.C.J. 12.

247. See *id.* at 14.

248. See *id.* at 40.

249. See *id.* at 41.

250. See *id.* The ICJ's ruling would be especially important in the event Mauritania dropped its claim, especially with a backdrop of secret negotiations between the parties in a bid to dismember the Western Sahara. See JARAT CHOPRA, UNITED NATIONS DETERMINATION OF THE WESTERN SAHARAN SELF (1994). See generally JOHN DAMIS, CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE (1983).

251. See Franck, *The Stealing of the Sahara*, *supra* note 197, at 713-14.

252. *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554 (Dec. 22).

253. *Id.* at 586.

as a cornerstone of the doctrine of *uti possidetis juris*. While colonial *effectivités* fulfills the condition of effective administration over a territory,<sup>254</sup> its real value is in showing title to territory under colonial law. It limits the territorial jurisdiction within which a colonial power exercised sovereignty, either in relation to another external competing sovereign or another internal administrative sub-division of the territory.<sup>255</sup> This territorial limitation consists of the *uti possidetis juris* line that was sanctified as an international boundary when the colonial ruler departed and the new ruler inherited the territory through succession. Thus, proof of colonial *effectivités* can be found when parties to a dispute come to an agreement by consent, and international law essentially ossifies the post-colonial boundaries on an international level.<sup>256</sup> The pleadings and judgment in *Frontier Dispute (Libya/Chad)* undertook a thorough engagement on this issue and its role in determining the *uti possidetis juris* line.<sup>257</sup>

To prove the extent of colonial rule in *Kasikili/Sedudu Island (Botswana v. Namibia)*, the state parties relied on a document that ostensibly showed evidence of an administrative agreement between the colonial authorities in charge of the Caprivi strip—the precursor to modern Namibia—and the colonial authorities in Bechuanaland.<sup>258</sup> However, the

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254. See *supra* Part II.

255. Cf. *supra* note 232 (regarding post-colonial *effectivités*). Colonial *effectivités* demonstrates, in a document, that effective control was exercised over a territory claimed to be within the jurisdiction of the principal colonial occupier. See also *supra* text accompanying note 253.

256. See CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 153–55.

257. Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, 16 (Feb. 3) (involving a cross-border dispute over a parcel of territory around Lake Chad, where the court engaged in a detailed discussion on the concept of *droit d'outre-mer*, or French colonial law).

258. See *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1058 (Dec. 13). The ICJ seems to have engaged in the rights discourse without necessarily laying down the parameters of what it anticipates this to entail. It was equally ambiguous about the sources of those rights. The ICJ also emphasized the presence and activities of the Masubian people and their title-generating capacities. See *id.* at 1045, 1093.

Similarly, in the *Western Sahara Case*, Morocco sought to prove its title to territory by demonstrating exercise of internal sovereignty. *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16). One such issue was the appointment of *caids*, which was advanced as an important factor in proving the role and influence of the Sultan over the region. See *id.* at 44. While not examining the merits of either of these arguments, it is suggested that they have their sources in religion, tradition, and culture and their different interpretations. However, the task of determining the sources of other rights is difficult when not all sources are as established as religion. See, e.g., *id.* at 83–102 (separate opinion of Judge Ammoun) (illustrating the importance of nomadism and its importance in the *Western Sahara Case*). It is clear that the ICJ is willing to engage arguments with

court did not accept the document as evidence of the adequate exercise of colonial *effectivités* over the territory<sup>259</sup> and consequently did not accept the sovereignty claim.<sup>260</sup>

Like the doctrine of colonial *effectivités*, the doctrine of *uti possidetis juris* essentially applies a retrospective doctrine that is based on a specific reading of the fate of the territory at a given moment in history. Although Judge Harry Dillard's separate opinion in the *Western Sahara Case* stated that "[i]t is for the people to determine the destiny of the territory"<sup>261</sup> and not vice versa, it was in fact the fate of the territory that retrospectively determined the fate of the people. The ICJ's application of *uti possidetis juris* is appropriate to these cases of disputed territory because the court has insisted that state consent is the defining standard in determining title to the territory.<sup>262</sup> In terms of the discussion of contemporary claims to self-determination involving a territorial element, the extent and exclusivity of colonial *effectivités* truly is fundamental. This was the underlying argument in several cases in which modern post-colonial entities sought to prove variations on *uti possidetis juris* lines based on lack of colonial administration in border regions.<sup>263</sup>

Colonial *effectivités* is open to criticism on a number of grounds, especially in the context of indigenous rights to territory, where states have interpreted the legal doctrine differently. Kingsbury identifies five competing conceptual structures for the perpetuation of indigenous peoples' claims in international and comparative law.<sup>264</sup> This discussion is ex-

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regard to alternative displays of ownership, which is significant in the context of indigenous peoples' claims to territory.

259. See *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. at 1100.

260. See *id.* at 1103–05. See also CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 140–48.

261. *Western Sahara*, 1975 I.C.J. at 122 (separate opinion of Judge Dillard).

262. This is not a new theoretical point since it has always been possible to change boundaries through the consent of the state parties. See *Kaikobad, Some Observations on the Doctrine of Continuity and Finality of Boundaries*, *supra* note 22 (discussing boundaries and the manner in which they function); BOGGS, *supra* note 151 (providing an older and more theoretical examination).

263. See, e.g., *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6 (Feb. 3) (questioning the specific title-generating ability of indigenous peoples' actions). See also CASTELLINO & ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS, *supra* note 31, at 137–40.

264. See Kingsbury, *supra* note 13. According to Kingsbury, these five claims could be classified as: "(1) human rights and non-discrimination claims; (2) minority claims; (3) self-determination claims; (4) historic sovereignty claims; and (5) claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states." See *id.* at 190. But see Will Kymlicka, *Theorizing Indigenous Rights*, 49



tremely helpful since it reveals the range of arguments regarding the relationship between a state's existing legal doctrine and its application to the rights of indigenous peoples. Weissner's detailed study also reveals the different approaches that exist in states' treatment of indigenous peoples' rights.<sup>265</sup>

#### D. Critical Date

Without a doubt, the most significant ramification for the future of a territory is the snapshot<sup>266</sup> of the territory on the critical date. The significance of the critical date in a territorial or maritime delimitation dispute lies primarily in distinguishing between:

[A]cts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims.<sup>267</sup>

Therefore, the parties' acts after the critical date are not relevant in assessing the value of *effectivités*.<sup>268</sup> In *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the disputants contested two legal issues concerning the doctrine of *uti possidetis juris*:

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U. TORONTO L.J. 281–92 (1999) (illustrating an alternative approach to indigenous peoples' claims).

265. See Weissner, *supra* note 48 (covering the domestic jurisdictions of a range of states, including the United States, Canada, New Zealand, Australia, Brazil, and others).

266. See *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 658 (Dec. 22). The ICJ explained:

[*Uti possidetis* . . . applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is; i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands.

*Id.*

267. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, para. 117 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008).

268. See *id.* See also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, 2001 I.C.J. 575, 682 (Oct. 23) ("[The ICJ] cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.").

(1) the extent to which the judicially-determined line<sup>269</sup> extended to the maritime areas and the disputed islands; and (2) the extent to which documentary evidence established the extent of the local authorities' control.<sup>270</sup>

On the second point, Nicaragua argued that the Spanish authorities in Madrid had exclusive jurisdiction over the territorial sea, and therefore the sea could not be included in the local authorities' justifiable claims under the doctrine of *uti possidetis juris*.<sup>271</sup> While the ICJ regarded the *uti possidetis juris* line as germane to territorial title and boundary delimitation at the moment of decolonization,<sup>272</sup> regardless of whether the boundaries were on land or sea,<sup>273</sup> the court found it difficult to see how *uti possidetis juris* could be used to determine sovereignty over the islands.<sup>274</sup> In addressing the Nicaraguan claim, the court could only determine the disputed islands' status during Spanish colonial rule, and the available options were stark.<sup>275</sup> Articulating an important linkage between *terra nullius* and *uti possidetis juris*, the court stated:

It is well established that "a key aspect of the principle [of *uti possidetis juris*] is the denial of the possibility of *terra nullius*." However, that dictum cannot bring within the territory of successor States islands not shown to be subject to Spanish colonial rule, nor *ipso facto* render as "attributed", islands which have no connection with the mainland coast concerned. Even if both Parties in this case agree that there is no question of the islands concerned being *res nullius*, necessary legal questions remain to be answered.<sup>276</sup>

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269. See *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, 1960 I.C.J. 192, 199–200 (Nov. 18) (quoting an English translation of the Gámez-Bonilla Treaty of 1894). Pursuant to article III of the Gámez-Bonilla Treaty, the dispute between Honduras and Nicaragua was submitted for arbitration to King Alfonso XIII of Spain as sole arbitrator. See *id.* at 200. After the award was handed down on December 23, 1906, Nicaragua challenged its validity in 1912. See *id.* at 203. After concerted boundary incidents with the Organization of American States mediating, the parties agreed to submit the dispute to the ICJ in 1957. See *id.*

270. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, para. 150 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008).

271. See *id.*

272. See *id.* para. 151.

273. See *id.* para. 156.

274. See *id.* para. 158.

275. See *id.* para. 157.

276. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, para. 157 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Feb. 5, 2008) (internal citation omitted).

In this sense, the court could not see the relevance of the doctrine of *uti possidetis juris* since the principle could not provide a clear answer to the question of the sovereignty of the islands.<sup>277</sup> Rather, the court found that "if the islands are not *terra nullius*, as both Parties acknowledge and as is generally recognized, it must be assumed that they had been under the rule of the Spanish Crown."<sup>278</sup> Upholding the Nicaraguan query, the court ruled:

[U]ti possidetis juris presupposes the existence of a delimitation of territory between the colonial provinces concerned having been effected by the central colonial authorities. Thus in order to apply the principle of *uti possidetis juris* to the islands in dispute it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces.<sup>279</sup>

This ruling echoed the ICJ's prior judgment in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, where the court faced similar difficulty in attributing islands that had not been allocated to the contesting territorial administrations.<sup>280</sup> The court stressed:

[W]hen the principle of *uti possidetis juris* is involved, the jus referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definitive answers to the appurtenance of marginal areas, or sparsely populated areas of minimal economic significance.<sup>281</sup>

As a result, the *uti possidetis juris* line has limited value in such circumstances, and also raises fundamental questions about the nature of colonial *effectivités* and the extent to which it generated title-claiming activities. If colonial *effectivités* is taken at face value, it consists of "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period."<sup>282</sup>

Read in this light, questions arise about the extent to which every colonial power has exercised effective administrative control over territory deemed to be under colonial rule. It also brings into sharp conflict the contiguous territory rule—i.e., where claim to hinterland may be laid

277. *See id.* para. 158.

278. *See id.*

279. *See id.*

280. *Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, 1992 I.C.J. 351, 558–59 (Sept. 11).

281. *Id.* at 559.

282. *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 586 (Dec. 22).

based on effective occupation of the coast, a rule adopted by the Berlin West Africa Conference<sup>283</sup>—and would have significant ramifications for indigenous peoples and nations that have been submerged under modern states based on tacit or implicit application of *uti possidetis juris*. However, such a reading of the judgment is excessively expansive; it is clear that the court had no intention of sanctifying a general rule that would bring into question the nature of the control exercised by colonial powers, except in the context of an interstate territorial dispute. Although there may be no legal significance attached to the fate of former colonial territories, it does signify the opening up of the nature of control exercised during colonial times in an international legal forum, about which earlier cases were reticent.<sup>284</sup> Indeed it could be argued that the engagement of this discussion is tribute to the point raised in *Territorial Dispute (Libya/Chad)* regarding colonial *effectivités* and the extent to which it propelled title-generating claims to territory.<sup>285</sup>

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283. See C.H. Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century*, *supra* note 39, at 46–47. See generally SYBIL E. CROWE, *THE BERLIN WEST AFRICA CONFERENCE 1884–1885* (1942). The Berlin West Africa Conference (1884–85) consisted of a series of negotiations that took place in Berlin, Germany under the chairmanship of Chancellor Otto von Bismarck. See *id.* at 5–6. The purpose of the conference was to create a forum through which the major European powers could engage in discussions and determinations concerning their future roles in Africa. See *id.* It is historically famous for the decision to divide Africa into spheres of control. See *id.* at 190.

284. The court is still likely to read the intertemporal rule in its strictest light, but it has arguably begun to weigh different factors and examine a wider range of evidence than previously considered. See Kaiyan Homi Kaikobad, *The Quality of Justice: “Excès de Pouvoir” in the Adjudication and Arbitration of Territorial and Boundary Disputes*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 293 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

285. In *Territorial Dispute (Libya/Chad)*, the Libyans strongly rebutted the *effectivités* argument with respect to treaties:

[T]he historical evidence shows that when the Anglo-French agreements from 1890 to 1899 were concluded neither France nor Great Britain had any effective authority over the African territories and peoples included in their respective “spheres of influence” and, indeed, no meaningful presence at all in most of the region. When France created the “circonscription spéciale dite ‘territoire militaire des pays et protectorates du Tchad’” in September 1900, within what were then called the French Congo Territories, it had neither effective authority nor any real presence in the areas surrounding or extending north of Bir Alali in Kanem or in the regions of Borkou, Tibesti, Ouinianga, Erdi and Ennedi.

Memorial Submitted by the Great Socialist People’s Libyan Arab Jamahiriya Vol.1, *Territorial Dispute (Libya/Chad)*, 1991 I.C.J. Pleadings 71, para. 4.06 (Aug. 26, 1991).

*E. Pending Cases*

The doctrine of *uti possidetis juris* is likely to be called into question in several pending cases.<sup>286</sup> For instance, in *Territorial & Maritime Dispute (Nicaragua v. Colombia)*, Nicaragua has already sought to convince the ICJ of its sovereignty over the San Andrés Archipelago based on ancient titles generated by the doctrine of *uti possidetis juris*.<sup>287</sup> Although many of the pending cases raise issues similar to those previously addressed by the ICJ, the PCIJ, and related special tribunals, each disputed territorial claim or boundary delimitation request inevitably raises specific elements that challenge the ICJ to be an authority on history, and to reflect this authority in legal judgment.<sup>288</sup> This challenge is identified by Judge Higgins, who discussed *Frontier Dispute (Benin/Niger)* in a special address to the International Law Commission:

To understand who at the time had the authority to determine or change a frontier required reliance on national law. But then, as in other such cases, it was important for the Court to be able to identify which authorised colonial acts were purely intra-colonial or whether they could have the effect of altering a frontier for purposes of international law.<sup>289</sup>

In that case, the ICJ was specifically instructed to use the principle of *uti possidetis juris* in its decision:

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286. See *Territorial and Maritime Dispute (Nicar. v. Colom.)* (Dec. 13, 2007), available at <http://www.icj-cij.org/docket/files/124/14305.pdf> (last visited Jan. 26, 2008); *Pulp Mills on the River Uruguay (Arg. v. Uru.)* (Application Instituting Proceedings) (May 4, 2006), available at <http://www.icj-cij.org/docket/files/135/10779.pdf> (last visited Jan. 26, 2008) (concerning the extent to which the Government of Uruguay may decide to locate a pulp mill on the common boundary between the states without due consultation); *Dispute Regarding Navigational and Related Rights of Costa Rica on the San Juan River (Costa Rica v. Nicar.)* (Application Instituting Proceedings) (Sept. 29, 2005) (regarding Costa Rica's rights on the San Juan River), available at <http://www.icj-cij.org/docket/files/133/8268.pdf> (last visited Jan. 26, 2008); *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)* (Application Instituting Proceedings) (Sept. 16, 2004) (seeking to establish a maritime boundary that would delimit the continental shelf and exclusive economic zones), available at <http://www.icj-cij.org/docket/files/132/1697.pdf> (last visited Jan. 26, 2008); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)* (Special Agreement) (July 24, 2003), available at <http://www.icj-cij.org/docket/files/130/1785.pdf> (last visited Jan. 26, 2008).

287. See *Territorial and Maritime Dispute (Nicar. v. Colom.)* para. 7 (Dec. 13, 2007), available at <http://www.icj-cij.org/docket/files/124/14305.pdf> (last visited Jan. 26, 2008).

288. See H.E. Judge Rosalyn Higgins, President, ICJ, Speech at the 58th Session of the International Law Commission (July 25, 2006), available at <http://www.icj-cij.org/court/index.php?pr=1272&pt=3&p1=1&p2=3&p3=1>.

289. *Id.*

The interesting challenge was to have this doctrine play its important role, without ignoring, temporally speaking, all that had occurred in real life subsequently. The Court confirmed that it would look at maps and other data subsequent to the critical date, but to see if they evidenced an agreement to alter the *uti possidetis* line.<sup>290</sup>

The ICJ was asked to determine the boundary between Benin and Niger in the River Niger and River Mekou sector, which would establish *de jure* sovereignty over the disputed islands in the Niger River.<sup>291</sup> The ICJ applied the doctrine of *uti possidetis juris* to determine the inherited boundary from French colonial rule on the agreed critical dates: Benin's independence (formerly the French colony of Dahomey) on August 1, 1960, and Niger's independence (formerly the French colony of Niger) on August 3, 1960.<sup>292</sup> While the ICJ was mindful that applying *droit d'outre-mer*, or French colonial law, was overwhelmingly important, it also recognized that modern day physical realities could not be discounted, especially in determining the sovereignty of islands that may appear or disappear over time.<sup>293</sup> In determining the nature of *droit d'outre-mer*, the most relevant document was the decree of the President of the French Republic of June 16, 1895,<sup>294</sup> which placed the entire territory of Afrique Occidentale Française under the stewardship of a Governor-General, and then divided the territory into colonies headed by Lieutenant-Governors, which were divided into *cercles*, or smaller administrative units.<sup>295</sup> The judgment also discussed the process for modifying the units' territorial dimensions, with local Lieutenant-Governors holding considerable power for this modification.<sup>296</sup> The judgment was also unique in that it determined the frontier on two bridges between Gaya in Niger and Malanville in Benin—unprecedented in the history of the territorial disputes.<sup>297</sup>

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290. *Id.*

291. Frontier Dispute (Benin/Niger), 2005 I.C.J. 90, 94–103 (July 12).

292. *Id.* at 108.

293. *See id.* at 108–09.

294. *See id.* at 110.

295. *See generally* DOV RONEN, DAHOMEY: BETWEEN TRADITION AND MODERNITY (1975) (concerning the declaration of the independence of Dahomey, which subsequently became Benin); WILLIAM F.S. MILES, HAUSALAND DIVIDED: COLONIALISM AND INDEPENDENCE IN NIGERIA AND NIGER (1994) (concerning the independence of Niger and the division between Nigeria and Niger based on colonial linguistics).

296. *See id.* at 108–11.

297. *See id.* at 141–42. *See generally* Fabio Spadi, *The International Court of Justice Judgment in the Benin-Niger Border Dispute: The Interplay of Titles and "Effectivités" Under the Uti Possidetis Juris Principle*, 18 LEIDEN J. INT'L L. 777 (2005).

## V. MODERN LAWS OF SELF-DETERMINATION IN LIGHT OF THE DOCTRINES GOVERNING TERRITORIALITY

Having analyzed the major doctrinal tools that are available in public international law, and having studied their application in terms of the major international legal challenges that have arisen before the ICJ, it is now time to turn to the doctrines' value in self-determination claims. This Part pays particular attention to the doctrines' continued salience for territories that have been wrested from indigenous and other communities, especially those that remain effectively dispossessed and marginalized despite the decolonization process that may have occurred within the territories themselves.

Self-determination involves the following direct constraints vis-à-vis its application to the land rights of indigenous peoples: (1) its expression in human rights law, especially in the context of raising territorial claims; (2) its expression in public international law; (3) the legal entitlements of peoples, indigenous peoples, and minorities to this right; and (4) the difficulties with the means for expressing self-determination. Many arguments pertaining to indigenous peoples' self-determination start from the premise that the right should be applied in the same manner that it was applied during decolonization,<sup>298</sup> requiring the group asserting the right to self-determination to show that it had been subject to a process of colonization or quasi-colonization.<sup>299</sup> Indigenous peoples would have a strong claim, especially where public international law and subsequent colonial law were used to erase,<sup>300</sup> ignore,<sup>301</sup> or in some instances illegitimately transfer<sup>302</sup> title to the territory that they inhabited.<sup>303</sup>

Although self-determination is promised rather gloriously to all peoples in the human rights covenants,<sup>304</sup> "peoples" is inevitably read in the

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298. See generally Kingsbury, *supra* note 13, at 216–34.

299. See generally SUREDA, *supra* note 123, at 95–101 (discussing the analysis for determining entitlements to self-determination). See also Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the UN Era*, 88 AM. J. INT'L L. 304 (1994).

300. See ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS* 131–76 (2007).

301. See JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* (2006).

302. See, e.g., Albert Barume, *Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya*, in *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* 365 (Joshua Castellino & Niamh Walsh eds., 2005).

303. See Bradford, *supra* note 44.

304. See ICESCR, *supra* note 62, art. 1 ("All peoples have the right of self-determination."); ICCPR, *supra* note 62, art. 1 (sharing a common article 1). It would be difficult to construct an objective standard to measure "colonial" treatment in the modern

traditional European twentieth century colonial context, and is seldom extended further back in history, thus denying the right to groups that claim to be victims of subjugation in the ancient past in a manner they deem colonial. In human rights law, despite the strong rhetoric of self-determination, the right has limited utility in determining the fate of the territory historically inhabited by people of a nation or *ethnie*.<sup>305</sup> This narrow definition nullifies the value of decolonization rhetoric for indigenous peoples, because the right to self-determination contained in human rights annals offers little remedy to the dispossession of land.<sup>306</sup>

During the wave of decolonization in the latter part of the twentieth century, the three options that existed for a unit emerging from decolonization were relatively straightforward: (1) creation of an independent state; (2) free association with an existing state; or (3) integration with a pre-existing state.<sup>307</sup> Despite the clear articulation of these options, very few processes of decolonization occurred through any reference to the people.<sup>308</sup> Rather, the territorial units were handed over to those claiming sovereignty without consulting the inhabiting people.<sup>309</sup> As a result, decolonization was more akin to Latin American seizure of political power, rather than a concerted focus on the democratic consent notion that underpinned the American and French Revolutions.

Despite these difficulties, the existence of the right continues to raise aspirations worldwide, in many instances playing into the hands of iden-

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context. However, denying indigenous populations of their human rights and access to justice provides one possible basis for such a threshold.

305. See Joshua Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 55 (Nazila Ghanea & Alexandra Xanthaki eds., 2005).

306. See SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 99–107 (2000) (reflecting on the issues addressed by the HRC in article 1 of the ICCPR). See generally THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS, *supra* note 13, at 116–376 (discussing human rights instruments). See G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

307. See G.A. Res. 1541 (XV), *supra* note 59.

308. See generally SUREDA, *supra* note 123 (detailing the extent to which the decolonization processes occurred and the extent to which there was consultation). While the work is now dated it nonetheless remains a comprehensive account of U.N. decolonization, much of which had already occurred at the time of writing. See *id.*

309. See JOHN D. HARGREAVES, *DECOLONIZATION IN AFRICA* (2d ed. 1996). The consent of the Africans was needed for tranquility, though in terms of the handover of power, mere acquiescence would possibly suffice. See *id.* at 22. African consent was required by the British in terms of its colonies—not regarding the legitimacy of the new arrangements for the emerging state, but in the context of having to sell the plan at home to political forces opposing the U.K. Parliament. See *id.* at 115, 180.



tity entrepreneurs that seek political power at the cost of dismembering existing states.<sup>310</sup> For more genuine claims, however, the right remains of dubious value—impossible to ignore, but a constant red herring in the quest for equal rights for displaced and dispossessed populations struggling to come to terms with what modernity implies for traditional ways of life.<sup>311</sup> As was revealed in the achievement of autonomy in the northern Canadian territories of Nunavut, other means may provide a more useful avenue compared to self-determination claims, assuming, however, that a state is willing to engage in discussion with an indigenous people<sup>312</sup>—something that very few states are currently willing to do.<sup>313</sup>

Self-determination, including the potential option of political status determination, i.e., the option of raising the issue of the best political structure for determination by the specific group, should be made available to indigenous peoples (just as it was to colonial peoples) by conceptualizing self-determination for indigenous peoples through an expansive analysis of the Human Rights Committee (“HRC”) jurisprudence on the applicability of article 1(2) of the ICCPR.<sup>314</sup> Article 1 states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mu-

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310. See, e.g., PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* (2001). It could be argued that the entire dissolution of the Former Yugoslavia was motivated by the entrepreneurial efforts of Slobodan Milosevic. See *id.* at 168. In trying to garner greater power within the state for Serbia, Milosevic effectively appealed to the more separatist elements within the state, leading in a most devastating and costly manner to Yugoslavia’s dismemberment. See *id.*

311. See also International Labour Organisation [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* arts. 13–17, June 27, 1989, 28 I.L.M. 1384; THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS*, *supra* note 13, at 366 (explaining that many indigenous groups are disappointed that the ILO Convention’s evasive language fails to address self-determination). See also Lee Swepston, *Indigenous Peoples in International Law and Organizations*, in *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* 53 (Joshua Castellino & Niamh Walsh eds., 2005).

312. See JENS DAHL, JACK HICKS & PEER JULL, *NUNAVUT: INUIT REGAIN CONTROL OF THEIR LANDS AND THEIR LIVES* 24 (2000) (discussing the Inuit negotiations with the Canadian government).

313. The discussion in Canada over indigenous rights is in sharp contrast to the discussion that has taken place in Australia under the premiership of John Howard. See ANDREW MARKUS, *RACE: JOHN HOWARD AND THE REMAKING OF AUSTRALIA* (2001).

314. See ICCPR, *supra* note 62, art. 1(2).

tual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

While the HRC—the monitoring body of the ICCPR and the quasi-judicial monitors of Covenant obligations—has been reluctant to engage the issue of self-determination,<sup>315</sup> its reluctance has changed slightly in the context of indigenous peoples' claims.<sup>316</sup> In the past, the HRC avoided engaging article 1.<sup>317</sup> However, the current approach is not as overtly cautious and self-determination arguments are addressed under the rubric of indigenous rights to “subsistence.”<sup>318</sup> Yet, in ruling that self-determination can be claimed under article 1(2) rather than article 1(1),

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315. See, e.g., *Mikmaq Tribal Society v. Canada*, Commc'n No. 78/1980, U.N. Doc. A39/40 (U.N. Hum. Rts. Comm. 1984); *Ominayak & the Lubicon Lake Band v. Canada*, Commc'n No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (U.N. Hum. Rts. Comm. 1990).

316. See *Äärelä & Näkkäljärvi v. Finland*, Commc'n No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997 (U.N. Hum. Rts. Comm. 2001); *Länsman v. Finland*, Commc'n No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (U.N. Hum. Rts. Comm. 1994); *Länsman v. Finland*, Commc'n No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (U.N. Hum. Rts. Comm. 1996). See also S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 3* (Pekka Aikio & Martin Scheinin eds., 2000); Martin Scheinin, *Indigenous Peoples' Rights Under the International Covenant on Civil and Political Rights*, in *INTERNATIONAL LAW AND INDIGENOUS PEOPLES 179* (Joshua Castellino & Niamh Walsh eds., 2005) (addressing the manner in which the HRC has discussed and determined complaints raised by indigenous peoples).

317. See, e.g., *Mikmaq Tribal Society v. Canada*, Commc'n No. 78/1980, at 200, 202, U.N. Doc. CCPR/C/43/D/205/1986 (U.N. Hum. Rts. Comm. 1984).

318. *Länsman v. Finland*, Commc'n No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (U.N. Hum. Rts. Comm. 1996). Of the initial HRC cases that alleged violations of article 1 of the ICCPR, the HRC only found a violation of the ICCPR in *Lubicon Lake Band v. Canada*, Commc'n No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) (U.N. Hum. Rts. Comm. 1990). However, the HRC found that article 27 had been violated. See *id.* para. 33. Since 2000, in cases similarly alleging article 1 violations, the HRC has similarly found violations of alternative articles of the ICCPR. See *Gorji-Dinka v. Cameroon*, Commc'n No. 1145/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (U.N. Hum. Rts. Comm. 2005); *Diergaardt v. Namibia*, Commc'n No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (U.N. Hum. Rts. Comm. 2000). See generally A.F. Bayefsky, *Jurisprudence—CCPR*, <http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/5/type/all> (last visited Feb. 5, 2008) (listing HRC cases alleging ICCPR violations).

the HRC may be accused of nevertheless taking a highly conservative and non-confrontational stance to the detriment of the drafters' intent.<sup>319</sup>

It has always been clear that the right to self-determination was considered a right of "whole peoples." However, if the HRC finds that indigenous peoples face quasi-colonial situations where the right to self-determination has been violated, restriction to only the socio-economic aspects of the right would seem to challenge the foundations of article 1(1). Instead, it could be argued that the difficulty with the application of article 1 as a whole lies in determining who the "people" are, not the restrictive application of their rights once this determination has been made. Without a doubt, a quasi-judicial body such as the HRC is always likely to approach the determination of a group's political status with some trepidation,<sup>320</sup> yet it could be argued that this remains crucial if the territorial element of self-determination is to remain alive. Article 1 as a whole was put in its preeminent position at the head of the ICESCR and the ICCPR on the grounds that, unless a subjugated people can determine its own political, economic, social, and cultural future, an articulation of the rest of their human rights may prove meaningless.

Furthermore, the HRC must not seek to undo one wrong by imposing another wrong. Therefore, populations resettled on indigenous territory—many of whom may have lived there for centuries—also have rights and cannot be dispossessed. This leads to a distinction between two types of claims: (1) territory where indigenous peoples, subjugated nations, or *ethnie* live on contiguous territories where they form the majority; and (2) territory where these communities live dispersed throughout the state.<sup>321</sup> In the latter, a territorially entrenched self-determination solution would be impractical due to the need to respect other groups living among the indigenous people. However, where indigenous peoples or others with genuine territorial self-determination claims live in homogenous pockets, a more coherent engagement of this claim would be consistent with the evolving nature of indigenous claims themselves and a growing sense of the rights of historically suppressed communities. This would also offer an adequate response to the HRC's own past conservative approach as indicated by General Comment 12, which inter-

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319. See Joshua Castellino & Jérémie Gilbert, *Self-Determination, Indigenous Peoples and Minorities*, 3 MACQUARIE L. J. 155 (2003).

320. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 22–24 (2002).

321. See Castellino & Gilbert, *supra* note 319.

prets self-determination without the territorial ownership element, and thus, for many, is not true self-determination at all.<sup>322</sup>

From this distinction between contiguous, homogenous groups living in discrete territorial units and non-contiguous, non-homogenous groups that are territorially dispersed, four remedies of political self-determination emerge:

1. Political self-determination that includes a consent-based determination of the fate of the territory.<sup>323</sup> This remedy may or may not extend to possessory interdicts over contested territories and could be offered to territorially based indigenous people living in contiguous zones or homogenous pockets. It also includes the right of such determination and addresses the subsequent title to the territory they inhabit.
2. Non-political self-determination that includes a range of rights that fall short of accepting the territorial claim.<sup>324</sup> This remedy could be offered to non-territorially based indigenous peoples to guarantee access to human rights law and to address issues of personal autonomy.
3. Non-political self-determination to minorities that guarantees human rights and access to special measures, but does not confer the right of self-determination in any sense, on the grounds that minorities are not peoples.<sup>325</sup>
4. Remedial right to self-determination where widespread and consistent rights denial occurs—usually in the form of crimes

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322. U.N. Office of the High Commissioner on Human Rights [HCHR], General Comment No. 12: The Right to Self-Determination of Peoples (Article 1), Human Rights Committee, 21st Sess. (1984), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.5, at 121 (2001). *See also* U.N. CERD, General Recommendation XXIII on Indigenous Peoples, U.N. Doc. CERD/C/51/Misc.13/Rev.4 (Aug. 18, 1997); U.N. CERD, General Recommendation XXI on Self-Determination, U.N. Doc. CERD/48/Misc.7/Rev.3 (1996); U.N. HCHR, General Comment 23: The Rights of Minorities (Article 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

323. Woodrow Wilson, Fourteen Point Plan, *in* THE PUBLIC PAPERS OF WOODROW WILSON (Ray Stannard Baker & William E. Dodd eds., 1927). *See also* Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT'L & COMP. L.Q. 99 (1994).

324. *See* Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, *supra* note 219 (advocating for a more forthright right to autonomy, even if it is not necessarily as widely applied).

325. This option maintains the current status quo, where minorities—*vis-à-vis* General Comment 12 and other documents—are not clearly entitled to the right to self-determination, which is reserved for “peoples.” *See supra* note 322.

against humanity or genocide—against a vulnerable group, such as indigenous peoples or minorities. The exercise of the territorial rights associated with self-determination should be part of the international community's duty to protect against gross human rights violations.<sup>326</sup>

One vital consideration is a group's territorial basis since it would be nearly impossible to realign states where indigenous populations do not live in a contiguous zone. Rather than subjecting all group claims to this standard of territorial basis and denying the territorial element of many genuine self-determination claims, the nuanced approach above will help give meaning to the right to self-determination in the post-colonial context. Territorially based indigenous peoples would have rights akin to those of colonial peoples, including political self-determination that includes a consent-based determination of territory.<sup>327</sup> Indigenous peoples not inhabiting distinct territories would have the right to non-political self-determination, which falls short of granting territorial claims.<sup>328</sup>

Also, as currently posited in terms of the ICCPR, minorities would continue to have their rights guaranteed under article 27 of the ICCPR<sup>329</sup> and would only be able to raise admissible claims under article 1, where allegations of gross human rights violations call into play the international community's duty to protect.<sup>330</sup> Apart from this eventuality, minor-

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326. See Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, *supra* note 13, at 12–14. But see Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 39 (Pekka Aikio & Martin Scheinin eds., 2000).

327. See Joshua Castellino, *The "Right" to Land, International Law & Indigenous Peoples*, in INTERNATIONAL LAW AND INDIGENOUS PEOPLES 89, 111 (Joshua Castellino & Niamh Walsh eds., 2005).

328. See *id.* at 111.

329. See ICCPR, *supra* note 62, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."). See also U.N. HCHR, General Comment 23: The Rights of Minorities (Article 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

330. See *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004) (describing the duty to protect as an "emerging norm that there is a collective responsibility to protect"). This high-level panel was convened by Secretary General Kofi Annan to "assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century." *Id.* ¶ 3. The report was also subsequently endorsed by Secre-

ity rights protection should focus on guaranteeing non-discrimination and equality, with the possibility of constructing affirmative action measures where such action is warranted and likely to be effective.<sup>331</sup> In addition, “internal self-determination,” i.e., self-determination that does not take into account the title to territory aspect, could also be entertained in the name of effective participation within the political rubric of the state.<sup>332</sup>

This four-tiered approach to self-determination claims highlights the interaction between the doctrines governing territoriality in international law and the right to self-determination of subjugated peoples. Furthermore, it offers some remedy to past processes that were inadequately addressed in international law, the persistence of which undermines its claim to provide justice. While this approach gives indigenous claims a higher valence than that of other submerged nations, this is a justifiable distinction that already exists<sup>333</sup> on the grounds that indigenous peoples are nonetheless “peoples,” while minorities may not be. The approach also has the advantage of rectifying the incomprehensible double standard where more recent colonization is subjected to the territorial remedy of self-determination while older colonization is not. In any case, the inclusion of indigenous peoples as peoples in international law has found some traction, as reflected in the creation of the Permanent Forum on Indigenous Populations and the controversial Declaration on the Rights of Indigenous Peoples.<sup>334</sup>

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tary-General Annan in a 2005 report. *See* The Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

331. *See generally* GERTRUDE EZORSKY, *RACISM & JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* (1991) (providing a discussion of affirmative action and its interesting legal challenges); MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 87–88 (1996) (addressing the value of affirmative action for international human rights law); *THE AFFIRMATIVE ACTION DEBATE* (Steven M. Cahn ed., 2d ed. 2002) (providing a more current offering on the affirmative action debate, especially as played out in the United States).

332. *See* Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, *supra* note 219, at 307 (“[S]elf-determination is increasingly recognized as having an internal aspect that requires full and effective participation by all groups in society.”).

333. *See generally* TIMO MAKKONEN, *IDENTITY, DIFFERENCE AND OTHERNESS: THE CONCEPTS OF “PEOPLE,” “INDIGENOUS PEOPLE” AND “MINORITY” IN INTERNATIONAL LAW* (2000).

334. *See* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The Declaration on the Rights of Indigenous Peoples was adopted by a vote of 143 (in favor) to 4 (against) with 11 abstentions. *See* Press Release, U.N., General Assembly Adopts Declaration On Rights Of Indigenous Peoples; “Major Step Forward” Towards Human Rights For All, Says President (Sept. 13, 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. *See also*

Such developments are congruous with the emergence of norms against genocide, crimes against humanity, and the international community's duty to protect populations against gross human rights violations. Validating remedial self-determination, a mechanism arguably at work in Bangladesh, Eritrea, Timor-Leste, and Kosovo, would effectively provide sanctions in law, rendering states accountable to the international community for mistreatment of indigenous groups.<sup>335</sup> In one sense, the recognition of remedial self-determination reflects Grotius' maxim *jus resistendi ac secessionis*.<sup>336</sup> It is the natural law right of self-defense,<sup>337</sup>

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PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 370–96 (2002) (providing insight into the contentious nature of the framing of the document and its history).

335. See *supra* notes 9, 222. See generally G.A. Res. 2625 (XXV), *supra* note 57. The resolution articulates the rationale of self-determination as the need to promote friendly relations among states and to end colonization:

Every State has a duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples . . . .

...

Every state has the duty to promote, through joint and separate action universal respect for and observance of human rights and fundamental freedoms . . . .

...

Every State has the duty to refrain from any forcible action which deprives peoples . . . in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support . . . .

...

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

*Id.* at 123–24. For more on this document and its importance in developing the norm of self-determination, see CASTELLINO, *INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL “NATIONAL” IDENTITY*, *supra* note 15, at 34–41.

336. See NEUBERGER, *supra* note 25, at 4; HUGO GROTIUS AND INTERNATIONAL RELATIONS 267 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1992).

and in exercise of this right, the entity may opt to secede from an existing state with the backing of the international community.<sup>338</sup>

#### CONCLUSION

Despite the uncertain legal valence ascribed to self-determination, especially in its territorial dimension, it remains the only vehicle through which indigenous rights to territory can be expressed. The right itself has seen numerous changes since its early expressions, and at each *fin de siècle* it has developed nuances as a political principle. Giving a principle of uncertain substantive content the authority of a legal tenet was arguably fraught with danger. Yet, political forces bestowed the right to self-determination as the vehicle for expression of freedom in the face of oppression. However, in looking towards self-determination as a tool for modern freedom from oppression, Kingsbury's warning vis-à-vis the future of self-determination is worth heeding:

[The] argument from decolonisation has been reinforced by practice suggesting that self-determination in the strong form as a right to establish a separate state may be an extraordinary remedy in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state . . . . But the far-reaching argument that self-determination in this strong form of statehood or almost complete autonomy is essential as a general precondition for human rights does not establish which groups or territories are the units of self-determination for purposes of human rights enhancement; nor does it overcome legitimate concerns about the threats to human rights and to human security posed by repeated fragmentation and irredentism. The remedial human rights justification for self-determination, while persuasive in some cases, is most unlikely to become normal rather than exceptional unless the sovereignty and legitimacy of states declines precipitously.<sup>339</sup>

A more concerted approach at engaging the underlying tensions in many post-colonial states, like the one proposed, will allow more thorough analysis and reflection on whether the quest to protect order—by sanctifying inherited international frontiers—has truly yielded order. In some parts of the world, the accepted boundaries have become the ac-

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337. See Castellino, *The Secession of Bangladesh: Setting New Standards in International Law?*, *supra* note 222, at 93–94.

338. See *supra* note 222 (discussing territorial claims achieved through international political processes rather than law).

339. Benedict Kingsbury, *Reconstructing Self-Determination: A Relational Approach*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* 23 (Pekka Aikio & Martin Scheinin eds., 2000).



cepted markers of identity, but in many other places, boundaries continue to fuel aspiration and separatism. The law as it stands suggests that *uti possidetis juris* lines may be modified by consent. However, this consent is restricted to that between sovereign states. This particularly disadvantages cross-border communities who are often unrepresented by the governments on both sides of the frontier. It also fails to provide any remedy to indigenous peoples, many of whom are not in strong enough political positions to mobilize support for their causes. As it stands, non-state actors have no explicit right in international law to demand or even raise questions of territorial adjustment, rendering the territorial aspects of self-determination relatively meaningless. It is mainly this interpretation that has led the quasi-judicial human rights bodies, such as the HRC and its counterpart in the International Convention for the Elimination of All Forms of Racial Discrimination, to articulate the norm of internal self-determination.<sup>340</sup> However, denying the political territorial aspect of self-determination reduces this historic right—used as a rallying point to fight injustice—to a relatively mundane discussion about political rights within states. The claimants rightly fail to see why they need to exist within externally defined units for the sake of historical convenience and international order. As a result, aggrieved and unrepresented peoples along with political opportunists raise the banner of self-determination, often resorting to the use of force to internationalize their conflict and seek resolution of the issue away from the realm of law and within the realm of power.<sup>341</sup>

Thus, in terms of indigenous peoples and the right to land, international law is keen to guarantee order and stymie any norm that could potentially violate that order. Accordingly, international law stresses that self-determination should involve the accommodation of differing national identities within the confines of the state, rather than the creation of new states or the dismembering of older states, and quasi-judicial human rights bodies are less than keen to make the connection between self-determination and the right to property for indigenous peoples in deference to state parties.

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340. See generally Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION 101 (Christian Tomuschat ed., 1993).

341. See generally U.N. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Minority Rights and the Prevention of Ethnic Conflicts*, U.N. Doc. E/CN.4/Sub.2/AC.5/2000/CRP.3 (May 10, 2000), available at [http://www.unhcr.ch/huridoca/huridoca.nsf/AllSymbols/31CE7BBED216F60C802568FD0047B63A/\\$File/G0013786.pdf](http://www.unhcr.ch/huridoca/huridoca.nsf/AllSymbols/31CE7BBED216F60C802568FD0047B63A/$File/G0013786.pdf); CHRISTOPHER O. QUAYE, LIBERATION STRUGGLES IN INTERNATIONAL LAW (1991).

While it is commendable that indigenous peoples' enfranchisement has grown within the U.N. and most state systems, it remains akin in many cases to the granting of full franchise to members living within a colonial setting. For a fully acceptable solution to the situation, the underlying basis of the self-determination claim needs to be addressed. However, the constraints to such an address remain clear—populations that have settled upon the territory have claims too. The state often acts in the interest of these settler claims, and the state consents to human rights law in the name of its inhabitants. This particular debate has resulted in the frustration of several important legal documents within the U.N. system,<sup>342</sup> within regional settings,<sup>343</sup> and also in the context of other organizations.<sup>344</sup> The stalling point remains the issue of land rights, and while important case law is being developed on the subject,<sup>345</sup> this jurisprudence tends to occur within domestic rather than international settings.<sup>346</sup> Thus, we remain a considerable way from being able to address the issue of land rights within international and human rights law. Rather than a clash of ideology, as it was in the negotiation of the International Bill of

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342. See U.N. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples* 103–15, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En). See also Siegfried Wiessner & Marie Battiste, *The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People*, 13 ST. THOMAS L. REV. 383 (2000); THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS*, *supra* note 13, at 370–96 (discussing the U.N. Draft Declaration on the Rights of Indigenous Peoples).

343. See Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 1333d sess., OEA/Ser/L/V/II.95 (1997). See also THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS*, *supra* note 13, at 397–404 (discussing the Proposed American Declaration on the Rights of Indigenous Peoples).

344. See Fergus MacKay, *Universal Rights or Universe onto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 (2002) (commenting on developing standards at the World Bank vis-à-vis indigenous peoples). See also ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* arts. 13–17, June 27, 1989, 28 I.L.M. 1384.

345. See Wiessner, *supra* note 48; Inbal Sansani, *American Indian Land Rights in the Inter-American System: Dann v. United States*, 10 HUM. RTS. BRIEFS 2 (2003); Osvaldo Kreimer, *Indigenous Peoples' Right to Land, Territories and Natural Resources: A Technical Meeting of the OAS Working Group*, 10 HUM. RTS. BRIEFS 13, 15–16 (2003).

346. See INTERNATIONAL LAW AND INDIGENOUS PEOPLES 159–391 (Joshua Castellino & Niamh Walsh eds., 2005) (including studies of domestic events in Australia, Canada, Mexico, Nicaragua, India, Bangladesh, Nigeria, South Africa, and Kenya). Some perceptible changes have been achieved at the regional level, not least within the Inter-American system. See Anaya & Williams, *supra* note 193.

Rights,<sup>347</sup> this is a clash between the competing interests of the Old World—in establishing indigenous communities that have been dispossessed over time—and the New—in legitimately occupying the same territory. The establishment of an appropriate mechanism for addressing this clash remains central to the protection, promotion, and propagation of indigenous rights and identity.

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347. *See generally* H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN (1945) (illustrating the perceived challenge of drafting the International Bill of Rights).