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Following a Sigmoid Progression: Some Jurisprudential and Pragmatic Considerations Regarding Territorial Acquisition Among Nation-States

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FOLLOWING A SIGMOID PROGRESSION: SOME JURISPRUDENTIAL AND PRAGMATIC CONSIDERATIONS REGARDING TERRITORIAL ACQUISITION AMONG NATION-STATES

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Abstract: This article analyzes methods and doctrines used by States to acquire territories. The role of the United Nations in resolving disputes between nations and the inhabitants directly affected by the disputes is also addressed, including the jurisdictional, jurisprudential, and practical considerations of territorial acquisition. Finally, traditional territorial acquisition doctrines are applied to extraterrestrial and outer space acquisition. As Western civilization etched out territories and borders across its known world, international norms of diplomatic behavior appeared in the form of customs. These customs eventually grew into codifications, which in turn grew into the elaborate international system enjoyed and protested today. Laws emerged among international States to formalize the growing body of norms of interaction across them. Modern territorial sovereignty provides the State an "exclusive right" to perform State functions within that territory, but with a realization that no State may exercise its authority within the territorial limits of other States.

INTRODUCTION

Before lands were "possessed" and nation-states emerged, there was territory. For millennia, people have organized themselves into groups, tribes, and nations for community-level protection, kinship, and com-

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mon identity.[1] The laws that emerged in these high-context social structures codified the accepted, informal standards of interaction.[2] National boundaries, a relatively recent innovation in human history, characterize the nation-state and organize the world as we know it; they are purely symbolic but strict limits on identity and connection to higher-order social groups.[3] Indeed, as fields of social regulation, both international relations and international law depend heavily on specific definitions in order to function in arenas of ambiguity and fluid inference.[4]

As Western civilization etched territories and borders across the known world, international norms of diplomatic behavior appeared in the form of customs.[5] These customs were eventually codified and grew into the elaborate international system we know today.[6] Eventually, laws emerged within societies to formalize this growing body of norms of international interaction.[7] In the fourteenth century BC, for example, treaties between Egypt and its neighbors reveal that even hundreds of years ago principles of mutual sovereignty and equality among political entities were firmly entrenched.[8] The Greeks developed a similarly complex system of international laws to regulate interactions among their city-states.[9]

International rules of territorial acquisition, in their modern form, are largely a product of the last five centuries.[10] This history suggests their peculiarly European origins; indeed, modern international law of territorial acquisition is almost exclusively a product of Western civilization, rather than an equitable interaction among all civilizations.[11] To be sure, the concept of diplomatic immunity was influenced by Islamic civilizations and the practices of the Ottoman empire, but this influ-

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[1] John Maxcy Zane, The Story of Law 22 (1927). This book provides a fascinating in-depth look into the origins and evolution of legal development.

[2] *See id.* at 24.

[3] *See* I.A. Shearer, Starke's International Law 172 (11th ed. 1994).

[4] *See* M.F. Lindley, The Acquisition and Government of Backward Territory in International Law 19 (1926).

[5] Zane, *supra* note 1, at 418.

[6] *See id.* at 419.

[7] *See id.* at 24.

[8] Charles G. Fenwick, International Law 5 (4th ed. 1965).

[9] *Id.* at 9.

[10] Shearer, *supra* note 3, at 7–8.

[11] *Id.* at 7–9. For a comprehensive discussion and categorization of the world's civilizations, see generally 1 Arnold J. Toynbee, A Study of History 51–128 (2d ed. 5th impression 1951). For a formulation of Toynbee's categories within the context of international relations per se, as well as a very insightful update to Toynbee's categories to conform to the modern day, see generally Samuel P. Huntington, *The Clash of Civilizations?*, Foreign Aff., Summer 1993, at 22.

ence registered relatively late in the evolution of established European rules of international conflict avoidance that formed during the periods of most European expansion.[12]

Encounters between Europeans and the indigenous societies of the Americas did not immediately create the basis for determining the rules of intercivilizational interaction, but rather clarified for Europeans the need to establish rules for minimizing conflict among European Powers.[13] The European Powers thus adopted rationales that served their interests without regard for the rights or well-being of the indigenous societies that already occupied lands "discovered" by European explorers.[14] The Europeans' insistence on adopting universal rules of international interaction is therefore significant; it reflects a departure from the earlier practice of extending hegemony over foreign peoples.[15] This motivation to build universal rules of international law prevailed in international relations far beyond those rules' immediate utility in managing relations among European powers.[16] In this regard, the Europeans' strong desire to formulate universal rules—rather than those that simply served national interests—is remarkable.[17] In later centuries, this logic was extended to practices of members of the world community, at times to the detriment of members of Western civilization who would have preferred to forego hegemonic interests altogether rather than to flout the objective of universal rules of international interaction.[18]

Self-serving rules from the era of post-Renaissance European hegemonic expansion grew into tenets of international law that exist today.[19] Even so, parties to modern discussions of international law fail to recognize the fact that international law is a product of European civilization's unique perceptions of the "natural" order of the world, instead clinging to the notion that universality is inherent in rules of international interaction.[20] Ultimately, modern international law is the outgrowth of an unwavering adherence among the Western European powers to the purported universality of the rules they adopted to fore-

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[12] *See* Sharon Korman, The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice 34 (1996).

[13] *See id.* at 45.

[14] *See id.* at 46.

[15] *See* Malcolm N. Shaw, International Law 23–24 (6th ed. 2008).

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.* at 13–14.

[20] *See id.* at 39.

stall conflict among themselves as they pursued their respective hegemonic ambitions.[21] To be sure, had such rules of international law preserved those tenets that were fundamentally generalizable only to European powers—for example, the Papal differentiation between Christian peoples and all others—there would be no perceptions of universality in international law today.[22] In the present era, the United Nations (U.N.)—a product of conflicts primarily within and affecting Western civilization—evidences the commonly accepted concepts of equality of States, particularly in light of the legacy of the League of Nations.[23] Although the notion of "sovereignty" generates much debate, this Article addresses the term only with regard to territorial acquisition, with an eye to emphasizing the prominent role of Western civilization in establishing the rules of international law that dominate the world today.[24]

Although early civilizations were less conscious of territorial boundaries than of common identity, the necessity to hold territory and defend it against threats inevitably led to defined territories established according to the nation-state formula familiar in modern times.[25] To be sure, it is an observable fact that civilizations tend to try to extend their boundaries as far as possible.[26] Under these conditions, civilizational expansion originally involved the seizure of territory without regard to whether the territory already belonged to indigenous societies.[27] Nevertheless, norms that now guide international behavior began as norms to guide intercivilizational behavior, namely between the Egyptian civilization and its Sumeric and Babylonic neighbors.[28]

Territorial sovereignty grants the State an exclusive right of authority and control within that territory.[29] The corollary is that no State has any right to exercise its authority within the territory of any other State.[30] Implicit in this definition is the principle that the limits of a State's duties and privileges correspond to the geographic boundaries

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[21] *See* SHAW, *supra* note 15, at 13–14.

[22] *See id.* at 39.

[23] *See id.* at 30–31.

[24] *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 17–18 (7th ed. 1997). Throughout the past century, international political cooperation has placed some restrictions upon a State's sovereignty, as States have become less autonomous than they were in the eighteenth and nineteenth centuries. *See* SHEARER, *supra* note 3, at 90.

[25] *See* MALANCZUK, *supra* note 24, at 147–153.

[26] *See id.*

[27] *Id.*

[28] *See* FENWICK, *supra* note 8, at 5.

[29] Island of Palmas (Neth./U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928).

[30] *Id.*

of its territory.[31] A State's territory includes the land itself and all that exists above and below it.[32] In addition, a State's territory includes as much as twelve miles of sea extending from any coastal border.[33]

The *Island of Palmas* arbitration provides exceptional insight into the role of ancient doctrines in international territorial governance and possession.[34] The arbitration involved a dispute between the Netherlands and the United States, both of which claimed sovereignty over the Island of Palmas.[35] The United States acquired the island from Spain, which claimed title dating back to 1648 under the doctrine of discovery.[36] Nevertheless, the Netherlands claimed title via active possession and the effective exercise of sovereign rights over a sufficient time to evoke contest.[37] The dispute was heard by the Permanent Court of Arbitration, which held that the island belonged to the Netherlands.[38] The resolution of this dispute placed the burden of contest on any State seeking to claim territory actively possessed by another State.[39] Following the passage of a sufficiently reasonable time period, a failure to contest constitutes acquiescence to possession by the sovereign that actively controls the disputed territory.[40]

From its origins in early civilizations, territorial acquisition has evolved through the millennia from relying primarily on the use of brute force to dominate weaker powers to an idealized concept of self-determination and peaceful transfers that eschews conquest and the use of force to acquire territory.[41] This Article reviews the manner of territorial acquisition in the twenty-first century, focusing on the devel-

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[31] *See* SHEARER, *supra* note 3, at 90. As Shearer states, "[t]he basic *rights* most frequently stressed have been those of the independence and equality of states, of territorial jurisdiction and of self-defense and self-preservation." *Id.* These rights contrast with several duties imposed upon a State, including: avoiding war, completing treaty obligations, and "not intervening in the affairs of other states." *Id.*

[32] MALANCZUK, *supra* note 24, at 76.

[33] *Id.*

[34] *See Island of Palmas,* 2 R.I.A.A. at 835.

[35] *See id.* at 831.

[36] *Id.* at 837.

[37] *Id.*

[38] *Id.* at 871.

[39] *See id.* at 870.

[40] *See Island of Palmas,* 2 R.I.A.A. at 868.

[41] MORTON H. HALPERIN & DAVID J. SCHEFFER, SELF-DETERMINATION IN THE NEW WORLD ORDER 16–17 (1992). There are two different concepts of self-determination. *Id.* at 16. The first— "external self-determination" —provides "that people have the right to choose their own sovereignty—that is, to be free from external coercion or alien domination." *Id.* The second concept simply requires that people have a meaningful role in the political process. *Id.* at 17.

opment of various means of acquisition.[42] Beginning with methods developed millennia ago, this Article charts the shifts in international policies and socially acceptable standards of territorial acquisition in modern times, particularly as they are relevant to the role of the International Court of Justice (ICJ) in the settlement of international disputes over territory.[43]

The European discovery of the Americas in 1492 fueled the formation of international standards of acquisition.[44] European States quickly attempted to establish themselves in this new, mostly open expanse.[45] Partly as a result of the power struggle prompted by the discovery of the vast natural resources available on the new continent, European States developed mutually recognizable standards for the acquisition of territory.[46] By establishing a pattern of reciprocal benefits, these international rules naturally worked to the advantage of European States alone.[47] Avoiding conflict among European States enabled each to better exploit the new lands in the Western Hemisphere.[48] As long as they abided by the standards established under the newly emergent doctrine of discovery, each State could devote its efforts to conquering and colonizing territories without undue concern about interference from other, equally powerful States.[49] These standards persisted and generally remained the primary methods for acquiring territory until World War II.[50]

The motive to possess and maintain territory depends on the perspective of the would-be possessor. Whereas States have significant interests in maintaining territorial integrity,[51] the interests of international governing bodies are geared more to preserving stability and equality.[52] As a result of the modern standards of territorial acquisi-

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[42] *See* discussion *infra* Parts I, III.

[43] *See* discussion *infra* Part I.

[44] *See* LINDLEY, *supra* note 4, at 27–28 (discussing commissions bestowed on European discoverers as "good evidence of the fact that Conquest or Cession was regarded as the normal method of acquiring territory already in the possession of native tribes").

[45] *See id.*

[46] KORMAN, *supra* note 12, at 47–48.

[47] *See id.*

[48] *See id.* By working together, the Europeans, through the doctrine of discovery, were able both to reduce the costs of such acquisitions by not fighting with each other, and further to ease their expansion by effectively creating an oligopsony over *terra nullius* in the Americas. *See id.* at 42–44.

[49] *Id.*

[50] *See id.* at 135–36.

[51] SHEARER, *supra* note 3, at 90.

[52] U.N. Charter art. 1, para. 1 (indicating that one purpose of the U.N. is "to maintain international peace and security . . . .").

tion—which have become, for the most part, internationally accepted norms of behavior for States—individual States' ability to acquire new territory is limited.[53] Modern standards, at least since the great wars of the twentieth century, focus primarily on questions of human rights and international treaties to determine territorial title and have done away with the archaic doctrines of conquest and discovery.[54]

Yet, conflicts continue to arise and territories continue to shift from State to State.[55] There are several motivations for unilateral deviations from international norms, including ethnocultural, religiophilosophical, and even merely geographic differences, which strain the integrity of traditional borders at various times under the continually evolving social conditions of the planet's complex infrastructure of human habitation and interest.[56] Self-determination, the central principle of modern acquisition, provides that certain peoples should have a say in the creation of their own governments.[57] Modern examples of the exercise of self-determination abound. For example, Palestinians have obtained recognition from a majority of the world's States;[58] factions within Québec continue to militate for secession from Canada;[59] the people of Darfur demand autonomy from Sudan;[60] and Puerto Rico's *independentistas* continue to advocate peacefully for the island's independence from the United States.[61] Before considering the relative legitimacy of each peo-

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[53] *See* David Webster, *Warfare and the Evolution of the State: A Reconsideration,* 40 Am. Antiquity 464, 465 (1975).

[54] *See* Korman, *supra* note 12, at 133.

[55] *See* Lea Brilmayer, Essay, *Secession and Self-Determination: A Territorial Interpretation,* 16 Yale J. Int'l L. 177, 177 (1991) (noting several modern-day secessionist movements that have attempted to redraw political boundaries and create internationally recognized States).

[56] *See* Malanczuk, *supra* note 24, at 157, 338. In discussing territorial disputes, Malanczuk notes that "legal and political arguments are often used side-by-side. . . . The main political arguments which are used in territorial disputes are the principles of geographical contiguity, of historical contiguity and of self-determination." *Id.* at 157. Additionally, "[t]he problems of minorities and of the special category of indigenous peoples . . . have led to a vivid discussion as to whether such groups have a right to self-determination or whether a new definition of self-determination is required to accommodate extreme situations." *Id.* at 338.

[57] *See* Brilmayer, *supra* note 56, at 177.

[58] *See* John Cerone, *The UN and the Status of Palestine—Disentangling the Legal Issue,* Am. Soc'y Int'l L. Insights (Sept. 13, 2011), http://www.asil.org/insights110913.cfm.

[59] *See* Anthony DePalma, *Canadian Court Rules Quebec Cannot Secede on Its Own,* N.Y. Times, Aug. 21, 1998, at A1.

[60] Jeffrey Gettleman, *Sudan Steps Up Furious Drive to Stop Rebels,* N.Y. Times, June 21, 2011, at A1, *available at* http://www.nytimes.com/2011/06/21/world/africa/21sudan.html.

[61] Jason Adolfo Otano, Note, *Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum,* 27 Fordham Int'l L.J. 1806, 1806 (2004).

ple's claims, however, it is essential to understand the methods of territorial acquisition that have evolved from ancient origins.

Part I addresses the legacy methods used by States in acquiring territory under traditional doctrines of occupation, prescription, cession, and conquest. Part II discusses contemporary issues regarding territorial acquisition, including self-determination and specific international agreements through efforts by the League of Nations and the United Nations. Part III address contemporary jurisprudential and pragmatic considerations for territorial acquisition under the principles of self-determination and self-defense, the doctrine of *uti possidetis,* and methods for territorial dispute resolution. Finally, this article concludes with future considerations for territorial acquisition, including acquisitions of extraterrestrial land and outer space.

I. The Legacy of Past Methods of Acquisition

As Lassa Oppenheim has written, "because the new law has developed out of the old . . . the old is necessary to an understanding of the new."[62] A basic appreciation of the legacy modes of acquisition is necessary to understand the geocentric, modern-day justifications for territorial acquisition. Moreover, despite international regulation, many of the ancient methods of acquisition remain.[63] Although newer, more humane methods may supplant the now-antiquated legacy modes of acquisition, twenty-first century modes of acquisition still reflect aspects of the archaic models.[64]

Throughout the millennia, the most powerful States have sought to expand their empires by seizing new land.[65] Such takings were more than a simple acquisition of property; rather, when a State laid claim to additional increments of territorial jurisdiction, it imposed "a right of political control, of *ultimate authority,*" as opposed to a "right of property."[66] As international codes of conduct have developed over the past five centuries, European States—and, more recently, States across all civilizations—began cooperating to identify ways to agree upon the establishment of title to lands in a manner that worked to the mutual

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[62] 1 Oppenheim's International Law, *supra* note 70, § 242.

[63] *See* Korman, *supra* note 12, at 250–55.

[64] *See* discussion *infra* Part III.

[65] *See generally* Barry A. Weinstein, *Boundaries and Security in International Law and State Practice,* 3 Finnish Y.B. Int'l L. 135 (1992) (discussing trends of territorial acquisition by powerful groups throughout history, starting with early nomadic tribes and continuing through the Soviet Union in the mid-twentieth century).

[66] Fenwick, *supra* note 8, at 403 (emphasis added).

benefit of those parties affected by each such case.[67] The concept of *title* in this Article thus describes the legal claim to territory by a State.[68] As these customs evolved, five doctrines of acquisition developed:[69] the doctrines of occupation; prescription; cession; accretion (or accession);[70] and conquest.[71] To be sure, this categorical approach often oversimplifies the complexities of territorial acquisition and tends to obscure the reality of political cross-purposes that have generated most

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[67] *See id.*

[68] *See id.*

[69] Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal,* 16 CONN. J. INT'L L. 1, 2 (2000). Lee's paper is an interesting and base analysis of the utilization of legacy modes of acquisition. *See id.* The paper also discusses *uti possidetis* and self-determination, and their potential application to modern international law. *See id.* at 11. Touching upon many of the same issues as this Article, Lee provides similar, yet alternative, views on territorial acquisition over time. *See id.* at 2.

[70] Although accretion is beyond the scope of this Article, it is useful to understand the basic doctrine. Accretion describes a geographical process where new land attaches to existing land. SHAW, *supra* note 15, at 498. New formations may be naturally occurring or artificial. 1 OPPENHEIM'S INTERNATIONAL LAW § 258 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Examples of natural accretion include land formed at river deltas, other newly formed islands and river beds that remain after water ceases to flow. *Id.* §§ 260–262. Examples of artificial accretion include "embankments, breakwaters, dykes, and the like . . . ." *Id.* § 259.

In *Nebraska v. Iowa,* the U.S. Supreme Court applied the doctrine of accretion (and its sister doctrine of avulsion) to settle a border dispute between two states:

> It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as "accretion," the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. . . .
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> It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, "avulsion." . . .
>
> These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel. . . .
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> . . . .
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> Such is the received rule of the law of nations on this point, as laid down by all the writers of authority.

143 U.S. 359, 360–62 (1982) (internal quotations omitted).

[71] *See* Seokwoo, *supra* note 69, at 2.

significant territorial conflicts over the past five centuries.[72] Moreover, some traditional modes of acquisition are archaic by today's standards and are unlikely to emerge as justifications for future title acquisitions.[73] In fact, judicial proceedings in both international and national courts tend to identify more than one mode of acquisition, and different categories of justification rarely reinforce one another; instead, they tend to generate vexingly conflicting conclusions in each case.[74] In order to ascertain title, and thus recommend granting it to a single party, it is necessary for a tribunal to disentangle all of the categories and determine which category governs the facts.[75] Hence, in the present discussion, some cases arise in multiple sections, and a discussion of each category of acquisition is necessary for a full understanding of the implications of each case.[76] Moreover, an understanding of traditional categories provides a useful basis for discussing modern acquisitions.

A. *The Doctrine of Occupation*

For practical purposes, the doctrine of occupation depends intimately on the doctrine of discovery.[77] Occupation requires settlement of non-appropriated territory by a State, with the intent of incorporating the territory into the national domain and exercising sovereignty over it.[78] Although European powers permitted simple discovery by other European States into the eighteenth century, title claims eventually required occupation of discovered lands.[79] States often manifested occupation by installing a defensible fort on the land to demonstrate their ability to safeguard the land from indigenous societies and foreign

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[72] Ian Brownlie, Principles of Public International Law 127 (6th ed. 2003).

[73] *See id.*

[74] *Id.*

[75] *Id.*

[76] *See id.*

[77] *Cf.* Lindsay G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands 127–37 (2005) (discussing how the U.S. Supreme Court wrestled with reconciling the doctrines of discovery and occupation through disputes regarding Native American title to land). From the discovery of previously unknown territories came significant rights to title, including rights of occupation. *See* Shaw, *supra* note 15, at 504.

[78] Fenwick, *supra* note 8, at 405.

[79] *Id.* at 404–05.

invaders.[80] Simply planting the State's flag on the unoccupied land, however, could suffice to effectuate occupation.[81]

This doctrine has become an obsolete form of territorial acquisition[82] for the simple reason that no habitable land remains open for possible occupation or discovery.[83] While searching for a new route to India, Christopher Columbus "discovered"—at least, from a European perspective—the Americas, and the doctrines of discovery and occupation emerged as integral parts of exploration and acquisition.[84] The original theory of discovery as a justification for territorial acquisition depended on a civilization-centric theory of information.[85] That is, the question of prior habitation depended on information available to members of Western civilization—namely, the European powers.[86] In the hands of a non-Western civilization—such as the Islamic, Sinic, or Far Eastern[87]—such information did nothing to influence European perceptions on the matter of this important tenet of international law.[88] An alternative expression of this fact is that, at the time, international law was fundamentally European law—and, indeed, only Western European law.[89] If a non-European power ultimately adopted the same theory, it could by such means gain legitimacy vis-à-vis the Europeans and possibly benefit in terms of its own quests for territorial expansion.[90] For example, the Russian Empire—categorized by Arnold J. Toynbee as part of the Orthodox civilization distinct from Western civilization[91]—eventually adopted this theory.[92] Despite its obsolescence,

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[80] *Id.* at 252.

[81] Shaw, *supra* note 15, at 504. Discoverers initially claimed monumentally broad swaths of land on behalf of their nations, as, for example, when Cabot claimed the entirety of North America by sighting it from a ship in 1497. Lindley, *supra* note 4, at 130.

[82] R.Y. Jennings, The Acquisition of Territory in International Law 20 (1963).

[83] *See id.*

[84] *See* Fenwick, *supra* note 8, at 404 ("Occupation as a title to territory obtained its important place in international law in connection with the claims of existing European states to acquisitions of territory in the New World opened up by explorers after the discovery of the American continent in the fifteenth century . . . .").

[85] *See* Jennings, *supra* note 82, at 20.

[86] *See id.*

[87] *See* 1 Toynbee, *supra* note 11, at 129 (listing these three civilizations, among others, as non-Western).

[88] *See* Korman, *supra* note 12, at 45.

[89] *See id.*

[90] *See id.* at 65.

[91] *See id.*; *see* 1 Toynbee, *supra* note 11, at 133.

[92] *Id.*

an understanding of the doctrine of occupation is crucial to the modern resolution of territorial disputes.[93]

1. Colonization and the Doctrine of Occupation

a. *The Americas*

The European discovery of the Americas in the late fifteenth century presented novel challenges to the European powers' pursuit of territorial acquisition that would minimize conflicts with other European powers.[94] The enduring legacy of the boundaries drawn during the original European occupation of the Americas has had an enormous effect on the identity and geography of the resulting States due to the use by the former colonies of the doctrine of *uti possidetis* to formalize their boundaries upon independence.[95] In many cases in the Americas, the European powers relied on the doctrine of conquest to acquire new territory and assert authority over indigenous societies; however, conquest alone was insufficient to establish title to the lands.[96]

The doctrine of discovery permitted Europeans to take control of land in the Americas by giving "title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[97] If a

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[93] *See* Mabo v Queensland (No. 2) (1992) 175 CLR 1 (Austl.). In *Mabo (No. 2),* the High Court of Australia faced the question of occupation in determining aboriginal rights to the Murray Islands, a dispute with origins dating back to Great Britain's first colonization of Australia. *See id.* at 20, 75. The United States may face a similar issue regarding title to the North Pole; while such possibility is rare, recent developments involving Russia could lead the United States to claim sovereignty over the North Pole based on the doctrine of discovery. *See* Luke Harding, *Kremlin Lays Claim to Huge Chunk of Oil-Rich North Pole,* Guardian (U.K.) (June 18, 2007), http://www.guardian.co.uk/world/2007/jun/28/russia.oil; Press Release, Comm'n on Limits of the Cont'l Shelf, Russian Federation First to Move to Establish Outer Limits of its Extended Continental Shelf, U.N. Press Release SEA/1729 (Dec. 21, 2001), *available at* http://www.un.org/News/Press/docs/2001/sea1729.doc.htm. Unfortunately, as of the time of this writing, the matter is still in early stages of development, and as such, credible information is somewhat sparse.

[94] Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,* 16 Eur. J. Int'l L. 25, 41–42 (2005).

[95] John Duncan, Uti Possidetis: *Is Possession Really Nine-Tenths of the Law? The Acquisition of Territory by the United States: Why, How, and Should We?* 38 McGeorge L. Rev. 513, 515–18 (2007). *Uti possidetis* ("so you possessed") is interpreted in the present-perfect tense in English ("so you have possessed") and implies *uti possidetis* ("so you shall [continue to] possess"). *Id.* at 516. The doctrine suggests that "administrative boundaries will become international boundaries when a political subdivision or colony achieves independence." Black's Law Dictionary 1686 (9th ed. 2009).

[96] Korman, *supra* note 12, at 44.

[97] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

European State discovered *terra nullius,* that State had a claim to the territory against all other European States and could take title to the land by way of the doctrine of occupation.[98] "It was a right which all [European States] asserted for themselves, and to the assertion of which, by others, all assented."[99] Hence, title could be established upon discovery by building some form of settlement in the territory.[100]

After the European discovery of the Americas, Papal grants and the doctrine of discovery were the initial means of providing rights of acquisition for *terra nullius,* or "no man's land."[101] *Terra nullius* is land that is, at least in theory, not possessed by another State.[102] To the European powers, it referred generally to land free from the possession of other European powers.[103] In 1492, the Pope granted the right to conquer the Western Hemisphere to Portugal and Spain, defining for each State a general area of dominion.[104] Under the authority of the Donation of Constantine, the Pope claimed the power to establish for Christian rulers the right to acquire territory from and rule over the "heathens and infidels" that sparsely populated the Western Hemisphere.[105] Many resisted this Papal power, however; indeed, several European States ignored the grants of territory and made forays into new continents despite of the Papal edicts.[106] Eventually, the doctrine of discovery developed to regulate the problems with Papal grants.[107]

The ability to claim land through simple discovery quickly led to a proliferation of claims by mere sightings from marine vessels.[108] To address this potential issue, beginning in the eighteenth century European States refused to recognize title by discovery alone.[109] European leaders realized that to continue to avoid mutual conflict, it would be necessary

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[98] *See id.*

[99] *Id.*

[100] LINDLEY, *supra* note 4, at 141.

[101] *Id.* at 124–25.

[102] KORMAN, *supra* note 12, at 43.

[103] *Id.*

[104] LINDLEY, *supra* note 4, at 124–26.

[105] *Id.* at 124.

[106] *Id.* at 126–28; Lesaffer, *supra* note 94, at 42. Certain European powers and indigenous societies in the newly discovered territories did not concur with the European concepts of *terra nullius. See* LINDLEY, *supra* note 4, at 127; Lesaffer, *supra* note 94, at 42. Indeed, the Incan response to these Papal grants was "that the Pope must be crazy to talk of giving away countries which do not belong to him." LINDLEY, *supra* note 4, at 127 (internal quotations omitted).

[107] *See* LINDLEY, *supra* note 4, at 129–30.

[108] *See id.* at 130–31.

[109] *See id.* at 132.

to condition title on something more than a mere sighting by sea.[110] Accordingly, occupation became a requirement for a legitimate claim of title.[111] The doctrine of discovery remained important, though: discovery of *terra nullius* permitted a State to claim temporary title, adverse to other States, until it was feasible to establish occupation.[112]

The guiding requirement for recognition of occupation was that there be "sufficient governmental control to afford security to life and property."[113] In the early days of European colonization, this often required building a defensible fort, but as the period continued, more was necessary.[114] Often, acquisition by occupation was possible only if the occupying power built and maintained a colony.[115] Once the territory was sufficiently occupied, it fell under the sovereignty of the occupying power, and claims by other European States were barred thereafter.[116]

b. *Africa*

Drawing from their experiences in colonizing the Americas, the European powers applied the same doctrines of acquisition to the colonization of Africa.[117] The Final Act of the Berlin Conference formalized the doctrines of acquisition.[118] However, the Final Act bound only the parties to the agreement and applied only to new cases of occupation on the coasts of Africa.[119] The Final Act enumerated three criteria for effectuating title by way of the doctrine of occupation: (1) furnishing notice to interested powers, (2) physical possession of the territory, and (3) establishment of a government sufficient to protect the rights of citizen-subjects.[120] The third criterion required the signatory States to establish authorities to ensure the freedom of trade and transit.[121] As in the

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[110] *See id.*

[111] *See* FENWICK, *supra* note 8, at 404.

[112] *See* MALANCZUK, *supra* note 24, at 149. The permitted grace period before the necessity for occupation varied depending upon the circumstances. *See* FENWICK, *supra* note 8, at 406–05. International tribunals also adjudged the necessary degree of occupation on a case-by-case basis. *See id.* Given the practical concerns that arise from acquiring territory across the Atlantic, a long grace period was a manifest requirement. *See id.*

[113] LINDLEY, *supra* note 4, at 141.

[114] *Id.* at 140.

[115] *Id.* at 141.

[116] *Id.* at 129–30.

[117] FENWICK, *supra* note 8, at 255.

[118] *See* LINDLEY, *supra* note 4, at 144.

[119] *Id.* at 145.

[120] *Id.* at 144, 147. The rights protected by the Final Act appear to be those already possessed by private individuals, as well as the rights of governments. *Id.* at 147.

[121] *Id.* at 144.

Americas, international law permitted a period of time between the original discovery and the establishment of effective occupation.[122] When necessary, reliance on the doctrine of cession—as opposed to the doctrine of conquest commonly invoked during the colonization of the Americas—often effectuated the transfer of title from indigenous societies.[123] Acquisitions under the doctrine of cession involved the transfer of territory by treaty.[124] Eventually, the doctrine of occupation, as the European powers came to understand it, extended beyond the coastal regions and governed the acquisition of territory in the African interior.[125]

c. *Greenland*

As recently as 1933, acquisition by occupation played an important role in determining sovereignty over a portion of Greenland.[126] In *Legal Status of Eastern Greenland,* decided by the Permanent Court of International Justice (PCIJ), the court determined that the degree of occupation necessary to exercise a claim of title over any land was

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[122] *Id.*

[123] *See* LINDLEY, *supra* note 4, at 166–68 (discussing instances in which territory was formally ceded to European States through international agreements). The cessions utilized in Africa were often "protectorates," which placed a region under the protection of a powerful State. *See id.* at 183. There were two types of protectorates. The first permitted the internal workings of a region to remain largely intact. *See id.* at 181. This structure often served to advance a territory toward self-determination when it was at an advanced state of development. *Cf. id.* (noting that the Ionian Islands adopted its own constitution while in a protectorate arrangement with Great Britain). The second system was a colonial protectorate, in which the protecting State assumed all or part of the territory's sovereignty. *Id.* at 182. The crucial difference between the two is that, under the first system, the protecting State had no intention of incorporating the protectorate into its own government, whereas in the colonial protectorate (as the name suggests), the intention was eventually to incorporate the protected State, or at least wield a significant amount of control. *See id.* at 182–83. Along the African coast, this system was crucial for Europeans wanting to expand into Africa in cases where the Europeans could not effectively acquire a region via occupation. *See id.* at 183–86 (examining various protectorate arrangements between European States and rulers in African coastal regions).

[124] *See id.* at 166.

[125] *See id.* at 148. In a dispute between Portugal and Great Britain over the central-African countries of Angola and Mozambique, Lord Salisbury expressly stated his view that the Berlin Conference did not change any of the principles of occupation in the interior lands. *Id.* at 151. Portugal argued that the conference did not make an actual occupation in interior African territories necessary, relying instead on the "spheres of influence" established as an outgrowth of the protectorate treaties. *See id.* Spheres of influence were agreements between States that permitted a State to claim and then occupy land. *See id.* at 207. Japan similarly employed spheres of influence to exercise control over Asia; for example, agreements in 1898 and 1902 with Russia and various Western States, respectively, recognized Japan's special interest in Korea. *Id.* at 218.

[126] *See* Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

measured by whether a State exerted "effective authority" over the disputed territory.[127] In the case, Norway claimed title based on the doctrine discovery, arguing that the territory at issue was *terra nullius* because Denmark refrained from establishing manifest occupation, and enunciating its intent to occupy.[128] Denmark objected, claiming that the reason it refrained from colonizing the land was that the nature of the terrain itself prevented colonization.[129] It claimed that it had indeed exercised sovereignty by way of continuous, peaceful, and undisputed protective authority over the land:[130] Denmark had explored the coasts, established a trading settlement, and mentioned its ownership of Greenland in treaties with Norway.[131] On the basis of these contacts, Denmark proved effective authority and convinced the PCIJ to rule in its favor, thereby defeating Norway's claim of *terra nullius.*[132]

2. Rights of Indigenous Peoples Under the Doctrine of Occupation

A necessary facet of the doctrine of occupation is the discovery of uninhabited *terra nullius.*[133] The concept of *terra nullius,* however, was veritably a legal fiction.[134] Specifically, *terra nullius* reflected only the Europeans' perception of "no man's land."[135] Indeed, a great number of indigenous residents often occupied the lands purportedly "discovered" by the European powers.[136] History shows that the presence of indigenous peoples failed to dissuade the European powers from staking claims to these lands as *terra nullius.*[137] To prevail on a claim of discovery and occupation of *terra nullius,* disputants fashioned creative arguments to distinguish *terra nullius* from occupied areas, and thereby to determine the rights of indigenous societies.[138]

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[127] *See id.* at 75.

[128] *Id.* at 44.

[129] *See id.* at 49.

[130] *Id.* at 44–45.

[131] *Id.* at 33, 44.

[132] *See Legal Status of Eastern Greenland,* 1933 P.C.I.J. at 71–72.

[133] *See* LINDLEY, *supra* note 4, at 2.

[134] *See Mabo (No.2)* (1992) 175 CLR at 40–42.

[135] *See* LINDLEY, *supra* note 4, at 18, 20.

[136] *See id.* at 24–44 (examining the practices of States seeking to occupy already-inhabited lands).

[137] *See id.* at 26, 34.

[138] *See generally* ROBERTSON, *supra* note 77 (offering a comprehensive analysis of the European discovery and occupation of the United States and early interpretations of the rights of Native Americans by the U.S. Congress, the U.S. Supreme Court, and various U.S. States). In his study of the facts surrounding *Johnson v. M'Intosh,* Robertson paints a detailed picture of the circumstances surrounding the case as it transpired through the U.S.

When the European powers landed in the Americas, they encountered indigenous people. These societies differed significantly from those in Western Europe,[139] and Europeans quickly devised an array of approaches for dealing with them.[140] Some early approaches, including those of Franciscus a Victoria, conceded that the indigenous societies had sovereignty over their territory.[141] If, however, the indigenous societies hindered religious teachings or the buildup of European colonies, the King of Spain had the right to acquire sovereignty over them through the doctrine of conquest.[142] In 1493, Pope Alexander VI granted Spain and Portugal the right to conquer indigenous societies in the Americas.[143] The Pope proposed an alternative argument—namely, that if the indigenous societies lacked a territorially defensive governmental structure, then those societies had no rights to their territories.[144] Other approaches set forth the concept of a "Family of Nations."[145] To be a member of the Family, indigenous societies had to have a form of government that advanced beyond a tribal level.[146] The indigenous government and society had to exist within defined, defended territory in accordance with the European model of territorial definition.[147]

Under this definition, however, the European powers precluded many tribes in the Americas from claiming territorial sovereignty despite claims that they possessed a governmental structure that delimited

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court system. *See id.* at 5–23. Robertson discusses, at length, the amount of detail and concern that went into the case, as it relates to *terra nullius* and tribal rights. *See id.* at 95–116.

[139] *See id.* at ix. The discovery of the Americas launched a vast desire on the part of the European sovereigns to colonize the region. *See id.* The European powers, however, eventually found it necessary "to adapt their traditional worldview to accommodate the Columbian landfall." *Id.* The Europeans' response to this affront on their worldviews was to "devise[] rules intended to justify the dispossession and subjugation of the native peoples of the Western Hemisphere. Of these rules the most fundamental were those governing the ownership of land." *Id.* at ix.

[140] FENWICK, *supra* note 8, at 406 (noting that at the time "international law did not recognize the title of wandering tribes or even of settled peoples whose civilization was regarded as below the European standard").

[141] *See* LINDLEY, *supra* note 4, at 12 (identifying Victoria as one of several scholars who held this view).

[142] *See id.*

[143] FENWICK, *supra* note 8, at 405.

[144] *See id.* at 18–20.

[145] LINDLEY, *supra* note 4, at 18–19.

[146] *See id.*

[147] *See id.* at 19 (quoting Portuguese and English publicists who noted that "native chiefs, half or wholly savage . . . [did] not possess any continued sovereignty, that being a political right derived from civilization.") (internal quotations omitted).

and defended specifically defined territory.[148] International law in Europe emerged as an understanding among nation-states circumscribed by political boundaries; it has never condoned granting official recognition of title to "wandering tribes or even [to] settled peoples whose civilization was regarded as below the European standard."[149] In essence, this meant that if a people never adopted a formal practice of precisely delimiting the boundaries of their territory in the European manner of possession, then the territory was considered by European States not to be possessed.[150]

Given the difficulties inherent in any objective attempt to determine the nature of foreign indigenous society's government and territorial philosophy, the European powers ultimately determined that occupation was, by definition, a right for them to wield over all foreign peoples.[151] The European powers reasoned that the concept of strictly delimited boundaries, subject to a concomitant burden of active defense, constituted a uniquely Christian political philosophy.[152] Any lands that fell outside the domains of "a Christian prince" constituted "'*territorium nullius*' subject to acquisition by Papal grant or by discovery and occupation without regard to the wishes of the native inhabitants."[153] The Europeans, thus, leveraged this doctrine unilaterally and without regard for the wishes of indigenous societies.[154] Over time, the occupation of lands deemed *terra nullius* expanded vastly, as the European powers recognized only a limited number of non-European governments.[155] To the Europeans, implicit in the very concept of civilization was the European philosophy of territorial integrity.[156] No society without a similar philosophy could be counted as a member of the Family of Nations, or the community of civilized peoples.[157] On this

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[148] FENWICK, *supra* note 8, at 406.

[149] *Id.*

[150] *Id.*

[151] *See id.*

[152] *See* LINDLEY, *supra* note 4, at 26.

[153] KORMAN, *supra* note 12, at 42 (internal quotations omitted). Some scholars argue, however, that actual European practice in the Americas more closely resembled cession or conquest, which necessarily acknowledged the existence of indigenous societies but refused to recognize their rights to sovereignty. *See id.* at 42–44.

[154] *Id.* at 41.

[155] *See* MALANCZUK, *supra* note 24, at 12. The only governments so recognized were those in India, the Ottoman Empire, Persia, China, Japan, Burma, Siam (currently Thailand), and Ethiopia. *Id.*

[156] *See* LINDLEY, *supra* note 4, at 18–19.

[157] *See id.* at 20.

basis, the Europeans concluded that such people lacked any moral right to self-determination.[158]

In later centuries, the doctrine of occupation, premised on the fictitious association between civilization and territorial delimitation, became obsolete as undiscovered territories became scarce; European hegemonies occupied all known lands that lacked a powerful defender.[159] Despite the eventual obsolescence of the doctrine of occupation, the concept of *terra nullius* survives today, and has appeared in modern cases involving prior takings of land.[160] In *Western Sahara,* the ICJ issued an advisory opinion regarding whether territory was *terra nullius* when it was established as a Spanish colony.[161] On behalf of Algeria, Ambassador Mohammed Bedjaoui argued that *terra nullius* "effectively constituted the legal spearhead of European colonization."[162] In its determination of the validity of the occupation, the ICJ ruled that "a cardinal condition" to support any claim to territory by way of the doctrine of occupation is that the land in question be *terra nullius*—a territory belonging to no-one—at the time of the act alleged to constitute the 'occupation.'"[163] Restricting the meaning of the term *terra nullius,* the ICJ held that the land in question was not *terra nullius* when Spain sought to occupy it, because one or more peoples, "which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them," already dwelled there.[164] This represented a fundamental shift between the Eurocentric and geocentric conceptions of the doctrine of occupation; it was the first time international law was interpreted explicitly to eschew the Eurocentric philosophy requiring territorial delimitation and the burden of defense to establish a people's rights to self-determination.[165]

More recently, in *Mabo v Queensland (No. 2),* the High Court of Australia decided a highly publicized *terra nullius* case in which it determined that title to land claimed by the British actually remained with indigenous societies unless the British or a successor government (Aus-

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[158] *See id.*

[159] *See* JENNINGS, *supra* note 82, at 20.

[160] *See* LINDLEY, *supra* note 4, at 28.

[161] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 1 (Oct. 16).

[162] KORMAN, *supra* note 12, at 42 n.5.

[163] *Western Sahara,* 1975 I.C.J. ¶ 79.

[164] *Id.* ¶ 81. The court also noted: "[A]uthority in the tribe was vested in a sheikh, subject to the assent of the 'Juma'a', that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law." *Id.* ¶ 88.

[165] *See* SHAW, *supra* note 15, at 503.

tralia in this case) had properly extinguished the indigenous title.[166] The issue arose when members of the indigenous societies argued that the land in question, which the Australian government had claimed was *terra nullius,* actually constituted an inhabited area.[167] The High Court of Australia held that title remained in the indigenous societies' hands unless the government had explicitly extinguished that right.[168] This case, therefore, established a compromise precedent between the original Eurocentric premise of territorial delimitation and burden of defense, and the radically new premise of political organization introduced in *Western Sahara.*[169] Specifically, the difference now lies in whether the occupying power formally (de jure) enunciated the extinction of the indigenous people's right to a defined territory.[170] This compromise legitimated the Eurocentric theory that justified European conquest in past centuries on the theory that no meaningful opportunity existed for further conquest.[171]

Acquisition via the doctrine of occupation remains an integral part of the system of international law that emerged from Western civilization's preference for hegemony.[172] Though antiquated as a mode of accumulating territory, the doctrine, which has evolved over the centuries, is very much alive in long-standing modern territorial disputes.[173] From the early stages of the doctrine's evolution, that allowed vast claims of title regardless of whether the expansive power actually colonized the land, to later stages, that required colonization followed by a burden to determine whether the affected peoples constituted a preexisting society recognizable in European territorial theory, the doctrine eventually evolved to include more generalizable considerations of the right of self-determination for indigenous societies.[174] Issues regarding prior takings of territory by occupation continue to arise in modern courts, and courts today must adjudicate the meaning and breadth of occupation as a justification for territorial acquisition.[175]

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[166] *Mabo (No. 2)* (1992) 175 CLR at 119.
[167] *See id.* at 2.
[168] *See id.* at 119.
[169] *See id.*; *Western Sahara,* 1975 I.C.J. ¶¶ 81–82.
[170] *Mabo (No. 2)* (1992) 175 CLR at 119.
[171] *See id.*
[172] *See* Brownlie, *supra* note 72, at 123.
[173] *See* Fenwick, *supra* note 8, at 412–419.
[174] *See id.* at 404–406; Jennings, *supra* note 82, at 82–83.
[175] *See* Jennings, *supra* note 82, at 20.

B. *The Doctrine of Prescription*

Prescription involves "[t]he effect of the lapse of time in creating and destroying rights."[176] Prescriptive title arises when there is no evidence of title under the doctrines of occupation, conquest, or cession; the territory in question has been under continuous and undisputed control long enough to effectively establish a new State; and, the international community has come to accept the government as legitimate in practice.[177] Three criteria are necessary to establish prescription. First, there must be effective control.[178] Second, this control must be present for a sufficient period to constitute general acceptance of the control among members of the international community.[179] Third, neither the original State nor third-party States must contest this control.[180] If "immemorial possession" occurs, such that the origin of title is unclear, then title is generally presumed to be valid.[181]

Prescriptive title may also be established when title is defective or unlawful.[182] If a State has effectively and peaceably controlled the territory for a sufficient period, the doctrine of prescription can remedy defects in title.[183] The crucial distinction between the doctrines of occupation and prescription is that under the former the territory must originally have constituted *terra nullius,* while under the latter the territory formerly belonged to another State.[184] Although the doctrine of prescription closely resembles the doctrine of adverse possession, they differ in that under the doctrine of prescription the original title holder must have acquiesced.[185] Under the doctrine of prescription, the claim to territory must be uncontested[186] If a third State disputes the claim of the State claiming title by prescription, title to the territory is imperfectible.[187] For example, in *Chamizal* the International Boundary Commission determined that the United States lacked a basis upon

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[176] Black's Law Dictionary, *supra* note 95, at 1302.
[177] *See* Lindley, *supra* note 4, at 178; Malanczuk, *supra* note 24, at 150.
[178] Malanczuk, *supra* note 24, at 150.
[179] *See* Lindley, *supra* note 4, at 179.
[180] Malanczuk, *supra* note 24, at 150.
[181] Lesaffer, *supra* note 94, at 11.
[182] Jennings, *supra* note 82, at 21.
[183] *Id.*
[184] Malanczuk, *supra* note 24, at 150.
[185] *Id.*
[186] *See* Lesaffer, *supra* note 94, at 51.
[187] *See id.*

which to claim territory via the doctrine of prescription because Mexico refused to acquiesce to the claim of the United States.[188]

The archetypal example of acquisition under the doctrine of prescription is the case of *Island of Palmas.*[189] In its opinion, the Permanent Court of Arbitration determined that, although Spain had some claim to the island as a result of having discovered it in 1648, title actually belonged to the Netherlands.[190] Here, Spain had discovered the island and received inchoate title, but never actually occupied it.[191] Thus, although Spain claimed ownership, the Netherlands established a sufficiently substantial settlement on the island to constitute occupation.[192] That is, under the doctrine of prescription the Netherlands established "continuous and peaceful display of State authority" on the island.[193] In the eyes of the Permanent Court of Arbitration, it was sufficient for purposes of establishing title for the Netherlands to display occasional artifacts of direct and indirect authority over the island, despite the fact that such activity fell short of the definitional requirement of continuous and numerous displays.[194] The difference between the Spanish and Dutch claims to the Island of Palmas thus consisted of Spain's mere claim to title compared with the Netherland's manifestation of title to any third party that might go so far as to observe the island's self-evident ascription.[195]

The doctrine of prescription was also relevant in *Legal Status of Eastern Greenland.*[196] Here, the PCIJ determined that, in order to show title via the doctrine of prescription, it was necessary to demonstrate two conditions: first, a party must show "the intention and will to act as sovereign," and, second, it must show "some actual exercise or display of such authority."[197] Denmark provided persuasive evidence of both conditions.[198] The shift away from the necessity for substantial occupa-

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[188] Chamizal (Mex./U.S.), 11 R.I.A.A. 309, 328 (Int'l Boundary Comm'n 1911).

[189] *See* Island of Palmas (Neth./U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); Lesaffer, *supra* note 94, at 51.

[190] *See Island of Palmas,* 2 R.I.A.A. at 867–69. Although the dispute in *Island of Palmas* was between the Netherlands and the United States, it was necessary for the court to determine Spain's rights to the islands, as Spain ceded the territory to the United States in 1898. *Id.* at 837.

[191] *Id.*

[192] *See id.*

[193] *See id.* at 870.

[194] *See id.* at 867.

[195] *See Island of Palmas,* 2 R.I.A.A. at 870.

[196] *See* 1933 P.C.I.J. at 45–46, 48.

[197] *Id.* at 45–46.

[198] *See id.* at 34–36, 48.

tion and toward the necessity to produce an unambiguous display of ascription relied on the limiting characteristics of the lands in question.[199] In both *Island of Palmas* and *Legal Status of Eastern Greenland,* the land in question posed obvious obstacles—geological, climatological, and geographical—to substantial occupation, such that the courts needed an alternative theory that accommodated these natural limitations while preserving the burden of demonstrable commitment to ownership on the part of the claimants.[200]

Although a State with a claim to territory generally must consent before it is possible to grant prescription to the land, a State cannot wait indefinitely to object.[201] In the 1959 case of *Sovereignty over Certain Frontier Land,* the Boundary Commission of 1843 had previously determined the allocation of territory among the relevant States.[202] Later, at the Convention of 1892, Belgium asserted sovereignty over some disputed territory.[203] Although the Netherlands had notice of this claim, it refrained from repudiating it until 1922.[204] As a result of this delay, the ICJ found for Belgium.[205] By comparison, the *Chamizal* opinion found that the United States had no legitimate basis to exercise prescription over territories that Mexico also claimed.[206] In *Chamizal,* the United States and Mexico disputed their common border in certain places.[207] When the United States claimed prescriptive title based on "undisturbed, uninterrupted, and unchallenged possession," Mexico disputed this and showed that it had already challenged the boundaries in diplomatic circles.[208] The arbitrators thus denied prescriptive title on the grounds that Mexico had already challenged the U.S. claim.[209]

C. *The Doctrine of Cession*

Acquisition under the doctrine of cession occurs when one State transfers land to another State via treaty.[210] It may occur by purchase, as

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[199] *See id.* at 50–51.

[200] *See id.*; *Island of Palmas,* 2 R.I.A.A. at 867.

[201] *See* Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 229–30 (June 20).

[202] *Id.* at 222.

[203] *Id.* at 229.

[204] *Id.* at 229–230.

[205] *See id.* at 230.

[206] *See id.*; *Chamizal,* 11 R.I.A.A. at 329; Lesaffer, *supra* note 94, at 51.

[207] *See Chamizal,* 11 R.I.A.A. at 317.

[208] *Id.* at 328–29.

[209] *See id.* at 329.

[210] *See* FENWICK, *supra* note 8, at 422.

occurred with the Louisiana Purchase.[211] It can also occur by exchange, as evidenced by the 1890 cession by Great Britain of the island of Helgoland to Germany in exchange for territory adjoining German East Africa.[212] Alternatively, a peace treaty may govern the transfer of land, such that the value-in-exchange consists of the agreement to a permanent cessation of hostilities.[213] Cession creates "the formal transfer from one state to another of the sovereignty over a definite area of territory."[214] The doctrine of cession is the only mode of acquisition that requires the enunciated intentions of at least two States.[215] The receiving State must manifestly intend to receive the land and subsequently establish sovereignty.[216] Likewise, the ceding State must manifestly intend to transfer the land and relinquish all claims of sovereignty.[217] This form of title is derivative, not original.[218] Thus, the validity of the receiving State's title is dependent upon the validity of the ceding State's title.[219] *Nemo plus juris ad alium transferre potest quam ipse habet:* No party has the power to transfer a right to another that is greater than that which he actually possesses.[220]

In past centuries, a transfer made under duress—that is, under the threat of force—was a valid manner of transferring title.[221] For a time, tribunals even considered the doctrines of conquest and cession as alternative, coexisting justifications for territorial acquisition.[222] The 1969 Vienna Convention on the Law of Treaties (Vienna Convention), however, declared that, "[a] cession by treaty is void where the conclusion of the treaty has been procured by the threat or use of force . . . ."[223] The author posits that this also constituted a point of departure between the former Eurocentric elaborations of international law for the purpose of forestalling conflict among the members of Western civilization, and the modern recognition that the era of Eurocentric international law had ended for the sake of the universality of the law.

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[211] *Id.* at 423.

[212] *See id.*

[213] *See id.* at 425.

[214] *Id.* at 422.

[215] *See* JENNINGS, *supra* note 82, at 16.

[216] *See* 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 70, §§ 244–245.

[217] *See id.*

[218] JENNINGS, *supra* note 82, at 16.

[219] *See id.*

[220] Translated by the author.

[221] *See* JENNINGS, *supra* note 82, at 19.

[222] *Cf. id.* (suggesting that cession resulting from coercion coexists with, rather than erases, title by conquest).

[223] Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331.

D. *The Doctrine of Conquest*

The doctrine of conquest is one of the earliest and most prominent doctrines of acquisition.[224] Title by conquest was perfectible if the conquering State declared an intention to conquer, took the territory by force, and had the ability to govern it.[225] Most States in past centuries considered this a valid method of acquisition.[226] The European powers colonized Asian territories largely via the doctrines of conquest and cession.[227] The British acquisition of India, the Dutch acquisition of the Caribbean islands known as the East Indies, and the Russian acquisition of most of northern and central Asia are just a few examples.[228] Moreover, the strongest European States continued to pursue the conquest of the European continent, controverting Eurocentric international law.[229]

The doctrine of conquest gave the victorious State sovereignty over the conquered territories and their indigenous societies.[230] Winning in battle alone, however, was insufficient to transfer title.[231] Annexation was also necessary to establish sovereignty, and established an expectation that unambiguous artifacts of annexation would be manifested.[232] The conqueror must intend to govern the territory, have effective possession and control, and no exiled government or allies thereof may exist to contest control.[233] International law recognized title as valid if the conquered State was totally destroyed (*debellatio*), through a peace treaty granting cession, or if the failed State acquiesced.[234] If the land failed to pass through cession and a peace treaty, however, claimants to the land resorted to the doctrine of *uti possidetis*.[235] Further, in the absence of a treaty, it was necessary to show that the war had completely ended, and the defeated society must have surrendered and submitted

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[224] *See* ZANE, *supra* note 1, at 32. Referring to tribes around 10,000 B.C., Zane notes that "[f]ierce fighting must have gone on among these various tribes . . . for the acquisitive instinct . . . came into play." *Id.* at 32–33. Further, Zane notes that the concept of property developed when humans originally began hunting for food supplies. *Id.* at 33. It was common practice for tribes to acquire personal hunting grounds, upon which "[a]ny encroachment by another tribe would be repelled by force." *Id.*

[225] *See* LINDLEY, *supra* note 4, at 160.

[226] *See id.*

[227] KORMAN, *supra* note 12, at 64.

[228] *Id.*

[229] *See id.* at 66.

[230] *Id.* at 64.

[231] *See* LINDLEY, *supra* note 4, at 160.

[232] *Id.* at 160–61.

[233] *See id.* at 164.

[234] *See* KORMAN, *supra* note 12, at 9.

[235] LINDLEY, *supra* note 4, at 160; *see supra* text accompanying note 95.

to the new authority.[236] It was necessary to show by evidence that resistance by the opposing society, and any of its allies, had ceased.[237]

The conquering State's intention is crucial in considerations of title under the doctrine of conquest. Although intent may often be inferred from the State's actions, only some cases of conquest result in annexation.[238] During World War II,[239] the members of the Western-Orthodox alliance[240] "expressly disclaimed the intention of annexing Germany, although they had occupied all of Germany's territory and defeated all of Germany's allies."[241] Thus, in addition to conquering the territory, extension of civil administration and incorporation of the territory into the acquiring State is necessary for the completion of title.[242]

The doctrine of conquest has become an obsolete justification for acquisition.[243] International law has either entirely extinguished or heavily restricted recognition of title under this doctrine.[244] These restrictions on territorial rights under the doctrine of conquest result from shifts in moral views during the twentieth century, as human rights have become more influential in policy determinations.[245]

II. Segue into Modernism

World War I, a Western civilizational conflict, was devastating both for European States and for peripheral States affected by the hostilities.[246] After the war, the international diplomatic community—which,

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[236] *See* Lindley, *supra* note 4, at 161.

[237] Korman, *supra* note 12, at 109–11.

[238] *See id.* at 120.

[239] World War II may be construed as a broad, intercivilizational war as it actively involved three civilizations: Western, Far East, and Orthodox (predominantly Russian). *See* 1 Toynbee, *supra* note 11, at 51. Furthermore, operations extended into territories of the Islamic, Simic, and Hindu civilizations (North Africa and Southeast Asian island nations, China, and India, respectively). *See id.*; John Graham Royde-Smith, *World Wars, in* Encyclopedia Britannica 986–96 (Philip W. Goetz ed., 15th ed. 1983).

[240] The Western-Orthodox alliance—also known as the Allied powers—was dominated by British, U.S., and Russian forces. *See* 1 Toynbee, *supra* note 11, at 51. The opposition, known as the Axis, also included Western civilizations, and can be construed as a Western-Japanese alliance. *See id.*

[241] Malanczuk, *supra* note 24, at 151–52.

[242] Korman, *supra* note 12, at 9.

[243] *See id.* at 133.

[244] *Id.* at 191–92.

[245] *See id.* at 238–44.

[246] World War I originated in the Balkan States, which comprise a potentially volatile mix of three civilizations, including the Islamic, Western, and Orthodox. *See* 1 Toynbee, *supra* note 11, at 51; Samuel R. Williamson, Jr., *The Origins of World War I,* 18 J. Interdisc.

at the time, consisted primarily of Europeans—determined that allowing territorial acquisition as a result of war was an open invitation to further conflict.[247] States began a series of reforms to disclaim annexation as a means of resolving conflict, and they proceeded to advance the doctrine of self-determination as the basis for forming a political State.[248] To realize this goal, international organizations like the League of Nations were established and tasked with promoting peace.[249]

As States began to embrace the doctrine of self-determination as the peaceful, and, therefore, proper justification for territorial transfer, the legacy doctrines of acquisition quickly began a decline into obsolescence.[250] Possession, a common element of the legacy modes, has made its way into modern doctrines.[251] Specifically, "effective possession and control" are requirements for the doctrines of both prescription and occupation.[252] Although the latter did not require immediate possession to establish rights to a territory, occupation was required for title to be perfected.[253] Under the doctrine of prescription, "the intention and will to act as a sovereign" was an absolute necessity.[254] Under the doctrine of conquest, title could only be legitimated by actual possession of the land or by way of the doctrine of cession.[255] Even in the case of cession, many authorities required some form of effective control to justify recognition of the acquisition.[256]

States continue to advance legacy modes of acquisition to support their claims to territory.[257] The rationale for this is simply that modern courts continue to look to effective possession as a determinative factor in the resolution of a case.[258] In *Minquiers and Ecrehos,* the ICJ looked to

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Hist. 795, 795 (1988). Germany lay at the center of both conflicts in Europe, however the role of non-Western civilizations was more clearly peripheral in WWI than in WWII. *See* Gerhard L. Weinberg, A World at Arms: A Global History of World War II 6–7 (1994).

[247] *See* Korman, *supra* note 12, at 150–51.

[248] *Id.* at 152–56; *see* Woodrow Wilson, Address to Congress: The Fourteen Points (Jan. 8, 1918).

[249] Korman, *supra* note 12, at 151.

[250] *See id.* at 133.

[251] Jennings, *supra* note 82, at 23.

[252] *Id.*

[253] *See* Malanczuk, *supra* note 24, at 149–50.

[254] *Id.* at 150.

[255] *See* Lindley, *supra* note 4, at 160.

[256] Shearer, *supra* note 3, at 146.

[257] *See* Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47, 50–51 (Nov. 17).

[258] *See id.* at 57.

numerous treaties to determine possession.[259] France and Britain contested title to fishing islets in the English Channel.[260] After reviewing numerous treaties and negotiations concerning the islets that dated from feudal times, the ICJ looked to which State could demonstrate the most effective possession.[261] Ultimately, having determined that its actions better demonstrated effective possession, the ICJ ruled for Great Britain.[262]

Relatedly, former ICJ Justice de Visscher suggested a non-traditional mode of acquisition, namely, consolidation of title.[263] Under this theory, claim to title is a determined by a variety of factors, and the judicial authority would attempt to identify a coherent logic across possibly conflicting doctrines.[264] Tribunals would consider evidence of recognition, estoppel, and acquiescence.[265] This complex relationship had "the effect of attaching a territory . . . to a given state."[266] Possession is a heavy consideration in consolidation of title.[267] Under the theory, possession "is the foundation and the *sine qua non* of this process of consolidation," as long as the possession is of sufficiently long duration.[268] In this context, possession is different from the requirements for possession under the doctrine of prescription, as no requirement exists that possession be manifestly peaceful or uncontested.[269]

In the Eritrea-Yemen arbitration, a proceeding to resolve a title dispute over the Red Sea Islands, there was very little evidence of which State controlled governmental functions on the islands.[270] The tribunal thus applied the theory of consolidation of title, specifically examining evidence of the "demonstration of use, presence, display of governmental authority, and other ways of showing a possession which may gradually consolidate into a title."[271] In making its ruling, the tribunal stated

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[259] *See id.* at 54.

[260] *Id.* at 49, 57.

[261] *Id.* at 57.

[262] *Id.* at 72.

[263] SHAW, *supra* note 15, at 507. de Visscher was a member of the ICJ from 1946 to 1952. P. Couvreur, *Charles de Visscher and International Justice,* 11 EUR. J. INT'L L. 905, 930 (2000).

[264] *Cf.* SHAW, *supra* note 15, at 507 (differentiating consolidation from more limited theoretical bases for acquisition).

[265] *Id.*

[266] *Id.*

[267] *See* JENNINGS, *supra* note 82, at 25–26.

[268] *Id.* at 26.

[269] *Id.* at 25.

[270] Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) (Eri./Yemen), 22 R.I.A.A. 211, 274 (1998).

[271] *Id.* at 311–12.

that under modern international law, "an intentional display of power and authority over the territory . . . on a continuous and peaceful basis" is critical for territorial acquisition.[272]

Under the legacy doctrine of occupation, effective possession is required to perfect title, as this enables a powerful State to exert control over a smaller nation or tribe.[273] Today, traditional modes of acquisition are increasingly becoming obsolete; effective possession, however, persists as a central consideration for almost all acquisitions.[274] The obsolescence of the doctrine of occupation thus fails to nullify the benefits of controlling territory.[275] Instead, powerful States retain their ability to exercise control in acquiring territory; only the rationales behind the acquisitions have shifted.[276]

A. *Self-Determination and the End of the Doctrine of Conquest*

With the advent of international agreements intended to end war as a means of resolving disputes, the doctrine of conquest began a decline.[277] International organizations like the League of Nations, the U.N., and the World Trade Organization (WTO)[278] have made acquisition by "threat or use of force" invalid by international mandate.[279]

The victorious European powers founded the League of Nations based in part on U.S. President Woodrow Wilson's Fourteen Points, which he proposed in his address to a joint session of the U.S. Congress on January 8, 1918.[280] The Fourteen Points sought simply to encourage lasting peace.[281] The final Point called for an international association to guarantee "political independence and territorial integrity to great and small states alike."[282] The League's purpose is manifest in Article 10;

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[272] *Id.* at 268.

[273] *See supra* text accompanying notes 83–89.

[274] *See* SHAW, *supra* note16, 502–07 (discussing how States continue to gain control over territory through effective control).

[275] *See id.*

[276] *See id.*

[277] *See* KORMAN, *supra* note 12, at 133.

[278] The WTO was originally the General Agreement and Tariffs and Trade (GATT), an outgrowth of the Bretton-Woods conferences on establishing standards for the revival of a viable world monetary condition. *See* SHAW, *supra* note 15, at 1285–87.

[279] U.N. Charter art. 2, para 4; *see* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 187, 189 (June 27).

[280] *See* Wilson, *supra* note 248.

[281] *See id.*

[282] *Id.*

namely, that the body of States should cooperate "[i]n case of any such aggression or in case of any threat or danger of such aggression."[283]

Article 10 of the League of Nations Covenant pronounced that member States would "respect and preserve as against external aggression the territorial integrity and existing political independence" of the other member States.[284] The international community generally agreed that Article 10 prohibited acquisition by force and made no exception for circumstances, like cases of self-defense, in which the use of force would otherwise be acceptable.[285] The language of Article 10 carried forward to the current Article 2(4) of the U.N. Charter, which requires all members of the U.N. to refrain from utilizing the "threat or use of force" in any "manner inconsistent with [p]urposes of the United Nations."[286]

Questions have arisen as to whether it is ever proper to acquire territory from an aggressor State that loses a war.[287] Great Britain argued that Article 10 only abolished acquisition by conquest generally, but did not prohibit it in all situations—it argued, for example, for an exception justifying the acquisition of territory as punishment for aggressions.[288] Others argued that if the Council or PCIJ recommended an adjustment of borders, then it would be necessary to permit the use of force to enforce the judgment.[289] Another view was that annexation at the end of a conflict was permissible if a League of Nations covenant justified the war.[290] Finally, many authorities read Article 10 as banning all acquisitions of territory by force under any circumstances.[291]

The purpose of these post-World War I reforms was to restrict the benefits that States stood to receive from war.[292] Despite these reforms, the members of the Western-Orthodox alliance controlled the disposition of German territories.[293] The victorious powers left Germany largely intact and established the Weimar Republic from the German prov-

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[283] League of Nations Covenant art. 10.

[284] *Id.*

[285] *See* Korman, *supra* note 12, at 181–86.

[286] U.N. Charter art. 2, para. 4.

[287] Korman, *supra* note 12, at 182.

[288] *Id.* at 186.

[289] *Id.* at 187.

[290] *Id.*

[291] *Id.* at 182–83.

[292] *Id.* at 185–86.

[293] *See, e.g.*, Winston S. Churchill, The Second World War: The Gathering Storm 6–7 (1948).

inces.[294] Under the Treaty of Versailles, the League of Nations controlled Germany's colonies through the Mandates System.[295]

The Mandates System appointed a "Mandatory State" to administer the colonies under a prescribed set of terms, while the League of Nations retained ultimate authority.[296] The Mandatory State acted as trustee of the former colonies when the members of the League of Nations deemed the colonies unable to protect themselves politically.[297] Despite disdainful protests from the international community about acquisition by way of the doctrine of conquest, the League of Nations effectively permitted such action through the Mandates System by simply providing formal legitimacy.[298] "[T]he Allied victory seemed merely to represent a new peak of imperial expansion conducted by the victors at the expense of the vanquished."[299] The League of Nations suffered a failure in the form of rejection by the U.S. Senate—the same fate suffered by the Treaty of Versailles.[300] Nevertheless, the United States insisted that it was entitled to participate in the system of mandates established by the new international organization in had declined to join.[301]

B. *Annexation Issues During World War II*

World War II was the result of a plethora of socioeconomic, political and other factors that combined to stifle German recovery after World War I.[302] A major factor traces its origins to World War I, namely,

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[294] *Id.* at 7.

[295] *See* League of Nations Covenant art. 22.

[296] *See id.* (establishing the framework of the Mandates System). Among other considerations, this framework required that the "tutelage" of "those territories and colonies which as a consequence of the late war have ceased to be under the sovereignty of the States which formally governed them . . . to be entrusted to advanced nations . . . ." *Id.* art. 22, paras. 1–2. It also directed that each Mandatory State provide support "according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other circumstances." *Id.* art. 22, para. 3. Mandatory States were also required to provide annual reports to the League of Nations Council regarding their entrusted territories. *Id.* art. 22, para. 7.

[297] *See id.*

[298] KORMAN, *supra* note 12, at 142–43.

[299] *Id.* at 141.

[300] *See id.* at 159 (noting that the United States failed to ratify both the League of Nations and the Treaty of Versailles).

[301] *See id.* ("[T]he position of the United States in putting forth its claim to participation in the assignment and formulation of the terms of the League Mandates: the Principal Allied Powers gained title to the German colonies by conquest and, since [the United States] assisted in the defeat of the Central Powers, . . . it [is] entitled to a share in all the spoils of victory . . . .").

[302] *See generally* CHURCHILL, *supra* note 293 (discussing in great detail the historical circumstances after World War I that led to World War II).

the taking of German territories as sanctions for its role in that war.[303] In addition to the effect of heavy monetary sanctions, the loss of land was devastating to the German people.[304] Rumors exist to the effect that, shortly after signing the Treaty of Versailles, French Marshal Ferdinand Foch, an advocate of heavy sanctions on Germany, stated: "This is not Peace. It is an Armistice for twenty years."[305] Sir Winston Churchill was also critical of the methods by which the Armistice sought to achieve peace.[306] Specifically, he believed that a "cardinal tragedy was the complete break-up of the Austro-Hungarian Empire."[307] Regarding *Mein Kampf,* Churchill stated that Hitler desired the expansion of Germany in order to restore the nation's prior greatness.[308]

1. The Kellogg-Briand Pact in World War II

Between World War I and World War II there were several international attempts to discourage war. Prominent among these efforts, the Kellogg-Briand Pact of 1928 (the Pact), also known as the General Treaty for the Renunciation of War, renounced warfare as a means of resolving international controversies.[309] Although the Pact failed to specify that self-defense was an exception, arguably it implied as much.[310] Moreover, the Pact withdrew protection from States that breached the Pact.[311] Further, the Pact permitted the annexation of territory as a sanction against an aggressor State if the international community determined such action was warranted.[312] World War II, however, was supposedly the outgrowth of justified actions under the Pact, and yet it fell short of prohibiting the imposition of forcible territorial changes upon an aggressor.[313]

At the close of World War II, the members of the Western-Orthodox alliance redistributed the conquered territories.[314] The United States put the Pacific Islands under a "strategic trust," and the Soviet

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[303] *See id.* at 54. The French occupation of the Ruhr in 1923 provides just one example of how Germany effectively lost their lands following World War I. *Id.*

[304] *See id.* at 7.

[305] *See id.*

[306] *See id.* at 10.

[307] *Id.*

[308] *See* CHURCHILL, *supra* note 293 at 57.

[309] General Treaty for Renunciation of War as an Instrument of National Policy art. 5, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

[310] *See* KORMAN, *supra* note 12, at 193.

[311] *Id.* at 198.

[312] *Id.*

[313] *See id.* at 199.

[314] *See id.* at 161–62.

Union annexed parts of Poland, the former Prussia, and the Sakhalin Islands to the north of Japan.[315] The Atlantic Charter encouraged the concept of self-determination while suggesting that the members of the Western-Orthodox alliance disclaim any rights to the territory that they had captured.[316] Poland also annexed a portion of Germany in order to provide a "short and more easily defensible frontier between Poland and Germany."[317] The distribution and annexation of territory after World War II seems to indicate that the Kellogg-Briand Pact permitted the international community to effect territorial changes.[318] Although the Pact prohibited individual cases of conquest for territory, the manner in which the victorious powers annexed Germany after World War II is strong evidence that annexation is permissible if the international community agrees to it.[319]

2. The Role of the U.N.

It is human nature to pursue ways to improve one's comfort and security. Applied on a national scale, this tendency can lead to a desire to reach out and conquer territory unilaterally, taking from another for the unilateral betterment of one's own State regardless of the expense to the affected party.[320] In the period of European colonial expansion, a common purpose was the acquisition of resources.[321] Prior to this period, and again after it, the purpose was largely security—for example, the Soviet Union's dominance of Eastern Europe was intended to secure resources and shore up national security.[322]

The founding members of the U.N. developed that institution to unify States and promote international cooperation for peace and sta-

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[315] *Id.* at 163, 167, 168–69. The strategic trust utilized under the Pacific Islands Mandate differed from a typical trust territory, in that the Security Council performed all U.N. functions under a strategic trust. *Id.* at 163. This resulted in America's ability to establish naval and military bases, which effectively created a *strategic* area, rather than a *trust* State. *Id.*

[316] *See id.* at 162.

[317] 3 Marjorie M. Whiteman, Dep't of State, Digest of International Law 348–49 (1964) (quoting a radio address made by President Truman to the United States regarding the Berlin Conference) (internal quotations omitted).

[318] *See* Korman, *supra* note 12, at 199.

[319] *See id.*

[320] *See* 1 D.W. Meinig, The Shaping of America: A Geographical Perspective on 500 Years of History 6–7 (1988).

[321] *See id.*

[322] *See, e.g.*, Charles H. Fairbanks, Jr., *Gorbachev's Global Doughnut: The Empire with a Hole in the Middle, in* Contemporary Issues in Soviet Foreign Policy: From Brezhnev to Gorbachev 600–03 (Frederic J. Fleron, Jr. et al., eds., 1991).

bility.[323] The U.N. Charter has at its foundation reforms developed in response to the experiences and effects of World War I and World War II.[324] There is a specific focus on peaceful resolution of international disputes and the role of self-determination in acquisitions.[325] As noted in Article 1(2) of the U.N. Charter, a crucial goal of the U.N. is to join States together in "respect for the principle of equal rights and self-determination of peoples."[326]

The U.N. attempted to restrict States' abilities to conquer foreign nations in Article 2(4) of the U.N. Charter.[327] Article 2(4) states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[328] This construction is clearly similar to that of Article 10 of the League of Nations Charter.[329] As was the case with Article 10, Article 2(4) of the U.N. Charter has been the subject of much study and interpretation.[330] Most read the resolution as a ban on the use of force against any other party subject to two exceptions.[331] First, there is no justification to use force unless it is part of a U.N.-

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[323] *See* U.N. Charter art. 1. The purposes of the U.N. charter are:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 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;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Id.

[324] *See* U.N. Charter pmbl.

[325] *See id.* art. 1, para. 2.

[326] *Id.*

[327] *See* BROWNLIE, *supra* note 72, at 699.

[328] U.N. Charter art. 2, para. 4.

[329] *See id.*; League of Nations Covenant art. 10 ("The Members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League.").

[330] *See* BROWNLIE, *supra* note 72, at 699–700.

[331] *See id.* at 699–703.

authorized collective action to maintain or restore international peace.[332] Second, self-defense against armed attacks is permissible until the U.N. can intervene to preserve or restore peace and security among the disputants.[333]

With regard to acquisition by force, many authorities argue that the U.N. Charter admits no circumstances under which it is ever possible to legitimate the acquisition of territory by threat or actual imposition of force.[334] Hence, when a State acquires territory as a result of self-defense, there may be a temporary occupation, but there can be no legal transfer of title.[335] There are several rationales for this blanket prohibition. For example, there are practical restrictions on any realistic ability to expand acquisitional rights.[336] Further, a principle of proportionality suggests that any use of force in self-defense must constitute a clear necessity vis-à-vis the degree of the threat faced by the defending State.[337] One form of evidence of necessity is the immediacy of the retaliation.[338] Beyond necessity and immediacy, retaliation must also be proportional to the seriousness of the threat.[339] Another rationale for the strict limitations on acquisition by conquest is the right of self-determination.

3. Self-Determination and the Expansion of European Hegemony

The concept of self-determination is probably the most well-established feature of the modern philosophy of national rights.[340] Reaching back as far as the North American colonies' struggle for independence within the British realm, and extending to peoples outside the boundaries of Western civilization, this concept has become an internationally recognized rule.[341] Its broad acceptance is further evidence of the obsolescence of the doctrine of conquest in the present

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[332] U.N. Charter arts. 39, 42.

[333] *Id.* art. 51.

[334] *See* KORMAN, *supra* note 12, at 200.

[335] *See id.* at 210.

[336] *See id.* at 206–08.

[337] MALANCZUK, *supra* note 24, at 314, 317.

[338] *Id.* at 316–17.

[339] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) ("[A] state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered."); *see* MALANCZUK, *supra* note 24, at 316–17.

[340] *See* MALANCZUK, *supra* note 24, at 326–27.

[341] *Id.*

day.[342] Under this theory, acquisition by force can no longer divest a territory's people of their rights because those rights are conferred inalienably on the original, rightful inhabitants.[343] As States began to recognize this right, opportunities for acquisition by force began to diminish substantially.[344] In 1970, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Declaration on Principles of International Law) determined the following rule:

> The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.
>
> . . . .
>
> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, *all 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 the Charter.[345]

In addition to suggesting that any threat or actual imposition of force voids acquisition of territory, the declaration clearly mandates that individuals should have rights of self-determination.[346]

III. Some Jurisprudential and Pragmatic Considerations Today

Viewed two-dimensionally, the Earth possesses a vast but finite surface area.[347] States controlling the surface area also control the subter-

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[342] *See* Korman, *supra* note 12, at 228.

[343] *See id.* at 227.

[344] *See id.*

[345] G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) (emphasis added).

[346] *See* Malanczuk, *supra* note 24, at 327.

[347] *See The World Factbook,* Cent. Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (follow hyperlink to expand "Geography: WORLD") (last visited Jan. 10, 2012) (stating that the total surface area of Earth is 510.072 million sq. km.; land comprises 148.94 million sq. km. (29.1% of the surface area), while water encompasses 361.132 million sq. km. (70.9% of the surface area)); *see also* Nina Caspersen & Gareth Stansfield, *Introduction*, *in* Unrecognized States in the International System 1–8 (Nina Caspersen & Gareth Stansfield eds., 2011) (describing the division of the Earth's surface into entities that control delineated territory).

ranean soil, and adjacent waters and airspace.[348] The Earth is the foundation for international society, which itself is "subject to the ebb and flow of political life," where new States supplant the old.[349] When nation-states claim sovereignty over land previously held by predecessor states, the international community must decide when and if to accept the new claim.[350] The decision to accept the new claim is an act of recognition, a "formal acknowledgement by one state that another state exists as a separate and independent government."[351] Note, however, that acceptance of a State's existence does not presuppose official recognition of the State's government via diplomatic relations.[352]

A. *State vs. Political Recognition*

Throughout human history, nations have resorted to war to settle international disputes, and the relatively new collection of international organizations founded with the objective of achieving peace are simply incapable of thwarting this inherent human tendency.[353] Despite the best efforts of these well-intentioned groups, nations will continue to attempt to extend their territories and promulgate their beliefs through conquest.[354] Existing and new nation-states acquire territory.[355] The predecessor State may choose to accept the acquisition of territory, or it may appeal to the international community for redress against the acquiring State.[356]

Governments must distinguish between state and political recognition.[357] A lack of diplomatic relations does not mean that States do not recognize each other as independent States.[358] States need not accord formal recognition to any other State, but will treat others as inde-

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[348] Restatement (Second) of Foreign Relations Law of the United States § 11 (1965) ("The territory of a state consists of (a) its land area; (b) its internal waters and their beds; (c) its territorial sea and the bed of the territorial sea; and (d) the subsoil under, and . . . the air space above, (a), (b), and (c).").

[349] *See* Shaw, *supra* note 15 at 444.

[350] *See id.*

[351] 8 West's Encyclopedia of American Law 252 (2d ed. 2004).

[352] *See* Shaw, *supra* note 15, at 444–45.

[353] *See* Jennings, *supra* note 82, at 59–61.

[354] *Cf.* 1 Oppenheim's International Law, *supra* note 70, § 55(3) (listing twentieth-century examples of the seizure of occupation of foreign territory by a state).

[355] *See, e.g.*, Shaw, *supra* note 15, at 492–509 (discussing the methods by which States—both existing and new—acquire territory).

[356] *See* Jennings, *supra* note 82, at 79–80.

[357] *See* Shaw, *supra* note 15, at 444–46.

[358] *See id.* at 446–47.

pendent State entities that meet with certain requirements.[359] Upon the occurrence of a transitional event, existing States determine whether to recognize the change, and if so, decide on "the kind of legal entity" the new State assumes.[360] States render such decisions based on policy and other political considerations.[361] Recognition therefore occurs after the event that purportedly establishes the new nation-state.[362]

Recognition is a crucial factor for prescription.[363] As noted previously, recognition requires that other States recognize a State's right to territory in order to effectuate prescription.[364] In the modern context, States have sought to justify recognition in cases wherein they had illegally conquered territory but held it indefinitely.[365] Although much of the international community now rejects the legacy doctrines of justification for territorial acquisition, it is necessary to address the fact that States will continue to acquire territory even if what they seize lacks internationally-recognized title.[366] If acquisition through force persists despite international condemnation, recognition and prescription are the two best means of response.[367] Eventually, the international community needs to know who has title to the territory; after all, title must belong to someone.[368] Permitting the vanquished party to hold de jure title could pose significant problems.[369] Recognition, which implies prescription, is the better doctrine through which to accomplish a transfer of title.[370] Scholars have called recognition "the primary way in

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[359] *See id.*

[360] *See id.* at 444–54 (examining historical examples of state recognition).

[361] *See id.* at 445. For example, the United States refused to recognize the People's Republic of China and North Korea based primarily on political judgment. *Id.* at 445. Although both foreign governments "exercised effective control over their respective territories," the United States wanted to preclude the legal effects resulting from recognition. *Id.* "Recognition is [thus] a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation." *Id.*

[362] *See id.*

[363] *See id.* at 148.

[364] *See* SHAW, *supra* note 15, at 504–05.

[365] *See id.* at 500.

[366] *See id.*

[367] *Cf.* MALANCZUK, *supra* note 24, at 150–51, 154–56 (noting that States may acknowledge the expansion of another state's territory through prescription and recognition).

[368] *See id.* at 74–75.

[369] *See id.* at 153.

[370] *Cf.* SHAW, *supra* note 15, at 444–45, 490 (stating that "the essence of territorial sovereignty is contained in the notion of title," and discussing recognition as a means of defining territorial sovereignty among the international community).

which the international community has sought to reconcile illegality or doubt with political reality and the need for certainty."[371]

Recognition is achievable by the official acknowledgment by a number of States that the party in possession should indeed have title to the land.[372] Several prerequisites are necessary to validate recognition.[373] First, the recognition must consist of an express statement.[374] Second, the conquest must benefit from de jure recognition, rather than simply de facto recognition.[375] Third, the new State must be recognized by third-party States.[376] Additionally, the third-party States that recognize title must generally have some legal claim to the territory, unless "a considerable number of other States have likewise recognized title."[377]

Although the concept of recognition in international affairs is useful for the determination of title, in practice the opposite concept—non-recognition—is a more frequent remedy when territory is acquired by force.[378] Express non-recognition by an exiled government, a third-party State, or the U.N. acts to bar prescription.[379] Affected parties have used this doctrine frequently in response to the use of force to seize territory.[380] The Stimson Doctrine employed the principle of non-recognition with respect to Japan.[381] Specifically, U.S. Secretary of State Henry Stimson announced that the United States would refrain from granting official approval of Japan's aggression against China in establishing a surrogate State in Manchuria.[382] The Stimson Doctrine broke sharply from the traditional view that, regardless of the legality of the war, an action of conquest and annexation vests title to the territory in

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[371] Malcolm Shaw, Title to Territory in Africa: International Legal Issues 23–24 (1986).

[372] *See* 1 Oppenheim's International Law, *supra* note 70, § 39.

[373] *See id.* § 45.

[374] *See* Malanczuk, *supra* note 24, at 155.

[375] *Id.* A de jure recognition occurs when a State formally fulfills the requirements of statehood. Shearer, *supra* note 3, at 130. De facto recognition accords statehood because the facts of the situation justify it. *Id.* However, international law considers the territorial title defective under this circumstance: "[I]f the recognizing state says that it recognizes the conquest only de facto, it is saying in effect that it regards the conqueror's title as defective, and such a statement obviously cannot give the conqueror good title to the territory." Malanczuk, *supra* note 24, at 155.

[376] Malanczuk, *supra* note 24, at 155.

[377] Jennings, *supra* note 82, at 44.

[378] *See id.* at 67–68.

[379] *See id.* at 44.

[380] *See id.*

[381] *See, e.g.*, Korman, *supra* note 12, at 239.

[382] *See* Malanczuk, *supra* note 24, at 152.

the victor.[383] Shortly after the United States enunciated the Stimson Doctrine, the League of Nations passed a resolution concurring with the notion that stating that States should refrain from recognizing "any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations."[384] This directed States to assume an obligation to refuse recognition of any territorial change undertaken by way of the threat or use of force.[385]

Similarly, the Declaration on Principles of International Law states that, "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal."[386] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* the ICJ validated as a governing principle each State's duty to refrain from granting official sanction to an action when the U.N. Security Council has determined the action to be illegal.[387] The international community, however, has often applied the standard inconsistently.[388] For example, in 1961, India invaded the Portuguese colony of Goa,[389] claiming that Portugal had contravened its obligations under the Declaration on the Granting of Independence to Colonial Countries and Peoples, and, therefore, that Portugal's possession was illegal.[390] Portugal countered that India violated Article 2(4) of the U.N. Charter when it forcibly acquired the territory.[391] When the case came before the U.N. Security Council, the Council refused to condemn the act for political reasons.[392] Though it was feasible to grant the people of Goa the right to form their own government,[393] and despite manifest violations of international law by India, the Council permitted annexation under the "colonial enclave" exception, rather than extending to Goa an official right of self-determination.[394] This exception applies to annexations wherein the

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[383] *See, e.g.*, KORMAN, *supra* note 12, at 239.

[384] League of Nations Official Journal, Records of the Special Session of the Assembly, Special Supplement No. 101, 87 (1932); MALANCZUK, *supra* note 24, at 152.

[385] MALANCZUK, *supra* note 24, at 152.

[386] G.A. Res. 2625 (XXV), *supra* note 345, at 123.

[387] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 116, 119 (June 21).

[388] *See* KORMAN, *supra* note 12, at 269–70.

[389] *Id.* at 267.

[390] *See* G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

[391] *See* KORMAN, *supra* note 12, at 267, 270.

[392] *See id.* 269–70.

[393] *See id.* 272–74.

[394] *See id.*

acquired territory shares ethnic and geographic links with the conquering State.[395]

In the early twentieth century, the United States accepted and helped apply Declarative Theory principles toward recognition of new States in the Americas and the Caribbean.[396] The 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention) established the process, still in use today, for nation-state recognition under international law.[397] Under the Montevideo Convention, "[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 other states."[398] Further, the Montevideo Convention delineates between a State's political stature and recognition by other States.[399] "The political existence of the state is independent of recognition by the other states."[400] Although the Montevideo Convention dealt exclusively with States in the Americas and the Caribbean, over time its treaty has transformed into a restatement of international law.[401] For example, the Montevideo Convention's definition of a State survived into the late twentieth century.[402] In 1991, the European Union applied this definition as a basis for recognizing Croatia, Macedonia, and Slovenia as independent States.[403] Switzerland applies the Montevideo Convention's definition to recognize States, but distinguishes state recognition from political recognition.[404] India treats recognition "as a matter of course or routine" once "condi-

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[395] G.A. Res. 1514 (XV), *supra* note 390. National unity and territorial integrity of a country are crucial concerns for the U.N., thus, any attempt made to disrupt this is incompatible with the purposes and principles of the U.N. Charter. *See* U.N. Charter art. 2, para. 4.

[396] *See* Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S 3802 [hereinafter Montevideo Convention].

[397] *See id.*

[398] *Id.*

[399] *Id.* art. 3.

[400] *Id.*

[401] *See, e.g.*, Cases and Materials on International Law 99 (D.J. Harris ed., 6th ed. 2004).

[402] *Id.*

[403] 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, 182 (1992).

[404] *See The Recognition of States and Governments,* Switz. Fed. Dep't Foreign Aff., http://www.eda.admin.ch/eda/en/home/topics/intla/cintla/recco.html (last modified Dec. 10, 2009) ("[T]here is *no obligation* under international law to recognize other states. . . . Where the recognition of governments is concerned, the central element is the exercise of sovereign power over the state. . . . Switzerland is in favour of the *widest-possible recognition of states,* but it is extremely reticent about recognizing governments.").

tions of statehood have been fulfilled."[405] Despite the potential benefits of non-recognition, it remains inefficient in protecting territorial boundaries. Unless the international community is willing to exert enough force on aggressor nations, States will continue to conquer neighboring nations in the face of international condemnation.[406]

A prime example of the inefficiency of non-recognition is Israel's conquests in Palestine. In 1967, Israel captured territory that was part of the original Mandate for Palestine.[407] In 1980, Israel passed an act to legalize its annexation of East Jerusalem.[408] The U.N. Security Council was quick to condemn the act.[409] Although most States view the war as valid self-defense, none have recognized Israel's right to title in East Jerusalem.[410] Despite such international condemnation and use of non-recognition, Israel continues to hold possession of the territory.[411] There have been more recent examples of the successful use of non-recognition—namely, the first Gulf War. In that instance, the international community came together in condemnation of Iraq and provided assistance to Kuwait in order to expel the aggressing force, to restore possession to Kuwait, and to maintain the territorial rights of Iraq.[412]

B. *The Doctrine of* Uti Possidetis

Under the doctrine of *uti possidetis,* colonial boundaries remain after a colony achieves independence.[413] This doctrine is a reasonable solution in the limited context of colonies that become independent States.[414] The principal goal of *uti possidetis* is to find political solutions to territorial disputes and avoid conflict.[415] One of the earliest applications of the doctrine occurred during the independence of the States

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[405] *See* K.P. Misra, *India's Policy of Recognition of States and Governments,* 55 Am. J. Int'l L. 398, 422 (1961).

[406] *See* Korman, *supra* note 12, at 248.

[407] *See, e.g.*, *id.* at 252.

[408] *Id.* at 254.

[409] S.C. Res. 478, ¶¶ 1–7, U.N. Doc. S/RES/478 (Aug. 20, 1980); *see* Korman, *supra* note 12, at 254.

[410] *See* Korman, *supra* note 12, at 255–56.

[411] *See id.* at 254.

[412] *See id.* at 215–16.

[413] *See generally* Duncan, *supra* note 95 (taking account of the doctrine's role in the United States by looking deeply into territorial acquisitions and the utilization of *uti possidetis* since the time of the establishment of European hegemony in America).

[414] *See id.* at 543. While utilizing *uti possidetis* is somewhat easy and simplistic in its concept, there are practical concerns that demand a dialectic. *See id.* Issues such as cultural and economic gaps and geographical problems may create a necessity to redraw the boundary lines, rather than leave them to the simplicity of *uti possidetis*. *Id.*

[415] *See* Brownlie, *supra* note 72, at 129–30.

of Central and South America.[416] By permitting the new States to adopt the boundary lines of the former colonies from which they emerged, the application of the doctrine prevented border disputes among the new States and forestalled further European intervention.[417]

States throughout the world have justified territorial acquisition by way of *uti possidetis,* including the States that emerged from Yugoslavia in the latter decades of the twentieth century.[418] Although the application of the concept is optional in resolving territorial disputes, it can reduce conflict in many instances and, therefore, has been a popular tool for the demarcation of the boundaries of newly-independent States.[419] Following World War II, the Western-Orthodox alliance assumed the power of disposition over the defeated regimes.[420] They assumed this power to be valid, in fact, regardless of whether the defeated State consented.[421] An example of such a disposition was the Sykes-Picot Agreement of 1916, a secret agreement made between France and Great Britain regarding the demarcation of territories in the Middle East.[422] Russia made the secret pact public, but the League of Nations effectively mandated the agreement and imposed it upon the affected nations of the Middle East.[423] Much of the territory eventually fell under the Mandates system, and the Iran-Syria border is a remnant of such decisions.[424]

The common result of the application of *uti possidetis* under the Mandates and Trustee Systems was the creation of States based upon geographic, rather than cultural, boundaries.[425] These unnatural divisions have invited regional infighting in many regions of the world, particularly in Africa.[426] The creation of the U.N. prompted the decolonization of many regions.[427] Many of the colonies under the Mandates and Trustee systems obtained rights of self-determination.[428] Despite the granting of such rights, many States are still an uneasy amalgam of

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[416] *See id.*
[417] *See* KORMAN, *supra* note 12, at 235.
[418] BROWNLIE, *supra* note 72, at 130.
[419] *See id.*
[420] *See id.*
[421] *See id.*
[422] *See* KORMAN, *supra* note 12, at 158.
[423] *See id.* at 135–37, 158.
[424] *See id.* at 160.
[425] *See* BROWNLIE, *supra* note 72, at 129.
[426] *See id.* at 163.
[427] *See id.* at 164.
[428] *See id.*

ethnic, religious, or cultural groups.[429] The following section addresses these problems and explores how increased utilization of self-determination rights could assist in reducing ethnically based violence, as affected the Kurds in Iraq, Serbs and Bosnians in Yugoslavia, and other peoples in an array of States. The following section also speculates as to the effects of a broad recognition of numerous States in observance of rights of self-determination, should such an eventuality come to pass.

C. *Practical Limitations on Annexation Under Claims of Self-Defense*

The primary practical restriction on acquisition under the doctrine of conquest under the U.N. Charter is the absence of an established adjudicative body with power to hear and resolve disputes involving conquered territory.[430] If the U.N. allowed such acquisitions and annexations, an international body would have to take responsibility for determining whether the taking was just, and if so, how to conclude the matter.[431] To this author, such a body would necessarily have to be acceptable to all the parties involved. Currently, the U.N. simply provides a framework for the resolution of such conflicts;[432] however, it lacks the power to abrogate and alter territorial boundaries.[433]

Another practical restriction is that under the U.N. Charter, it is impossible to acquire territory through measures of self-defense.[434] A defending State has no justification for taking any of the territory of the aggressor after it successfully repels an attack.[435] Were it possible for one State to acquire land from an aggressor State, it could discourage States from invading other nations.[436] If the international community allowed such takings after a war, however, it would make "questions of title depend upon the determination of such controversial issues as the identification of the aggressor and the limits and meaning of self-defense."[437]

Finally, the Vienna Convention voids any treaty into which a State enters under the threat of force.[438] That is, quid pro quo annexation,

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[429] *See* James Mayall, *Irredentist and Secessionist Challenges, in* NATIONALISM 269, 276 (John Hutchinson & Anthony D. Smith eds., 1994).

[430] *See* KORMAN, *supra* note 12, at 207.

[431] JENNINGS, *supra* note 82, at 56.

[432] *See* U.N. Charter art. 39.

[433] BROWNLIE, *supra* note 72, at 163–64.

[434] *See* U.N. Charter art. 51.

[435] KORMAN, *supra* note 12, at 203–09.

[436] *See* JENNINGS, *supra* note 82, at 421–23.

[437] KORMAN, *supra* note 12, at 206.

[438] Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331.

in which "quid" is the victor's agreement to sign a treaty to cease hostilities, constitutes duress and is consequently invalid because territorial annexation between two parties at war lacks innate recognition by the international community.[439] Thus, any annexation resulting from self-defense would almost certainly be formalized in an agreement to end the war, and would therefore be void under the Vienna Convention.[440]

D. *Self-Determination Under Modern International Law*

The principle of self-determination[441] allows a people to determine without coercion its preferred form of government.[442] The concept has evolved through a number of stages and is still the subject of much contention.[443] The principle of self-determination was a key factor in the foundation of the United States.[444] President Thomas Jefferson wrote in the Declaration of Independence that "Governments are instituted among Men, deriving their just powers from the consent of the governed."[445] Although not the first group to use the term "self-determination," the Bolshevik revolutionaries who founded the Soviet Union were the first to encompass within the term a view of national equality wherein States have sovereign equality and the validity of a claim for self-determination depends upon the oppression of the claimant group.[446] For Western European advocates of "self-determination" as a term encompassing government by popular consent, a transfer of territory between States is valid only with the consent of the people.[447] Although President Wilson's lofty views on self-determination, which were specifically aimed at peoples outside the boundaries of Western civilization, lacked international recognition immediately after World War I, the international community has since begun recognizing more human rights—certainly including, but likewise moving beyond, the right of self-determination itself.[448]

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[439] *See id.* arts. 51–53.

[440] *See id.* arts. 51–52.

[441] *See* Zejnullah Gruda, *Some Key Principles for a Lasting Solution of the Status of Kosova:* Uti Possidetis*, the Ethnic Principle, and Self-Determination,* 80 CHI.-KENT L. REV. 353, 366–67, 370 (2005). International law defines a "people" generally as the inhabitants who reside within a common political boundary. *See id.* at 367.

[442] *See* MALANCZUK, *supra* note 24, at 326.

[443] *See id.* at 327.

[444] *See* Gruda, *supra* note 441, at 370.

[445] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[446] W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 11–14 (Robert A. Nicholas ed., 1977).

[447] *See id.* at 12.

[448] *Id.* at 160–61.

Following World War II, the right of self-determination continued to evolve, starting with the U.N.'s Trustee System, modeled after the League of Nations' Mandates System, which placed certain territorial regions under a Trust.[449] The ICJ granted the Moroccan Sahara a right of self-determination in *Western Sahara*.[450] Under the U.N.'s system, there were three possible methods for former colonial peoples to determine their form of government: (1) integration of the colony into an existing State, (2) creation of a sovereign, independent State, or (3) any other condition or status that grows out of an uncoerced decision by the people.[451]

Initially, international law limited the principle of self-determination to newly decolonized States.[452] Those States under the Mandates or Trust Systems clearly had a right to self-determination in determining their new governments.[453] It is unclear, however, whether non-colonial States have the same rights to self-determination.[454] What is also unclear is whether a colonial State may rely on the right to self-determination anew after its initial reliance, as might occur if a different indigenous group asserted independence from the post-colonial government.[455] Although the re-utilization of self-determination in forming governments could become problematic, peoples within established States are increasingly beginning to demand rights of self-determination.[456]

A major concern regarding the principle of self-determination as it applies to non-colonial States is that it may conflict directly with certain agreements among States regarding territorial integrity.[457] It is often the case that the principle of self-determination is manifest within the same document that requires respect for territorial integrity.[458] Several U.N. resolutions recognize a right of self-determination to certain peoples.[459] Despite the apparent contradictions in U.N. documents, the U.N.'s actions over the past few years seem to indicate an expansion of self-

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[449] MALANCZUK, *supra* note 24, at 335.

[450] Western Sahara, Advisory Opinion, 175 I.C.J. 12, ¶¶ 62, 70 (Oct. 16).

[451] G.A. Res. 1514 (XV), *supra* note 390.

[452] *See* SHAW, *supra* note 15, at 251–53.

[453] *See* MALANCZUK, *supra* note 24, at 327–28.

[454] *See id.* at 329–33.

[455] *Id.* at 335.

[456] Mayall, *supra* note 429, at 274–76. Providing each "people" the right to establish their own State, or even choose their own form of government could cause major concerns in the international community. *Id.* at 276. According to Professor James Mayall, there may be as many as "8000 identifiably separate cultures." *Id.*

[457] *See* MALANCZUK, *supra* note 24, at 332.

[458] *See id.*

[459] *See, e.g.*, G.A. Res. 2160 (XXI), U.N. Doc. A/RES/2160XXI (Nov. 30, 1966); G.A. Res. 1514, *supra* note 390; G.A. Res. 637 (VII), U.N. Doc. A/RES/637(VII) (Dec. 16, 1952).

determination to peoples that inhabit lands beyond both the States and colonies of Western civilization, or even those that have exercised their right of self-determination independent of international influence.[460]

This expansion is apparent in the U.N. Declaration on the Rights of Indigenous Peoples.[461] This document specifically expresses a right of self-determination to indigenous societies.[462] Although the U.N. lacks the ability to convey title, mainly due to its lack of status as a territorial sovereign, and only possesses the power of recommendation, it has been common for an international agency to dispose of Mandate and Trustee territory through the collective action of States.[463] According to Ian Brownlie, the right to terminate mandates may actually fall within the U.N.'s powers.[464] The ICJ has also spoken out on applying the principle of self-determination to non-colonial territories.[465] In a 1949 advisory opinion, the court stated that "'[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'"[466] According to Brownlie, this confers upon the U.N. some implied right of territorial disposition under the Declaration on the Granting of Independence to Colonial Countries and Peoples.[467]

E. *Self-Determination and the Second Gulf War*

The most recent war in Iraq provides fairly clear evidence of why attempting to create rights of self-determination is a difficult proposition in reality. Although the original rationales given to justify the invasion of Iraq included the goal of giving the Iraqi people rights of self-determination, the United States also invaded for the purpose of establishing a friendly democratic government that would reject terror-

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[460] *See, e.g.*, G.A. Res. 2627(XXV); U.N. Doc. A/RES/2627XXV (Oct. 24, 1970).

[461] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 ¶ 3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[462] *Id.*

[463] BROWNLIE, *supra* note 72, at 163–64.

[464] *See id.* at 164. While there is some dispute over whether the U.N. should have the capacity to do this (strictly speaking, the Allied powers that participated in the Treaty of Versailles hold such power), the U.N. assumed the power to terminate the Mandate for South West Africa in 1966. *See id.*

[465] *See id.* at 657.

[466] *See id.* (quoting *Reparation,* ICJ 1949 (1972), at 182).

[467] *Id.* at 164. In the case of termination of mandates and trusteeships, Brownlie argues that the U.N. may terminate them because the U.N. is not "conferring sovereignty;" rather, the U.N. is simply deciding "on the manner in which the principle of self-determination shall be implemented." *Id.*

ism.[468] The goal of establishing democracy bears a close relationship to that of supporting self-determination; it is often assumed that a free people will select a democratic form of government, perhaps because it is counterintuitive that a newly-freed people would reject freedom by popular vote.[469] Thus, in a very real sense, the invasion of Iraq sought to permit self-determination.[470]

There are, however, many concerns attendant to "delivering" self-determination.[471] There are practical concerns regarding the cost of this enterprise, both from the perspective of the invading power, which must bear the cost of invasion, and from that of the invaded country, that is forced to suffer the inevitable collateral damage of even the most advanced, targeted campaign.[472] There are also theoretical concerns, including whether any State has a unilateral right to invade another for the purpose of establishing the conditions for self-determination.[473] In the case of Iraq, another rationale for the invasion was based on American claims of self-defense; the United States purportedly feared that al Qaeda might find safe haven with the Iraqi regime of President Saddam Hussein and pose an intensified threat.[474] The basis for this perception was the Iraqi leadership's refusal to cooperate with U.N. weapons inspectors in their attempt to verify the status of Iraq's arsenal of chemical weapons that had previously been used both against the Kurds in northern Iraq and against the Iranians in the Iran-Iraq war.[475] The Iraqi regime's flouting of the U.N.'s legitimate function seemed to offer clear evidence to national intelligence agencies around the world

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[468] *Fumbling the Moment,* Economist, May 29, 2004, at 21.

[469] Thomas M. Franck, *United Nations Prospects for a New Global Order,* 22 N.Y.U. J. Int'l L. & Pol. 601, 637 (1990).

[470] *See* Elisabeth Bumiller, *Bush Lays Out Goals for Iraq: Self-Rule and Stability,* N.Y. Times, May 24, 2004, at A1, A14.

[471] *See, e.g.*, Malanczuk, *supra* note 24, at 329.

[472] Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War,* 29 U. Pa. J. Int'l L. 1, 11–12 (2007).

[473] *See* Asli Ü. Bâli, *Justice Under Occupation: Role of Law and the Ethics of Nation-Building in Iraq,* 30 Yale J. Int'l L. 431, 439–40 (2005).

[474] *See* Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality,* 109 Mich. L. Rev. 447, 459–60 (2011).

[475] *See* Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention,* 15 Fla. J. Int'l L. 151, 157–58 (2002); David Wippman, *Changing the Legal Regime: Using Force in Iraq, Afghanistan, and Beyond,* 30 Cornell L. Forum 1, 5–6 (2003).

that Iraq possessed a dangerous stockpile of chemical weapons—and, hence, posed a danger to the United States.[476]

Thus, the U.S. invasion had as part of its justification the fear that Iraq might ally with al Qaeda.[477] According to U.S. officials, the activities of al Qaeda leaders in Baghdad reinforced the inference that Iraq posted an imminent threat.[478] This purported to reinforce a justification for invasion as necessary for self-defense under U.N. norms.[479] The problem with this argument was that, beyond the claims of Western powers, there was at best ambiguous evidence of an Iraqi alliance with al Qaeda.[480] Moreover, even if Iraq did provide support to al Qaeda, neither the U.N. Charter nor norms of international law recognize resource cooperation in and of itself as constituting an actual military alliance.[481] For this reason, the United States first sought authority from the U.N. Security Council, based on the Iraqi regime's obstruction of the U.N.'s attempt to inspect its weapons facilities pursuant to the international agreements made after the first Gulf War.[482] The Security Council's majority approbation suffered defeat after a veto threat, which left the United States to decide whether to undertake unilateral action.[483]

Having lost the opportunity to obtain formal international legitimation, the United States next turned to bilateral diplomacy to secure international support outside the Security Council.[484] In the author's view, this partially legitimated the invasion, by virtue of the participa-

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[476] *See, e.g.*, Office of The Prime Minister, Iraq's Weapons of Mass Destruction: The Assessment of the British Government, 2002, at 3 (U.K.), *available at* http://www.archive2.official-documents.co.uk/document/reps/iraq/cover.htm.

[477] *See* Posteraro, *supra* note 475, at 165.

[478] Interview with Donald H. Rumsfeld, Secretary of Defense, in Washington, D.C. (Sept. 26, 2002), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3669 (Department of Defense news briefing with Secretary Rumsfeld and General Pace).

[479] *See* M. Cherif Bassiouni, *Legal Status of Iraq from 2003–2008,* 11 Chi. J. Int'l L. 1, 4 (2010); Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks Against Iraq Justified?*, 12 Mich. St. J. Int'l L. 1, 39–40 (2003).

[480] *See* Kenneth Katzman, Cong. Research Serv., RL32217, Iraq and Al Qaeda: Allies or Not? 3–4 (2004), *available at* http://fpc.state.gov/documents/organization/34715.pdf.

[481] *See, e.g.*, Tess Bridgeman, *The Law of Neutrality and the Conflict with Al Qaeda,* 85 N.Y..U. L. Rev. 1186, 1210 (2010).

[482] *See* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 Stan. L. Rev. 415, 490–95 (2006).

[483] Felicity Barringer, *Eclipsed by Events, U.N. Officials Wonder About the Past and Ponder the Future,* N.Y. Times, Mar. 18, 2003, at A21.

[484] *See* Raymond W. Copson, Cong. Research Serv., RL 31715, Iraq War: Background and Issues Overview 2–4 (2003).

tion of a plurality of States; the effect was to relegate dissenting States to unilateral objections, as they likewise lacked the power to secure official U.N. condemnation, even in the form of a symbolic gesture in the U.N. General Assembly. The result was active international support for the U.S. invasion, which removed from the United States the burden of showing an absolute justification based on a theory of self-defense.[485] Specifically, the aggregation of international support justified the action under several theories, including that of the defense of the international community, and, more importantly, the fact that specific peoples within Iraq had long been deprived of their right of self-determination.[486] This argument was particularly compelling in light of the Iraqi regime's ruthless suppression of both the Kurdish people in the north and the Marsh Arabs in the south.[487]

Thus, the U.S. invasion of Iraq found support in the international community based simultaneously on the justifications of quelling cross-nation violence and supporting the rights of suppressed peoples to self-determination.[488] The justification of establishing a right of self-determination for a people would have been insufficient.[489] Likewise, it would have been difficult to justify invasion based solely on the imminence of the threat of a resource alliance between Iraq and al Qaeda.[490] The confluence of these two justifications, however, bolstered by Iraq's prior use of chemical weapons and evidence from national intelligence agencies regarding Iraq's pursuit of nuclear weapon technology, combined to enable the international community to support the U.S. invasion.[491] Now the question is how specifically to establish meaningful rights of self-determination.[492]

The challenge in Iraq is similar to that in Nigeria of former years, wherein the boundaries of the former colony enclosed three inde-

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[485] *See* Ackerman, *supra* note 474, at 464.

[486] *See* Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War,* 95 VA. L. REV. 1745, 1800–02 (2009).

[487] *Cf.* Roberta Cohen, *Iraq's Displaced: Where to Turn?*, 24 AM. U. INT'L L. REV. 301, 302 (2008) (discussing the facts that many Kurds and Marsh Arabs were already internally displaced in Iraq prior to the American invasion).

[488] *See* Sitaraman, *supra* note 486, at 1800–02.

[489] *See supra* text accompanying notes 486–488.

[490] *See id.*

[491] *See* Sitaraman, *supra* note 486, at 1800–03 (2009) (discussing the United Nations resolution that led to the American occupation of Iraq and the multiple potential justifications).

[492] *See, e.g.*, Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter?*, 33 DENV. J. INT'L L. & POL'Y 391, 391–92, 405–08 (2005) (arguing that that United States is a belligerent occupier and, as such, is bound to decide "how to incorporate the principle of self-determination . . . into the context of . . . occupation").

pendently identifiable peoples within a single State.[493] When the British undertook to meet this particular challenge, they made the choice to maintain the colonial boundaries, rather than to create a dangerous precedent of redrawing settled boundaries for the sake of individual people's independence.[494] The Organization of African Unity (today's African Union) likewise faithfully observed the principle of respecting prior colonial boundaries in settling all disputes among post-colonial African States.[495] Similarly, in Iraq, it was particularly difficulty to define the "Iraqi" people.[496] Specifically, there were the ethnic divisions between Kurds, an Indo-European people related to the Iranians, and Arabs, the dominant ethnicity,[497] and religious divisions between Sunni and Shi'a Muslims.[498] Some measure of violence had characterized the prior interactions among these three groups (Sunni Kurds, Sunni Arabs, and Shi'a Arabs), but it was unclear how much of that was actually a product of the defunct regime's policies of violent oppression, without which perhaps there may not have been any significant conflict among these groups.[499]

Throughout the occupation of Iraq, Western opinion-makers frequently insisted that peoples of disparate identities in the Islamic civilization were perpetually prone to violence against one another.[500] That this proposition conflicted with reality appeared not to dissuade many from applying this stereotype to Iraq.[501] There was, to be sure, a legitimate question of whether after the overthrow of Saddam Hussein the

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[493] *See* Larry R. Jackson, *Nigeria: The Politics of the First Republic,* 2 J. Black Stud. 277, 280–86 (1972); *cf.* Isaak I. Dore, *Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach,* 41 St. Louis U. L.J. 1301, 1303–04 (1997) (discussing the situation in Nigeria). *See generally* U.S. State Dep't, *Background Note: Nigeria,* http://www.state.gov/r/pa/ei/bgn/2836.htm.

[494] Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Secession,* 11 N.Y. Int'l L. Rev. 1, 34 (1998).

[495] *See* Charles E. Ehrlich, *Ethnicity and Constitutional Reform: The Case of Ethiopia,* 6 ILSA J. Int'l & Comp. L. 51, 54 (1999).

[496] *See* Harith Al-Qarawee, *Redefining a Nation: The Conflict of Identity and Federalism in Iraq,* 2 Persp. On Federalism, no. 1, 2010, at 32, 34.

[497] *See generally* Martin Van Bruinessen, *The Debate on the Ethnic Identity of the Kurdish Alevis in* Syncretistic Religious Communities in the Near East: Collected Papers of the Symposium, Berlin 1995 (K. Kehl-Bodrogi, B. Kellner-Heinkee & A. Otter-Beaujean eds. 1997) (describing the ethnic heritage of Kurdish peoples and how they differ from their European and Middle Eastern neighbors).

[498] *See* Bobby Ghosh, *How to Tell Sunnis and Shi'ites Apart,* Time, Mar. 5, 2007, at 30–31.

[499] *See id.*

[500] *See, e.g.*, Pew Research Center, *Muslim-Western Tensions Persist,* July 21, 2011, http://pewglobal.org/2011/07/21/muslim-western-tensions-persist/.

[501] *See, e.g.*, Edward D. Mansfield & Jack Snyder, *Prone to Violence,* Nat'l Int., Winter 2005–06, at 39, *available at* http://nationalinterest.org/article/prone-to-violence-596.

former British Mandate of Iraq still possessed sufficient cultural coherence exist within pre-invasion borders. The only viable solution in Iraq, however, given international precedent on the matter of dealing with former colonies, was to keep the nation-state intact and allow the Iraqis themselves to work out their own harmony.[502]

The tensions surrounding self-determination and its applicability to any given State are ongoing and challenging. One major challenge is that of simply developing a good definition of a people.[503] A "people," may be defined by a number of factors, including religion, ethnicity, culture, geography, and civilization of origin.[504] And according to James Mayall, there may be as many as "8000 identifiably separate cultures."[505] But it would be ludicrous to argue that boundaries should be drawn so as to isolate distinctly similar groups of people. The potentially huge number of States that would result is less concerning than the dangerous precedent of associating national boundaries with the territorial reaches of nominally distinct peoples. Such a position would incentivize surreptitious occupation and result in innumerable conflicts that the international community—now fragmented into an exponentially larger number of States—would be incapable of moderating. An example of an error of judicial judgment that indeed moved in this direction is *Western Sahara,* which incentivized foreign occupation for the sole purpose of securing international legitimacy for a new State based on an observation that it appeared to contain its own people.[506] In fact, the Moroccan Sahara constituted such a sparsely populated region, more than any other proposed State except Greenland, that populating it with a foreign people was a comparatively easy proposition.[507] Consequently, any precedent of permitting the definition of national boundaries to follow the territory claimed by a nominally distinct people is dangerous.[508]

With regard to modern doctrines for justifying the acquisition of territory, self-determination raises additional problems. For the principle

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[502] *See* Cohen, *supra* note 487, at 335.

[503] Gruda, *supra* note 441, at 366–68.

[504] *Id.*

[505] Mayall, *supra* note 429, at 276.

[506] *See Western Sahara,* 1975 I.C.J. ¶¶ 81, 151, 162.

[507] *See id.* ¶ 92; *World Population Prospects,* U.N. Dep't of Econ. & Soc. Affairs (Oct. 22, 2010), http://esa.un.org/wpp/Sorting-Tables/tab-sorting_population.htm; *Greenland, in* Central Intelligence Agency, The World Factbook (2011), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/gl.html/.

[508] *See* Alexander Martinenko, *The Right of Secession as a Human Right,* 3 Ann. Surv. Int'l & Comp. L. 19, 23–24 (1996).

of self-determination to work, the people must be able to effectuate an actual transfer of title to the new sovereign.[509] It is insufficient for a people simply to declare that, via self-determination, they now have title to the territory.[510] There must be some formal method of transitioning sovereigns if self-determination is to be viable.[511] The only effective doctrine for obtaining possession and transferring title appears to be cession.[512] The doctrine of occupation is problematic because the land would be unlikely to be considered *terra nullius;*[513] the doctrine of conquest is no longer acceptable to the international community which obviates this doctrine as a justification;[514] and, the doctrine of prescription would require the acquiescence of the exiting sovereign, which is unlikely to occur in most cases.[515] Thus, only the doctrine of cession remains.

F. *Negotiation and Arbitration of Territorial Disputes*

As traditional modes of acquisition become obsolete or scorned by the international community, and as their modern replacements seem to offer more problems than they solve, many States turn to negotiations or arbitrations to resolve disputes.[516] One forum for these methods of dispute resolution, the PCIJ, was founded by the League of Nations under Article 14 of the Charter.[517] The ICJ constitutes the successor to the PCIJ under the U.N.[518] When establishing which party has title to the territory, the ICJ usually bases its decisions on treaties, the doctrine of *uti possidetis,* and effective control.[519] The ICJ focuses primarily on legal documents when rendering decisions.[520]

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[509] *See* JENNINGS, *supra* note 82, at 78–79.

[510] *See id.*

[511] *Cf.* Martinenko, *supra* note 508, at 23–24.

[512] *Cf.* JENNINGS, *supra* note 82, at 16 (stating that while all other methods of title acquisition are unilateral, cession is a bilateral mode of acquisition that requires the cooperation of both parties).

[513] *See Western Sahara,* 1975 I.C.J. ¶ 80.

[514] *See* KORMAN, *supra* note 12, at 209–10.

[515] *See* JENNINGS, *supra* note 82, at 39.

[516] *See* Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution,* 32 U. PA. J. INT'L L. 1, 5–6 (2010).Arbitration facilities are available at The Hague, and several countries use them. *See* Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World,* 8 CARDOZO J. CONFLICT RESOL. 159, 197–98 (2006); *About Us,* PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Jan. 10, 2012).

[517] *See* League of Nations Charter art. 14.

[518] *History,* INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/court/index.php?p1=1&p2=1 (last visited Jan. 10, 2012).

[519] Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice,* 53 DUKE L.J. 1779, 1803–04 (2004).

[520] *See id.* at 1805–06.

In a dispute between Botswana and Namibia, the ICJ looked to the Anglo-German Treaty of 1 July 1890 to determine the legal status of, and boundary around, Kasikili/Sedudu Island.[521] The treaty had established spheres of influence between England and Germany.[522] Despite various sources of evidence of Namibian prescriptive title, including maps and other written evidence, the ICJ held that, by the terms of the Anglo-German Treaty, the island belonged to Botswana.[523] Similarly, in *Land and Maritime Boundary Between Cameroon and Nigeria,* the ICJ rejected Nigeria's claim for consolidation of title and stated that effective control was insufficient to override conventional title.[524] The ICJ ruled that the principle of *uti possidetis* determined title under the Anglo-German Agreement of 11 March 1913.[525]

In some cases, however, title cannot be determined from binding agreements.[526] In these situations, the court will look to whether a party has exercised effective control.[527] In *Sovereignty over Pulau Ligitan and Pulau Sipadan,* the ICJ examined a number of documents but was unable to find any that established title.[528] The court next looked to effective possession evidence and found that the island territories belonged to Malaysia based on current national legislation, pronouncements within administrative law, and quasi-judicial opinions.[529] Although such evidence was relatively scarce, it covered a significant period of time and displayed a pattern manifesting Malaysia's persistent intention to exercise political functions on the islands.[530] In reaching its determination, the ICJ noted that it will only weigh evidence of effective possession when it is otherwise infeasible to establish clear title.[531]

Surveying the types of evidence used most frequently, one scholar determined that parties in international arbitrations over territory

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[521] Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1045, ¶ 93 (Dec. 13).

[522] Anglo-German Treaty of July 1, 1890, *in* 51 Das Staatsarchiv: Sammlung der Offiziellen Aktenstücke zur Geschichte der Gegenwart [The State Archive: Collection of Official Documents Relating to Contemporary History] at 151 (Adam Blauhut trans., 1891).

[523] *Kasikili/Sedudu Island,* 1999 I.C.J. ¶¶ 82, 90, 94, 104.

[524] Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, 1998 I.C.J. 275, ¶ 106 (June 11).

[525] *Id.* ¶¶ 52, 60.

[526] *See, e.g.,* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. 625, ¶¶ 91–93 (Dec. 17).

[527] *See, e.g., id.* ¶¶ 92, 124.

[528] *See id.* ¶ 143.

[529] *See id.* ¶¶ 134–49.

[530] *See id.* ¶ 148; Lesaffer, *supra* note 94, at 55.

[531] Lesaffer, *supra* note 94, at 54.

brought a variety of reinforcing arguments.[532] Litigants frequently put forth arguments based on geography, economy, culture, heritage, elitism, and ideology as evidence for their respective claims.[533] Such evidence, however, was rarely persuasive if raised in lieu of treaties or other "hard" documents.[534] The reason is that most of the disputes feature an array of conflicting arguments by both sides, but these arguments often rest on sparse evidence.[535] Therefore, looking to treaties, agreements, and other "hard" evidence more readily enables the court to achieve sufficient clarity and certainty to support a confident ruling.[536]

Conclusion and the Future

Modes of acquisition have taken many forms since the dawn of civilizations, from rudimentary systems in which the most powerful actor might take what it could, to a modern, individual rights-based approach based on the collective experiences of Western civilization during the era of hegemonic expansion. Throughout the twentieth century, there were persistent attempts to eradicate the traditional doctrine of conquest and establish a system of peaceful transfer that recognizes the rights of people in addition to those of the State. The most prominent feature of this evolution was the establishment of international organizations to advocate peace and to protect the human rights of individuals. Unfortunately, these institutions, and the modern modes of peaceful acquisition they advocate, have proven inadequate. Even the strongest forms of condemnation from the international community have been unable to prevent the use of condemned practices to claim territory.

Part of the reason the modern modes of acquisition have failed to take control is perhaps their logical flaws. The concept of self-determination—namely, that every people should enjoy the right to consent to the form of government that will rule them—is limited in the extent to which it can be applied to every society on every continent. However, the practical limits to this principle, such as the prospect of 8000 separate States in the world, are obvious. Beyond this, the burden of determining what exactly constitutes a "people" for purposes of establishing a country under the doctrine of self-determination would clog and

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[532] *See* Sumner, *supra* note 519, at 1784–92.

[533] *See id.*

[534] *See id.* at 1806–07.

[535] *See id.* at 1783–92 (describing potential disputes when litigating based on geographical, economic, cultural, elitist, and ideological justifications).

[536] *Cf. id.* at 1809 (arguing that the ICJ's preference for treaty law might be an attempt to restore predictability and stability in international territorial disputes).

cripple the international legal system. Moreover, the precedent of granting independent States to often ill-defined independent peoples would undermine the integrity of national boundaries; it would not relax any tensions that might currently exist between groups. By now, it should go without saying providing a people a right of self-determination is not as simple as signing a declaration and then standing back to watch the birth of a new State.

The recent conflict in Iraq provides clear evidence that vindicating the right of self-determination takes huge amounts of time, treasure, and blood. The current Iraqi government may finally be the product of its people, but the role of the United States and its allies has been essential to its stability, and will be for the foreseeable future. In other scenarios, it is possible that similar efforts might fall short of the ideal outcome that appears to be the Iraqi experience of the twenty-first century. There remains no definition of what a "people" means in Iraq, but that question has waned in importance as Iraq's multiple peoples appear to have settled into some semblance of harmonious coexistence. While the nation still suffers from conflicts among cultures and religions, these conflicts are now less violent than they were in the immediate aftermath of the U.S. invasion.

More generally, recent experience has provoked questions of whether it is just to go to war in order to effectuate self-determination. Under what conditions is it valid for foreign powers to invade, regardless of the virtuous ends that they espouse to justify their campaign? In the case of the Iraqi invasion, for example, the U.N. officially declined to back it, so the international community acted outside of that structure to pursue what it collectively felt to be a worthwhile goal. This was an unprecedented act in the history of international relations, and it is unclear where that response may lead in the future of the U.N. or even the definition of the international community itself.

Perhaps the best way to confront the concerns that attend the acquisition of territory today is to utilize all available modes of acquisition in moderation. Rather than attempt to rely on the principle of self-determination as a spearhead for the reduction of conflict, the international community must develop a system for ascertaining the best mode of acquisition for each case. Moreover, in order to effectuate such a system, the international community, whether via the U.N. or some other body—including the unsettling possibility of further ad hoc, bilaterally-arranged international coalitions similar to that which supported the Iraq invasion—must be so organized as to wield collective authority in State relations. Since World War II, the modern system of imposing sanctions and issuing strongly worded resolutions has been widely used to

punish aggression. But that combination of remedies often seems more like a pro forma exercise in diplomacy than an effective means of effect needed change. Although such a system has worked in some situations, the international community is frequently helpless to stop aggression and acquisitions that result from centuries of cultural incompatibility.

Future domains of territorial acquisitions include space and the ocean floor. The 1960's race to the Moon served as the catalyst for the development of an international framework to determine nation-states' rights in space. In 1967, the U.N. reached a resolution in the matter by passing the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.[537] Although its primary purpose concerned the banning of nuclear and other weapons of mass destruction, the resolution provided a foundation to preserve space exploration for the good of all mankind, not for the advantage of individual nation-states.[538]

Principles of territorial acquisition may be necessary to resolve near-space disputes as well. International telecommunication networks rely on geosynchronous orbiting satellites.[539] The International Telecommunications Union, through INTELSAT, developed a system to allocate geosynchronous space and maintain satellite resources.[540] Nevertheless, non-member States predictably dispute the characterization of geosynchronous allocations as outer-space. For example, in 1976, the Bogota Declaration announced that "segments of the synchronous geostationary orbit are an integral part of the territory over which the equatorial States exercise their national sovereignty."[541]

To prevent rogue States from using force and relying on the doctrine of conquest to take territory, the international community must prepare to utilize sufficient force to subdue such uprisings. Beyond stopping aggression, however, the international community must also have some method for creating a system that will permit or induce rival cultures to live harmoniously. What is most interesting about the mode

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[537] *See generally* G.A. Res. 2222 (XXI)/21 U.N. Doc. A/RES/2222(XXI) (Dec. 19, 1966); G.A. Res. 1721 (XXI)/16 U.N. Doc. A/RES/1721(XVI) (Dec. 20, 1961).

[538] *See* SHAW, *supra* note 15, at 545.

[539] *See id.* at 549–52. Geosynchronous orbits occur approximately 22,300 miles above the equatorial line and allow satellites to remain fixed in relation to the Earth's surface. *See id.* at 552.

[540] *See id.* at 549. Shaw notes that the communists established a comparable system called INTER-SPUTNIK. *Id.*

[541] Bogota Declaration (Dec. 7, 1976), *in* 6 J. Space L. 193, 193 (1978). Signatories to the Bogota Declaration include Brazil, Columbia, the Congo, Ecuador, Indonesia, Kenya, Uganda, and Zaire. *Id.* at 196.

of reaction to the second Gulf War is the prospect that multiple modes of international cooperation, characterized by a combination of fixed associations of nations and ad hoc coalitions, may become this century's norm. Despite the uneasiness that this prospect will evoke in many quarters, it is possible that a competing system of cooperation, exemplified by the dissensus between the U.N. Security Council and the free coalition of States that backed the Iraq invasion, is superior to a fixed system that is the sole authority for international relations.

Although almost everyone can agree that wars and rogue States are undesirable, if the age-old status quo must suffer destruction, the international community must put into place an effective, realistic plan to end the justification for acquisition by way of the doctrine of conquest to dissuade rogue coalitions of States that might use conquest as a justification for territorial expansion. Meanwhile, it should review its current organizational premises, as the dissensus between the U.N. Security Council and the ad hoc coalition in the Iraq case indicates that the current structure impedes true international consensus about how to handle the modern international emergencies. Calls to vest more power in the U.N. suffer from the misguided assumption that the optimal way to police the world is by delegating more national sovereignty to a collectivity. In fact, the international scale of conflict is analogous to the national scale of a major economy. Centralized control works in a corporation, but a country, let alone an international union, requires a wiser, more refined balancing of competing interests. Equilibrium can only result from multiple States pursuing self-interested ends in cooperation with all other States. In the end, the system must be arranged so that it would be against the interests of every State to flout international consensus. Insofar as all States come to depend on all others to meet their needs, and no State remains that relies on the vicissitudes of a sole human decision-maker on the matter of international relations, flexibility will breed peace.