

In light of the evolution of the principle of self-determination, do the traditional modes for acquisition of territorial sovereignty have contemporary significance in international law?

Introduction

The concept of self-determination and the acquisition of territorial sovereignty are highly deliberated concepts. The principal notion of self-determination is a people's right to decide their State's political status and its fundamental purpose in the international community. In correlation with this is the notion of territorial sovereignty which denotes the legal competence that a State enjoys in respect of its territory, and its use implies that a State retains relative control and ownership over its territory. There are five traditional modes of acquisition commonly accepted in international law— namely occupation, accretion, cession, conquest and prescription¹ – and their contemporary significance in international law is questionable. This is primarily due to the modern requirement imposed by Courts that a State has to demonstrate it has a superior right to 'possess a section of land' as opposed to the actual 'mode' of acquisition to which the land was originally discovered and claimed.

Consequently, this paper will seek to explore the concept of self-determination and correlate it to the traditional modes of acquisition of territorial sovereignty. It will seek to explore the contemporary significance and legal standing of the five traditional 'modes of acquisition', and attempt to establish the justification for the legal apportionment the Courts have attributed to the 'better right to possess' the land in comparison to the actual 'mode of acquisition'. Finally, it will endeavor to determine whether the self-determination has a stronger contemporary significance than traditional modes of acquisition in modern international law.

Self Determination

The principle of self-determination draws its foundations from the ideologies of Statehood, and the fact that Statehood was traditionally neither a uniform or immediate requirement. Statehood was typically a process of consensual agreement by which a new colonial authority attempted to form an agreement with the traditional people of a territory in order to form a new State. When independence was resisted by the traditional people of a territory - war typically ensued and lasted for an extended period of time before a mutual agreement to establish a government was eventually achieved. Modern international law has characteristically assumed that the concept of self-determination was not a valid one but rather one which was ill-defined and uncharacteristic in its entirety.² The key recognition of self-determination was the reference included to it in the *United Nations Charter* in Article 1, paragraph 2 where it is stated 'the principle of equal rights and self-determination'.

The modern interpretation of self-determination is that it is in fact a legal principle and that the United Nations does now recognize the importance of it. The right to self-determination in light of territory sovereignty has been given prominence by the International Court of Justice particularly in circumstances where freedom from colonial domination should be apparent.³ The ICJ in its 1971 Advisory Opinion on *Namibia* clearly articulated that colonial

¹ L. Oppenheim, *International Law – A Treatise*, Third Edition, Lawbook Exchange Ltd, New Jersey, USA, Pg. 698.

² It is interesting to note that prior to 1945 there is almost no legal sources which include the term 'self-determination'. Refer to *Padelford and Anderson*, 33 AJ (1939), 465 at 474.

³ *Frontier Dispute*, ICJ Reports, 1986.

and subjugated people should have a definitive right to independence - free from claims of territorial acquisition.⁴ It's most definitive stance on the principle was in the *Case Concerning East Timor*⁵ where the Court stated '[t]he principle of self-determination of peoples has been recognized by the United Nations Charter and in the Jurisprudence of the Court ... and it is one of the essential principles of contemporary international law'. Furthermore, in the Resolutions relating to the *Western Sahara*⁶ and *Belize*⁷, the General Assembly gave binding precedence to a population's right to self-determination over and above any claims of sovereignty.

Thus, the principle of self-determination is now equated to other critical core elements of international law such as State sovereignty, the equality of States and perhaps most importantly - the equality of people within a State. The notion of self-determination in the context of acquisition of territorial sovereignty is important in number of instances. Firstly, when force is being used by a State to acquire a new territory, then the title may only be acquired by general acquiescence and recognition. Secondly, if the intervention of a liberation is unlawful but assistance to the same liberation is lawful then elements of self-determination are critical in justifying an action. Finally, the principle of self-determination is critical if territory is inhabited by people who are not organized as a State but which deserves independence. The territory cannot be regarded as *terra nullius* and cannot be acquired by appropriation of neighboring states in the instance it is abandoned by an existing sovereign.⁸

At present, it seems that apparent that there is insufficient evidence to support the concept of self-determination as a valid argument which would prohibit the transfer of territory based on an expression of opinion by the original inhabitants.⁹ This attitude may differ if more States refused to recognize territorial acquisition specifically because the principle of self-determination had been ignored. At present, all acquisition of territorial sovereignty cases are made primarily by a State and do not include consultation with the population concerned. Most jurists which support the principle of self-determination do so because they are of the belief that a joint decision - which is representative of the entire international community - is required, and so that the principle of *uti possidetis* can be upheld.¹⁰

Acquisition of Territorial Sovereignty

There are five primary modes of acquisition of territorial sovereignty which are typically dubbed the 'original' or 'traditional' methods.¹¹ Each mode of acquisition - namely occupation, accretion, cession, conquest and prescription¹² - is unique since it depends

⁴ *Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, ICJ Reports, 1971.

⁵ *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports, 1995.

⁶ G.A. Resolution 3292, 29 U.N. G.A.O.R. Supp (No 31) at 103-104, UN Doc A/9631 (1974) Preamble, Para 3

⁷ G.A. Resolution 3438, 34 U.N. G.A.O.R. Supp (No 46) at 204-205, UN Doc A/3436 (1979).

⁸ Evans, Malcolm, *International Law*, 2nd Edition, Oxford University Press, 2006, Pg. 225.

⁹ This is primarily because there is no specific provision which allows this. Refer to the discussion presented in Kozhevnikov (ed.), *International Law*, Moscow, 1957, Pg. 175-77.

¹⁰ Additionally, proponents for self-determination suggest that this is entire reason that the majority of African countries have been able to co-exist and avoid wars. Although opponents discard this view and suggest that the concept has lead to many internal civil wars between differing ethnic groups in Africa. See Brownlie, Ian, *International Law and the Use of Force by States*, Clarendon Press, 1963.

¹¹ L. Oppenheim, *International Law – A Treatise*, Third Edition, Lawbook Exchange Ltd, New Jersey, USA, 1948, Pg. 698.

¹² *Ibid*.

entirely on the actions of the claimant during the process. The creation of any subsequent title by acquisition is typically the consequence of a legal procedure relating to the formation and acknowledgment of the new legal entity. The events leading to the recognition of this title are critical to any relevant territorial ownership disputes involving the acquisition of title by the applicable claimant. Throughout history it has been commonly assumed that the discovery of a parcel of land and the resulting symbolic act of planting a flag immediately conferred an absolute title right – an assumption which has been dispelled by the Courts as a mere precursor to a title right which must be preceded by some mode of acquisition within a reasonable period of time¹³.

Consequently, it is apparent from the decisions in the *Islands of Palmas*¹⁴ and the *Eastern Greenland* cases¹⁵ that modern international law has primarily relied on the notion of the ‘better right to possess the land’ as the key element in establishing territorial sovereignty over and above any right that is conferred through a particular mode of acquisition which occurred previously. Arbitrator Huber’s decision in the *Islands of Palmas* case is consistent with the Courts decision in the *Miniquiers and Ecrehos*¹⁶ case such that the issue of determining the right of territorial sovereignty between two competing States passes to which one has the better - or more sustainable - right. Of particular note is the comments in the *Miniquiers and Ecrehos* case¹⁷, where the Court stated that the issue of possession was fundamental to any declaration of any sovereignty claim, and that it was necessary to ‘appraise the relative strengths of the opposing claims to the sovereignty’¹⁸ before providing sovereign title over any land. Of further note in these cases is that the concluding comments did actually recognize that the mode of acquisition was still of valid significance in determining territorial sovereignty - primarily because it enables the Court to measure the original method of possession between two competing States, and it allows the Court to determine the intensity of activity from the actual alleged acquisition date.

Interestingly, the intention to act as a sovereign, or *animus occupandi*¹⁹, is generally insisted upon by the Courts and any claim of territorial sovereignty without it has proven unfavorable. In the *Eastern Greenland* case²⁰, the Permanent Court measured the condition of the disputed area only from the critical date at which Norway had proclaimed its occupation.

In its ruling comments, the Court said

‘[a] claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as a sovereign, and some actual exercise or display of such authority.’²¹

Thus, it is evident from the Courts concluding comments that the law does not provide substantial weight to the actual mode of acquisition in contrast to the profound weight

¹³ MacGibbon, I.C, *Customary International Law and Acquiescence*, The British Year Book of International Law, (1958) , Page 127.

¹⁴ *Island of Palmas Arbitration (US v Netherlands)*, 2 RIAA 829 (1928).

¹⁵ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J, Ser. A/B, No. 53 (1933).

¹⁶ *Miniquiers and Ecrehos*, ICJ Reports (1953).

¹⁷ *Ibid*

¹⁸ *Ibid* at 47.

¹⁹ *Frontier Land* case, ICJ Reports (1959) at 250.

²⁰ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J, Ser. A/B, No. 53 (1933).

²¹ *Ibid* at pp. 45-6

provided to the key elements of ‘intention and will to act as sovereign’²² and ‘actual exercise or display of authority’²³. The clear emphasis provided by the Court on reliable State activity and maintenance is evidence that the original mode of acquisition is no longer a critical element in determining territorial right. This is consistent throughout the *Islands of Palmas*²⁴, *Eastern Greenland Case*²⁵ and *Rann of Kutch*²⁶ cases, where the Courts noted a number of key concepts which are critical in the determination of *animus occupandi* but appear as *obiter dictum* in the rulings. The first was that the activity must be *à titre de souverain*²⁷ such that the claimant can only be a State and not that of unauthorized natural or legal persons. Secondly, if the material presented to the Court is merely proof of occupation by the consent of another State, then no quantity of activity by a claimant can remove title from the consenting sovereign.²⁸ Finally, the emphasis on the display of State activity must be taken as a whole and the notion of ‘best right’ falls in favor of the State which has ‘displayed and exercise her sovereign rights to an extent sufficient to constitute a valid title to sovereignty’.²⁹

Conclusion

Contemporary international law has clearly demonstrated through decisions such as those in the *Islands of Palmas*³⁰ and *Eastern Greenland*³¹ cases, that the modern significance of the territorial acquisition is less important in determining territorial sovereignty. The International Court of Justice is becoming increasingly definitive in its stance on the recognition and acknowledgment of self-determination, albeit they still accept the view of ‘best right to ownership’ as the guiding principle in the determination of territorial acquisition. This is primarily due to the fact that the interpretation of modern international law on territory has been primarily developed on the *penumbra of equities*³² - or from the political considerations that must be taken into consideration when determining territorial ownership. It is accepted that this is a rational and natural action of the Courts because the international community expects the judicial and arbitral tribunals to consider the administrative, geographical, social and economic environment of any claimant before assigning title. Although the International Court of Justice has supported the concept of self-determination, it has recognized that there is not enough sufficient evidence to adopt its principles in their entirety and attempt to apply them to disputes over territorial acquisition and sovereignty. While it is evident that this may be changing in the international arena, it is not currently substantive enough to move away from the Courts accepted model of a ‘better right to possess the land’ – a model which is already significantly different to the traditional five modes of territorial acquisition and title. Until the United Nations incorporates self-determination in a clear statutory capacity and requests States to uphold its principles – the ‘better right to possess’ notion will remain the Courts authoritative position when determining acquisition of territorial sovereignty and title right disputes.

²² Ibid

²³ Ibid

²⁴ *Island of Palmas Arbitration (US v Netherlands)*, 2 RIAA 829 (1928)

²⁵ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J, Ser. A/B, No. 53 (1933).

²⁶ *The Indo-Pakistan Western-Boundary Case Tribunal (Constituted pursuant to the Agreement of 3 June 1965) Award, 19 February 1968, Government of India Press (1968)*

²⁷ Ibid at 97-99

²⁸ Ibid above n, 59 at 869

²⁹ Ibid above n, 60 at 51

³⁰ *Island of Palmas Arbitration (US v Netherlands)*, 2 RIAA 829 (1928)

³¹ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J, Ser. A/B, No. 53 (1933).

³² Brownlie, *The Justiciability of Disputes and Issues in International Relations*, 42 Br. Y. B. Int’L. 8, n. 1 (1967)

