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Dieter Dörr

*Johannes Gutenberg-Universität Mainz*

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## THE BACKGROUND OF THE THEORY OF DISCOVERY

Dieter Dörr\*

### I. Introduction

In his excellent book *Conquest by Law*,<sup>1</sup> Lindsay Robertson explained the importance of the theory of discovery in the westward expansion of the United States. As seen with the famous 1823 Supreme Court decision *Johnson v. M'Intosh*,<sup>2</sup> the first of the so-called Marshall trilogy,<sup>3</sup> this theory would be used to deprive Indians of their land. In this decision, Chief Justice Marshall stated:

They [Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>4</sup>

President Andrew Jackson would later misuse these words to dispossess the Indian Nations of their land without their consent. Once the Indian removal policy had begun, Marshall attempted to close the Pandora's Box *M'Intosh* opened with the subsequent decisions *Cherokee Nation v. Georgia*<sup>5</sup> and *Worcester v. Georgia*,<sup>6</sup> eight and nine years later, respectively.

Andrew Jackson became the seventh president of the United States on March 4, 1829.<sup>7</sup> He was a strong supporter of the Indian removal policy, the first step being the removal of the eastern tribes o lands west of the

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\* Dr. iur., Professor of Public Law, International and European Law, Media Law, Johannes Gutenberg-University Mainz.

1. LINDSAY ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005).

2. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

3. The trilogy also includes *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

4. *M'Intosh*, 21 U.S. (8 Wheat.) at 574.

5. 30 U.S. (5 Pet.) 1.

6. 31 U.S. (6 Pet.) 515.

7. ROBERTSON, *supra* note 1, at 126.

Mississippi.<sup>8</sup> On May 26, 1830 the Removal Act passed the House and the Senate, and was signed into law by President Jackson shortly after.<sup>9</sup> Chief Justice Marshall was shocked because the Act was based on the legal theory of discovery he developed in *M'Intosh*.<sup>10</sup> He tried to reformulate this discovery theory in 1831, when he stated in *Cherokee Nation* that "the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government . . . ."<sup>11</sup> In *Worcester v. Georgia*, 1832, he declared that discovery gave only "the exclusive right of purchasing such lands as the natives were willing to sell."<sup>12</sup>

But it was too late as the majority in the Supreme Court was changing dramatically. In the year 1831 President Jackson appointed two new judges who supported the removal policy, John McLean of Ohio and Henry Baldwin of Pennsylvania.<sup>13</sup> *Worcester* was the Marshall Court's last chance to reformulate the discovery doctrine. After this decision, Justice William Johnson died in 1834 and in January 1835 Jackson appointed James M. Wayne of Georgia in his place, another vigorous supporter of removal.<sup>14</sup> Justice Gabriel Duvall, a Marshall supporter, resigned.<sup>15</sup> Chief Justice Marshall still possessed his intellectual power but his physical strength was manifestly on decline; He died on July 6, 1835.<sup>16</sup> Thereafter the Jacksonians used their new majority to restore the *M'Intosh* discovery formulation.

In 1836 President Jackson appointed Philip P. Barbour of Virginia and Roger B. Taney of Maryland to the seats vacated by Duvall and Marshall.<sup>17</sup> In 1837 the Court increased to nine members.<sup>18</sup> Jackson appointed John Catron of Tennessee to the first seat.<sup>19</sup> His chosen successor and former Vice President, Van Buren, appointed John McKinley of Alabama to the

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8. *Id.* at 125.

9. *Id.*

10. *Id.* at 129.

11. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

12. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 545 (1832).

13. ROBERTSON, *supra* note 1, at 131.

14. *Id.* at 138.

15. *Id.*

16. *Id.*

17. *Id.* at 140.

18. *Id.*

19. *Id.*

second seat.<sup>20</sup> The Court comprised seven Jacksonian members post-1837, only Joseph Story and Smith Thomson remained from the Marshall Court.<sup>21</sup>

In the decisions following *Worcester*, the Jacksonians used the theory of discovery to argue “Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.”<sup>22</sup> The result was, in the formulation of Lindsay Robertson, conquest by law.<sup>23</sup> But what is the background of the theory of discovery? Is Chief Justice Marshall’s interpretation of the theory in *Johnson v. M’Intosh* valid? To answer these questions it is necessary to examine the theory’s origins.

The legal concept of discovery has two different roots: the idea of the Christian-European family and the idea of civilization. Before the great discoveries in the fifteenth century, legal relations between the various communities were conducted within a relatively fixed framework. The Christian empires in Europe formed the core of this exchange, with pluralistic legal relationships amongst themselves. These Christian-European empires coexisted side by side with Islamic empires. Legal interaction between these two spheres in the Middle Ages was regulated in a special way involving a large number of restrictions and prohibitions. The Greek-Byzantine cultural orbit represented the link between these two spheres; however, it was excluded from the tighter-knit community of Christian-European states and developed its own international law shaped by Constantinople.<sup>24</sup>

Following the great discoveries, the range of action of the Europeans rapidly expanded to cover the entire globe. This raised the question as to which legal rules should apply to the relations between the overseas communities and the European states. The first problem that arises is

20. *Id.*

21. *Id.*

22. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 409 (1842); *see also* *United States v. Fernandez*, 35 U.S. (10 Pet.) 303, 309 (1836); *Mitchel v. United States (Mitchel I)*, 34 U.S. (9 Pet.) 711, 746 (1835); *Mitchel v. United States (Mitchel II)*, 40 U.S. (15 Pet.) 52, 89 (1841).

23. *See* ROBERTSON, *supra* note 1, at 143-44.

24. *See generally* WILHELM G. GREWE, *EPOCHEN DER VÖLKERRECHTSGESCHICHTE* 72-82 (1984) [hereinafter GREWE, *EPOCHEN*]; GEORG STADTMÜLLER, *GESCHICHTE DES VÖLKERRECHTS: TEIL 1, UP TO THE CONGRESS OF VIENNA (1815)* 54-55 (1951); STEFAN VEROSTA & KARL ZEMANEK, *Die Geschichte des Völkerrechts*, in *VÖLKERRECHT VON ALFRED VERDROSS* 31, 58-59 (5th ed. 1964); Karl-Heinz Ziegler, *Zur Einführung: Völkerrechtsgeschichte*, in 27 *JURISTISCHE SCHULUNG [JUS]* 350, 352-53 (1987).

whether these relations are governed by international law. It is questionable whether the various forms of politically organized structures overseas, ranging from large, rigidly structured empires to loose tribal organizations, could be recognized as entities in international law, or whether, in view of their lack of Christianity — or in later years lack of civilization — their ability to act as legal entities should be denied.

## *II. The Doctrine of Discovery and the Idea of the Christian-European Family*

### *A. The Role of the Pope*

At the forefront of the doctrine of discovery is the idea of the Christian-European family of peoples. Thus, in the first Papal Bulls of 1344,<sup>25</sup> 1436,<sup>26</sup> and 1455,<sup>27</sup> referring to overseas territories, any rights of indigenous populations or communities in those overseas territories are totally denied. Furthermore, the Pope granted Spain and Portugal the right of conquest over any such territories.<sup>28</sup> The enfeoffment formula brings together these various aspects in granting the Portuguese kings the exclusive rights to wage war; to subordinate and appropriate the wealth and possessions of the Saracens, heathens, and other enemies of Christ; and to take their inhabitants into eternal slavery.<sup>29</sup> The Christian peoples as the discovering state had the right to take their lands.

### *B. The Spanish Late Scholastic School*

The first important dispute on the rights of overseas peoples and communities arose in connection with the activities of the Spanish in the New World. After it became known that the Spanish had smashed the Aztec

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25. Bull of Nov. 28, 1344, *reprinted in* Alfonso García Gallo, *Las Bulas de Alejandro VI y el ordenamiento jurídico de la expansión portuguesa y castellana en África y Indias*, in 27-28 INSTITUTO NACIONAL DE ESTUDIOS JURIDICOS, ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 738-39 (1957-58).

26. Bull Romanus Pontifex of Sept. 15, 1436, *reprinted in* Charles Martial De Witte, *Les Bulles Pontificales et l'Expansion Portugaise au XVe Siècle*, in 48 REVUE D'HISTOIRE ECCLÉSIASTIQUE 683, 717-18 (Roger Aubert et al. eds., 1967).

27. Bull Romanus Pontifex of Jan. 8, 1455, *reprinted in* EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 9-26 (Frances Gardiner Davenport ed., 1917).

28. *Id.*

29. JÖRG FISCH, DIE EUROPÄISCHE EXPANSION UND DAS VÖLKERRECHT 206-09 (1984).

Empire with brutal ruthlessness, a broad opposition movement grew within the Spanish church.<sup>30</sup>

Though their contributions have been largely overlooked, the works of the Spanish Late Scholastic School paved the way for the rise of modern international law. The first central figure in the discussion was Vitoria, who made an impressive attempt to systematically analyze and find a solution to relevant questions in his lecture "De Indis," likely given around 1532.<sup>31</sup> Vitoria (1483-1546) acknowledged that the recently discovered Indians, i.e., the Central American Indians, had rights of sovereignty and possession.<sup>32</sup> In his view, they were the legal owners and occupiers of the land.<sup>33</sup> Spain could neither derive title to Indian land through the Emperor nor the Pope.<sup>34</sup> The Emperor was not lord of the world,<sup>35</sup> and the Pope's authority extended only over Christendom, so accordingly he could not rule over any territories of heathens.<sup>36</sup> Even the right of discovery did not give Spain any legitimate title over the existing Indian empires.<sup>37</sup> Whilst non-sovereign territory could be claimed by the first person to discover it, the American territories were not non-sovereign, but instead populated by peoples who had the rights of sovereignty and possession.<sup>38</sup> Even the refusal of the Indians to accept Christianity did not give the Christians any rights of conquest or justification to wage war.<sup>39</sup>

Suárez (1548-1617), who along with Vitoria is probably the most significant member of the Spanish Late Scholastic School, deemed the Indian empires to have the same rights as those of Christian empires.<sup>40</sup> In his treatise, he places particularly clear stress upon the ideal of the equality

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30. *Id.* at 210-12.

31. See FRANCISCO DE VITORIA, *DE INDIS RECENTER INVENTIS, ET DE JURE BELLI HISPANORUM IN BARBAROS: RELECTIONES* (Walter Schätzel trans., 1952) (1539) (lectures on recently discovered Indians and the right of the Spanish to wage war against the barbarians); see also FISCH, *supra* note 29, at 212-13.

32. VITORIA, *supra* note 31, at 45.

33. *Id.*

34. See *id.* at 51-69.

35. *Id.* at 51.

36. See *id.* at 59-69.

37. *Id.* at 69.

38. *Id.*

39. See *id.* at 69-83.

40. See JOSEF SODER, FRANCISCO SUÁREZ UND DAS VÖLKERRECHT: GRUNDGEDANKEN ZU STAAT, RECHT UND INTERNATIONALEN BEZIEHUNGEN (1973) (on the importance of Suárez to modern international law); see also FISCH, *supra* note 29, at 224-25.

of all peoples.<sup>41</sup> Accordingly, in the work of both Vitoria and Suárez, international law is claimed to have universal application and encompass all communities under its jurisdiction.<sup>42</sup>

However, Vitoria and Suarez do allow Christian empires special rights: if the spreading of the gospel is hindered, or if a non-believing ruler forbids his subjects to convert to Christianity, then war may be waged against the non-believers.<sup>43</sup> This does not contradict their condemnation of waging war against non-believing Indians. Suarez and Vitoria justify war on the grounds that the Christian mission is being prevented by force, not the Indians refusal to convert to Christianity.<sup>44</sup> Both men thus proceeded from the premise that international law should allow non-believers to accept the Christian mission freely, without restraint.<sup>45</sup>

Of particular importance to this debate is Vazquez de Menchaca (1512-1569), who came from outside the ecclesiastical sphere and dealt with the question of overseas territories as early as 1564 in his "Controversiae Illustres."<sup>46</sup> He emphatically rejected the concept of special rights of Christian and civilized societies, because he regarded all men as born free.<sup>47</sup> Vazquez is a predecessor of Christian Wolff, to the extent that the concepts of the Late Scholastic School were transmitted through his works to the

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41. 23 FRANCISCO SUÁREZ, *TRACTUS TERTIUS DE CARITATE: OPERA OMNIA* 747-48 (1858).

42. For this reason Vitoria, Suárez, and possibly also Vásquez de Menchaca, deserve the honorary title of "Founders of International Law" much more than Hugo Grotius. On the discussion of Hugo Grotius as the "Founder of International Law," see generally CHRISTOPH LINK, *HUGO GROTIUS ALS STAATSDENKER* (1983); see also PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* 622 (1983); Wilhelm G. Grewe, *Grotius – Vater des Völkerrechts?*, 23 *DER STAAT* 161 (1984); Hartmut Schiedermaier, *Hugo Grotius und die Naturrechtsschule*, in *EINIGKEIT UND RECHT UND FREIHEIT, FESTSCHRIFT FÜR KARL CARSTENS* 477 (Bodo Börner et al. eds., 1st ed. 1984); cf. Karl-Heinz Ziegler, *Hugo Grotius als "Vater des Völkerrechts,"* in *GEDÄCHTNISSCHRIFT WOLFGANG MARTENS* 851, 856 (1987) [hereinafter Ziegler, *Hugo Grotius*] (Grotius remains preeminent, but the importance of the Late Scholastic School is rightly emphasized).

43. See VITORIA, *supra* note 31, at 105-09; see also FISCH, *supra* note 29, at 217-19, 224.

44. *Id.*

45. See Dieter Dörr, *Die "Indian Nations and Tribes" in Nordamerika und das Völkerrecht*, 36 *JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART [JÖR]* 489, 491 (1987); see also FISCH, *supra* note 29, at 217-18.

46. See KURT SEELMANN, *DIE LEHRE DES FERNANDO VAZQUEZ DE MENCHACA VOM DOMINIUM* (1979); see also FISCH, *supra* note 29, at 243-44.

47. 1 FERNANDO VÁSQUEZ DE MENCHACA, *CONTROVERSIAS FUNDAMENTALES Y OTRAS DE MÁS FREQUENTE* 4-5 (Fidel Rodríguez Alcalde ed., 1931).

Dutch University of Leiden, influencing, amongst others, Hugo Grotius (1583-1645), who is frequently, but misguidedly, referred to as the “father of (modern) international law.”<sup>48</sup>

Already in the eighteenth century and especially in the nineteenth century, "Christendom" lost its importance as the central community of international law. Thus, from 1815 onward there is no longer any reference to Christianity as a central principle in the major international treaties.<sup>49</sup>

### *C. Christian Wolff and the Idea of the State as a Legal Order*

It is therefore not surprising that the idea of the equality of all peoples became more consistently represented with the abandonment, or at least weakening, of the idea of the Christian-European family of peoples. Of particular importance to this process was Christian Wolff (1679-1754) and his rejection of all special rights of Christian, European and civilized societies in relation to overseas communities and peoples.<sup>50</sup> In his view, only non-sovereign territories could be occupied by the discovering state.<sup>51</sup> Non-sovereign, by his definition, included only those territories not already taken into possession by a people.<sup>52</sup> A precondition of the concept of a people is that the members of the group have associated with one another in a civil state.<sup>53</sup> In Wolff's view, very loose forms of organization are sufficient for this; all that is necessary is an association of people organized around a legal order, even if unwritten.<sup>54</sup> It is irrelevant whether the people are nomads or settled.<sup>55</sup> Wolff describes the "people" as a legal state, and thus refers back to an old philosophical tradition: it is not the state, but the people as a community organized within a legal framework that is the essential bearer of sovereignty in international law.<sup>56</sup>

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48. See Ziegler, *Hugo Grotius*, *supra* note 42, at 851.

49. See GREWE, *EPOCHEN*, *supra* note 24, at 520.

50. See FISCH, *supra* note 29, at 270-75.

51. *Id.* at 273.

52. *Id.*

53. E.g., 2 CHRISTIAN WOLFF, *JUS NATURALE METHODO SCIENTIFICA PERTRACTATUM* ¶¶ 175-197 (Hildesheim 1968) (1742).

54. FISCH, *supra* note 29, at 273.

55. *Id.*

56. Stefan Verosta, *Der Vertrag zwischen Portugal und dem Marathen-Staat von 1779 - europäisches oder universelles Völkerrecht*, in *FESTGABE FÜR WOLFGANG PREISER* 95 (1983).



### III. The Concept of Civilization

#### A. The Idea of Civilization

Despite the work of the Late Scholastic School, the theory of fundamental equality of all peoples did not prevail in the late eighteenth and nineteenth centuries. Rather, the concept of a community of “civilized” states was developed. Under this concept, the rights of the overseas communities to act in a legal capacity were increasingly denied. The majority of articles dealing with this relate to North America because the position of some Native communities was very powerful, something not realized today in Europe for the most part. For example, the Iroquois Federation was a major power, which made alliances with the competing powers of Britain and France.<sup>57</sup> Several British and American historians are of the opinion that the Iroquois Federation had a decisive and lasting influence on the struggle for predominance between Britain and France.<sup>58</sup>

#### B. Vattel and the Theory of Benefit of Mankind

A theory that highlighted the lack of rights of the overseas territories and the community of civilized states can largely be traced back to the Swiss scholar Emer de Vattel (1714-1767), the greatest opponent of Wolff.<sup>59</sup> Initially, Vattel shared Wolff’s views on virtually every point, but a big difference manifested itself in the civilization concept.<sup>60</sup>

Vattel developed the theory of benefit of mankind, primarily intended to justify the actions of Great Britain in North America.<sup>61</sup> In accordance with this theory, people had the right to appropriate land for themselves only for the benefit derived, and could not prevent others from gaining benefit from the same land.<sup>62</sup> In Vattel’s view, land must be divided up according to need.<sup>63</sup> This gives the closely settled civilized peoples the natural right to appropriate the land of nomads, because these are very wasteful with the

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57. See generally FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* (1984).

58. See, e.g., *id.*; see also FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* 416-24 (Univ. of N.M. photo. reprint 1971) (1942). On the unwritten constitution of the Iroquois Federation, see Letter from Benjamin Franklin to Mrs. Parker (Mar. 20, 1751), in HENRY C. DENNIS, *THE AMERICAN INDIAN 1492-1976*, at 14 (1977).

59. See, e.g., FISCH, *supra* note 29, at 274-75.

60. I EMER DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 1-16, 18, 81, 208-09 (Albert de Lapradelle ed., 1916).

61. *Id.* at 1, 18, 209.

62. *Id.* at 1, 18, 208.

63. *Id.*

land and do not utilize it effectively.<sup>64</sup> Vattel developed a ladder of civilization: those who do not build on the land and instead live off the environment, like the old Germanic tribes and some Tartars, deserved to be exterminated like wild animals.<sup>65</sup>

A portion of the land of nomadic peoples, the North American Indians among them, may be taken away for settled peoples in order to better utilize the land in the interest of humanity as a whole.<sup>66</sup> Vattel described Indians as “savages” and deemed the Europeans to have the right to restrict these “savages” to more confined boundaries.<sup>67</sup> In his opinion, the consent of the savages to the loss of land, e.g., through treaties, was certainly desirable, but not required by international law.<sup>68</sup>

### *C. Civilization and the Doctrine of Terra Nullius*

It is only a small step from the theory of benefit to mankind to the concept of the community of civilized nations of the late eighteenth and nineteenth centuries.<sup>69</sup> Under this theory, the international law community is equated with the civilized community. This is not a major divergence from Wolff, who described the “people” as a legal state, thus ascribing it a certain concept of civilization; however, the proponents of the doctrine of the community of civilized nations regarded all non-European people per se as uncivilized, regarding only the European states, and later the United States, as belonging to the civilized nations.<sup>70</sup>

The essence of the concept of civilization within this context approximates only very imprecisely to the German word “Zivilisation,” compared to the English and French word “civilization” or “civilisation” which refers both to the culture and to the technical-industrial achievements. The English term is very closely linked with technical-industrial progress. As a result of the alleged lack of technical-industrial achievement, the indigenous peoples in America, Africa, Asia and especially Australia were deemed not to have any civilization. Consequently, since they had no legal status, any actions against them could not be considered a violation of international law. John Stuart Mill

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64. *Id.* at 1, 7, 81.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1, 18, 209.

69. See FISCH, *supra* note 29, at 349-79; see also GREWE, EPOCHEN, *supra* note 24, at 638-46.

70. See FISCH, *supra* note 29, at 349-79.

evoked this doctrine when he wrote about barbarians and their lack of rights as a nation.<sup>71</sup>

Under the civilization doctrine, all overseas territories could be freely occupied by the discoverer state, as they are non-sovereign territories in international law. This doctrine is based on false assumptions about the indigenous peoples of America, Africa and Asia, who were regarded simply as nomadic hunters, living freely and independently outside any form of community. This applied particularly to North America, with Rousseau,<sup>72</sup> Tocqueville,<sup>73</sup> Cooper,<sup>74</sup> and later Thoreau<sup>75</sup> making significant contributions with their image of the “noble savage.” This rapidly dissolved into “barbarian” and later the “red devil.”<sup>76</sup> These images continue to shape conceptions of indigenous peoples, particularly in North America.

Although the doctrine of the community of civilized nations, which excluded the non-European communities, was based on false premises, it was regarded as the basis of international law. Especially in Australia, the idea of civilized nations and the concept of terra nullius were used to justify the occupation of the land of the aborigines. Terra nullius was borne of the theory that land was ownerless and, thus, the discovering state was allowed to occupy the land. Because courts in Australia denied any civilization of the aborigines, the land in Australia is argued to be terra nullius.

In the year 1833 the Supreme Court of New South Wales described the aborigines as “wandering tribes,” “living without certain habitation and without laws,” who “were never in the situation of conquered people.”<sup>77</sup> In the 1889 decision *Cooper v Stuart*, Lord Watson stated:

There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of

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71. See 4 JOHN STUART MILL, *A Few Words on Non-intervention*, in *DISSERTATIONS AND DISCUSSIONS, POLITICAL AND HISTORICAL* 157 (1867).

72. See JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE* (C.E. Vaughan ed., 1918) (1762).

73. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 43-46 (Henry Reeve trans., New York, D. Appleton & Co. 1899).

74. See JAMES FENIMORE COOPER, *THE LAST OF THE MOHICANS* (New York, Hurd & Houghton 1871) (1826).

75. See 1 HENRY DAVID THOREAU, *WALDEN* (Cambridge, Houghton, Mifflin & Co. 1897) (1854).

76. See HERMANN NIEDERMAYR, *EDLE WILDE UND GRAUSAME BARBAREN: BEGEGNUNG UND UMGANG MIT DEM FREMDEN IM SPIEGEL LATEINISCHER TEXTE* (2008).

77. *MacDonald v Levy* (1833) 1 Legge 39 (Austl.), available at [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1833/macdonald\\_v\\_levy/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1833/macdonald_v_levy/).

territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.<sup>78</sup>

In the 1971 decision *Milirrpum v Nabalco Pty Ltd.*, Justice Blackburn acknowledged:

I am very clearly of the opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws and not of men”, it is shown in the evidence before me.<sup>79</sup>

However, in that same case the court stated that since the aborigines never had an idea of property rights it was not possible that original property rights existed.<sup>80</sup> This decision resulted in the Aboriginal Land Rights Act of 1976, which allowed the transfer of land rights to aborigines under special circumstances requiring a traditional relationship to the land and no existence of conflicting rights.<sup>81</sup>

In the famous 1992 decision *Mabo v. Queensland (No. 2)*, the High Court of Australia explicitly rejected the terra nullius doctrine, acknowledged the original existence of native titles, and held that the Meriam people were entitled to possession, occupation, use and enjoyment of the Murray Islands.<sup>82</sup>

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78. *Cooper v Stuart* (1889) 14 App. Cas. 286, 291 (Austl.).

79. *Milirrpum v Nabalco Pty Ltd.* [1971] 17 FLR 141, 267 (Austl.).

80. *See id.* at 273-74.

81. Jürgen Bröhmer, *Grundlegende Entwicklungen des australischen Bundesverfassungsrechts*, 60 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART (JÖR) 689, 693 (2012).

82. *See Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (Austl.), available at <http://www.austlii.edu.au>.

#### D. Conclusion

The High Court in *Mabo (No. 2)* recognized that international law had allowed occupation of territory under the doctrine of terra nullius as an effective tool to acquire sovereignty.<sup>83</sup>

With the great voyages of European discoverers came the prospect of occupying new and valuable territories already inhabited. Territories were granted to the sovereigns of the respective discoverers provided that the discovery was confirmed by their occupation and the indigenous inhabitants were not organized in a political society. The sovereignty of the respective European nations was recognized over the territorial rights of "backward peoples" by applying the doctrine of terra nullis.

Various justifications for the acquisition of sovereignty over the territory of "backward peoples" have been advanced. Some scholars see the benefits of Christianity and European civilization upon the natives as a justification from medieval times.<sup>84</sup> Another justification first advanced by Vattel at the end of the eighteenth century was that Europeans had a right to cultivate occupied territories.<sup>85</sup>

The theory of discovery depended on land without settled inhabitants or settled law. However, this was never the reality. Even in the vast Australian outback, the aborigines led their lives in an ordered society with a government of law.

In *Cherokee Nation v. Georgia*, Justice Marshall noted that the Cherokee Nation was a State capable of managing its own affairs and governing itself. He stated:

They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.<sup>86</sup>

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83. *Id.* ¶¶ 33-34 (Brennan J., declaration).

84. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 78-80 (1990).

85. See VATTEL, *supra* note 60, at 1, 7, 81.

86. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

*IV. The Contradictions in Johnson v. M'Intosh*

In *Johnson v. M'Intosh*, Chief Justice Marshall used the theory of discovery to advance his argument. In doing so, he missed the background of the theory and its relationship with the ideas of the Christian-European family, civilization, and the doctrine of terra nullius. At the start of the decision he stated:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence.<sup>87</sup>

Marshall then went on to use the discovery doctrine to explain the relationship between the different European “discover” states, as well as the relationship between the United States and other European states. He stated:

But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave 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.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right

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87. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-73 (1823).

which all asserted for themselves, and to the assertion of which, by others, all assented.<sup>88</sup>

Marshall followed with a logical breach lacking in explanation: “Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.”<sup>89</sup> It is with these two sentences that he developed a title against the natives.

The next step in his argumentation was to deny the property rights of the Indians. Marshall stated:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>90</sup>

Justice Marshall later realized *Johnson v. M’Intosh* had opened a Pandora’s Box. He tried to close the box eight years later with *Cherokee Nation v. Georgia* in which he stated, “the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.”<sup>91</sup> One year later in *Worcester v. Georgia*, Marshall acknowledged that his construction in *Johnson v. M’Intosh* was wrong. He argued:

This [discovery] principle . . . gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants, by virtue of a discovery

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88. *Id.* at 573.

89. *Id.*

90. *Id.* at 574.

91. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.<sup>92</sup>

And he continued:

This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell.<sup>93</sup>

Interestingly, the theory of civilization is also discussed in *Johnson v. M'Intosh*. Marshall stated:

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.<sup>94</sup>

In *M'Intosh*, Marshall defends his opinion of the history of the colonization of North America.<sup>95</sup> In doing so, he misses the historical practices of Europe, and later the United States, which are a central and decisive factor in international law.<sup>96</sup> The practice of signing treaties with non-European communities represents a remarkable contradiction to the theory of discovery. Today the existence of these treaties is rarely acknowledged, usually found only in individual cases in the European international law literature.<sup>97</sup> A reason for this lack of attention could be

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92. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 516 (1832).

93. *Id.* at 517.

94. *M'Intosh*, 21 U.S. (8 Wheat.) at 590.

95. *Id.* at 574.

96. See HARTMUT SCHIEDERMAIR, *EFFEKTIVE HERRSCHAFTSGEWALT UND RECHTSFÄHIGKEIT IM VÖLKERRECHT* 638-39 (1984) [hereinafter SCHIEDERMAIR, *EFFEKTIVE*].

97. See GREWE, *EPOCHEN*, *supra* note 24, at 638-46.



that a large number of the older treaty collections did not contain colonial treaties; however, in recent years the "Consolidated Treaty Series" takes account of virtually all of the colonial treaties.<sup>98</sup>

A study of these treaties shows that the United States alone made nearly 370 treaties with Indian Nations.<sup>99</sup> The U.S. practice of dealing with Indian Nations through treaties did not change until a law passed on March 3, 1871 explicitly prohibiting any future treaty making with Indian Nations.<sup>100</sup>

From the initial discovery of America, Indians were regarded as fully sovereign nations.<sup>101</sup> The fixing of boundaries between the colonies and the Indian Federations on the east coast and the acquisition of land were effected by agreements between the representatives of the tribes and those of the English Crown.<sup>102</sup> The agreements were termed "treaties" and regarded as internationally binding.<sup>103</sup> This was partly because the Indians had a fierce military, a fact illuminated by King Louis XIV describing not England, but the Iroquois Federation as being the most dangerous opponent of France in the New World.<sup>104</sup>

The same picture emerges in Africa. Belgium, France, Germany, and Britain dealt with the African tribes on the basis of treaties and attempted to acquire contractual title to the land.<sup>105</sup>

In the same manner, both the United Kingdom and the Netherlands signed numerous treaties with various communities in Southeast Asia particularly concerned with the cession of land.<sup>106</sup>

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98. See 2 THE CONSOLIDATED TREATY SERIES: SPECIAL CHRONOLOGICAL LIST 1648-1920 (Clive Parry ed., 1984) [hereinafter PARRY].

99. 2 INDIAN AFFAIRS: LAWS AND TREATIES (1778-1883) (Charles J. Kappler ed., 1904), available at <http://digital.library.okstate.edu/Kappler/>. In the treaties, the Indian communities were initially termed "Nations" and later "Tribes" or "Bands." See Dörr, *supra* note 45, at 496.

100. See Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (current version at 25 U.S.C. § 71 (2012)).

101. See W. Coles Durham, Jr., *Indian Law in the Continental United States: An Overview*, 2 LAW & ANTHROPOLOGY: INTERNATIONALES JAHRBUCH FÜR RECHTSANTHROPOLOGIE 93, 94 (1987).

102. See *id.*

103. See FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 53 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN 1982 ED.]; see also Bernd C. Peyer, *Bürger – mehr oder weniger: Indianer und das Gesetz in den USA*, in PETER R. GERBER, VOM RECHT: INDIANER ZU SEIN 103, 104 (1986).

104. See GEORG FRIEDERICI, DER CHARAKTER DER ENTDECKUNG UND EROBERUNG AMERIKAS DURCH DIE EUROPÄER 364-65 (2d ed. 1969).

105. See PARRY, *supra* note 98.

106. *Id.*

From the beginning it was clear the United States did not proceed from the premise that Indian territory could be occupied at will. The law of March 3, 1789 stipulated that the land and property of Indians could not be taken without their consent, except through just and legal wars to which Congress must give assent.<sup>107</sup> In addition, section 4 of the first Non-Intercourse Act of 1790 stated that no sale of land by an Indian or Indian community within the United States is valid, unless undertaken through a treaty with the United States.<sup>108</sup> The very statement that only “just wars” may be conducted against Indians affirms their international law sovereignty by granting them combatant status.

During and following the American War of Independence from Britain (1775-1783), the United States adopted the practice of entering into treaties. Because of the ongoing British-American hostilities, both sides attempted to attract the respective Indian communities and their military might. During and after the war, there were repeated armed conflicts between the United States and tribes allied with Britain — particularly in the northwest, such as near the Ohio border, as a result of continuing expansion — in the wake of which the borders were redefined by treaty and the Indians were gradually pushed westward.<sup>109</sup>

After the War of 1812, in which the northwestern Indian tribes under Tecumseh prevented the United States from conquering Canada at the start of the war,<sup>110</sup> the preeminence of the United States over the Indians was established in the Treaty of Ghent (1814).<sup>111</sup> Still, the United States continued to deal with these communities through treaties, though they were increasingly used to dissolve Indian land rights.

All the colonial treaties, which provide an argument in favor of classification under international law in both their form and substance, contradict the doctrine of free right of occupation. The doctrine of the free right of occupation and the legal concept of discovery justified retrospective treaty breaches, which became increasingly prevalent after the conclusion of European expansion in the second half of the nineteenth century.<sup>112</sup>

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107. See Dörr, *supra* note 45, at 496.

108. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (current version at 25 U.S.C. § 1753 (2012)).

109. See generally GLENN TUCKER, *TECUMSEH: VISION OF GLORY* 55-73 (Russell & Russell 1973) (1956) (detailing the war on the Ohio Border, 1789-1795).

110. See *id.*

111. See *Johnson v. M'Intosh* 21 U.S. (8 Wheat.) 543, 567 (1823); see also Treaty of Peace and Amity, U.S.-Brit., Dec. 24, 1814, 8 Stat. 218.

112. FISCH, *supra* note 29, at 349-58.

In the decision *Worcester v. Georgia*, Chief Justice Marshall seemed to realize his historical explanation in *Johnson v. M'Intosh* was wrong. He stated:

Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their land when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.<sup>113</sup>

At the end of the *Johnson v. M'Intosh* decision, Marshall conceded to the extravagant appearance of converting the discovery of an inhabited country into conquest, but "if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it

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113. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546-47 (1832).

becomes the law of the land and cannot be questioned.”<sup>114</sup> This is typical of Chief Justice Marshall; if he had no argument, he always claimed that the result was clear or unquestionable.

Because of such treaties, the U.S. Supreme Court is still frequently involved in clarifying the legal position of Indians in the United States.<sup>115</sup> The Court proceeds from the premise that Indians within their own territory enjoy, in the same way as state entities, not only personal sovereignty over their members, but also territorial sovereignty over the land allocated to them.<sup>116</sup>

In the view of the U.S. Supreme Court, these tribes are considerably more than private, voluntary organizations. Though Indians have derived such sovereign rights as granted to them by U.S. legislation and treaties, they also possess an inherent sovereignty.<sup>117</sup> This continues to exist insofar as federal law or treaty does not explicitly withdraw the sovereign authority.<sup>118</sup> These powers represent the residual authority of a previously unrestricted sovereignty, which in the view of the U.S. Supreme Court, the Indian communities once enjoyed on their own territory.<sup>119</sup>

Thus, relations between Indians and the United States still contain elements subject to international law.<sup>120</sup> Today it cannot be said that indigenous peoples are regarded as having no sovereign rights within the United States. On the other hand, the *Johnson v. M'Intosh* decision was disastrous for the Indians as it was used to dispossess the Native Americans of their lands.

This legal evaluation is no peculiarity of the United States. In Canada, the relationship between the Indians and the United Kingdom, subsequently Canada, is interpreted in a similar manner. In contrast to earlier rulings, the Supreme Court of Canada has partially adopted the rulings of the U.S. Supreme Court, working from the assumption that the Indians had an

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114. *M'Intosh*, 21 U.S. (8 Wheat.) at 591.

115. CHARLES F. WILKINSON, *AMERICAN INDIANS: TIME AND THE LAW* (1987) (dealing with case law between 1959 and 1986, and detailing eighty rulings by the U.S. Supreme Court on Indian Law).

116. *See, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

117. *See, e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139-49 (1982); *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *see also* WILKINSON, *supra* note 115, at 54-63.

118. *See Merrion*, 455 U.S. at 313.

119. *See id.*

120. *See Dörr, supra* note 45, at 504.

inherent right to their own land.<sup>121</sup> However, it remains unclear whether these rights were simply personal rights of the individual Indian, or whether the Indian communities were entitled to something in the nature of sovereignty rights.<sup>122</sup>

In Central America, treaties were signed between the United Kingdom and Indian communities. As early as 1720, a formal treaty was made between Britain and the Mosquito, or Mesquito, Indians on the basis of full equality.<sup>123</sup> In the course of disputes between Nicaragua and the U.K. the Treaty of Managua was signed between the U.K. and Nicaragua in 1860.<sup>124</sup> In this treaty, the U.K. recognized Nicaragua's sovereignty over the entire territory of the Mosquito Indians without their consent.<sup>125</sup> In return, Nicaragua granted the Indians a large measure of autonomy.<sup>126</sup> When Nicaragua did not comply with these obligations, the U.K. objected to this treaty violation and the dispute was passed to the Austrian Kaiser Franz Josef for arbitration.<sup>127</sup> The arbitration of July 2, 1881 ruled for Britain and came down in clear favor of Indian autonomy.<sup>128</sup> In the arbitration ruling, it is stated that the Mosquito Indians maintained relations with the United Kingdom under international law.<sup>129</sup> Only in 1860 was the previous protectorate relationship under international law replaced by a subjugation relationship under domestic law.<sup>130</sup> In justification of its actions against the Indians, Nicaragua relied on the concept of civilization.<sup>131</sup> Whilst this was not outright rejected in principle by the arbitration ruling, it was not accepted as justification for the poor treatment of the Indians, and exposed as a subterfuge.<sup>132</sup>

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121. See STEPHAN MARQUARDT, *THE ABORIGINAL PEOPLES OF CANADA AND THEIR RIGHTS UNDER CANADIAN CONSTITUTIONAL LAW* 251 (1989); see also *Guerin v. The Queen* [1984], 2 S.C.R. 335 (Can.).

122. See MARQUARDT, *supra* note 121, at 262-67.

123. Convention Between Great Britain and Mosquito, U.K.-Mosquito, June 25, 1720, 31 Consol. T.S. 235.

124. Treaty of Managua, U.K.-Nicar., Jan. 8, 1860, 121 Consol. T.S. 318.

125. *Id.* at 319.

126. *Id.* at 320.

127. See Award as to the Interpretation of the Treaty of Managua (U.K. v. Nicar.), 28 R.I.A.A. 167 (1881), available at [http://legal.un.org/riaa/cases/vol\\_XXVIII/167-184.pdf](http://legal.un.org/riaa/cases/vol_XXVIII/167-184.pdf).

128. *Id.*; see also FISCH, *supra* note 29, at 394-99.

129. Award as to the Interpretation of the Treaty of Managua, *supra* note 127, at 173.

130. *Id.* at 174.

131. See *id.* at 175-76.

132. See *id.*

In a 1960 ruling on the dispute between Portugal and the Republic of India on transit rights over Indian territory,<sup>133</sup> the International Court of Justice clearly showed it did not question the validity of colonial treaties in international law. In this dispute, Portugal was claiming rights arising from a treaty with the Marathen state of 1779.<sup>134</sup> The International Court proceeded, as a matter of course, on the basis of recognizing the full legal status of both contracting signatories, and therefore regarded the 1779 treaty as valid under international law.<sup>135</sup> This is evidence of the fact that in state practice, the Indian and Southeast Asian communities were accepted into the international law community and were regarded by the European powers as able and willing to observe treaty rights and obligations.<sup>136</sup>

In the International Court's 1975 Sahara Report, it is clear that Spain didn't even regard the Western Sahara as non-sovereign territory during Spanish colonization.<sup>137</sup> On the contrary, Spain made agreements with the local tribes in order to acquire title in international law to the territory of the West Sahara.<sup>138</sup> Thus, the theory that the Sahara territory was *terra nullius* was rightly rejected. The majority judgment stated:

In the view of the Court, therefore, a determination that Western Sahara was a "*terra nullius*" at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation". Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such

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133. Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 9 (Apr. 12).

134. *Id.* at 37.

135. *Id.* at 45.

136. See FISCH, *supra* note 29, at 37-39, 455-60.

137. See Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 38-43 (Oct. 16).

138. *Id.* ¶ 81, at 39.

agreements with authorities of the country was regarded as an “occupation” of a “terra nullius” in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual “cession” of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.<sup>139</sup>

#### V. Summary

In taking account of these state practices, it cannot seriously be claimed that all overseas territories were regarded in the international law of the eighteenth and nineteenth centuries as non-sovereign or terra nullius because of the wild state of their inhabitants — in accordance with the theory of the civilized community. On the contrary, the treaty practices of the Europeans clearly shows that they regarded the Indian, Southeast Asian and African communities as having the will and ability to fulfill their treaty obligations.

Initially the founding members of the international law community comprised only the Christian and later civilized nations, that is to say the European states and, following its establishment, the United States. However, during European expansion, the European powers and the United States recognized numerous non-European communities as powers capable of maintaining relations under international law. With this recognition, the Indian nations became a part of the international law community. They acquired the ability to act in international law by dint of recognition.<sup>140</sup>

The doctrine of the non-sovereign territories, the “community of civilized nations” and the lack of international law sovereignty of the non-European communities as well as the theory of discovery with the concept of civilization justified breaches of treaties and morally legitimized the actions of the Europeans and later the United States. However, from the start, this doctrine was at odds with state practice. The deciding factor in international law sovereignty was to what extent non-European communities were regarded as being willing and able to enter into and observe treaty relations.

The question of what degree of civilization and recognition of law is required in order to affirm the existence of legal capacity in international law is not simply a historical problem — it is a constant theme in international law. Thus, it is not surprising that the philosophical question

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139. *Id.* ¶¶ 79, 80, at 39.

140. COHEN 1982 ED., *supra* note 103, at 39-40.

regarding what distinguishes the state from a band of robbers is repeatedly posed.

Today, article 4, paragraph 1 of the UN Charter specifies that only those states willing and able to fulfill their obligations arising from the Charter may become members of the United Nations.<sup>141</sup> The importance of this provision extends far beyond the question of UN membership. Examined correctly, this provision contains a definition of legal capacity to act, and thus of the state in the terms of international law.<sup>142</sup> States are accordingly only such communities as are willing and able to fulfill their entire obligations in international law. The state, in this case, is defined as a legal condition, as it was by Christian Wolff, with the extremely problematic consequence that a minimum level of legality is indispensable to establish the quality of statehood.

The exact minimum level of legality required is difficult to define. Despite some demurring opinions in the literature,<sup>143</sup> Nazi Germany did not have its right to act as an entity in international law, because it failed to achieve a minimum level of legality.<sup>144</sup> Cambodia was not excluded from the international law community during the reign of terror of the Khmer Rouge.<sup>145</sup> This ambiguity makes sense in order to protect the validity of international law and continue the prohibition on the use of force.

The problems that arise from the exclusion of large sections of the international community from international law are clearly illustrated by the theory of discovery, the idea of the community of civilized nations, and the doctrine of terra nullius. These doctrines were used in attempts to disenfranchise non-European peoples and to legitimize breaches of the colonial treaties. Conquest by law is a dark chapter of European and American history.

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141. U.N. Charter art. 4, para. 1.

142. See SCHIEDERMAIR, *EFFEKTIVE*, *supra* note 96, at 640.

143. Cf., e.g., Hans Kelsen, *The International Legal Status of Germany to Be Established Immediately upon Termination of the War*, 38 AM. J. INT'L L. 689 (1944).

144. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, art. 13, June 5, 1945, 60 Stat. 1649, available at <http://avalon.law.yale.edu/wwii/ger01.asp>.

145. See Theresa Klosterman, Comment, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833, 850 (1998).



