

TWO HUNDRED YEARS ON: A REEXAMINATION OF THE ACQUISITION OF AUSTRALIA

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The year 1988 marked the bicentennial of the arrival of the British to colonize Australia. The Australian Federal Government planned a massive celebration of that event. There is one group, the Australian Aborigines, that was not impressed. A number of legal challenges were mounted in the Australian courts and other forms of protest are on-going.¹ This paper examines in the context of international law the acquisition of what is now known as Australia.

I. HISTORICAL BACKGROUND

The "discovery" and "settlement" of Australia occurred in stages. On November 24, 1642, Abel Tasman sighted the southwest coast of Van Diemen's land (now called Tasmania). He landed on that territory and purported to take possession on behalf of the Dutch on December 3.² The British explorer Captain James Cook was given instructions in 1768 to discover what was supposed to exist as New Holland. He landed on the shores of Sydney (Botany Bay) on April 29, 1770, and by August 22 of that year he had taken possession of the entire east coast of the Australian mainland.³

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¹ See *infra* notes 106-12, 122 and accompanying text.

² He had instructions dated August 13, 1642 from the Governor General of the Dutch East Indies, Antonio van Diemen. ABEL JANSZON TASMAN'S JOURNAL OF HIS DISCOVERY OF VAN DIEMEN'S LAND AND NEW ZEALAND IN 1642, at 136 (J. Heeres ed. 1898); see also A. DALRYMPLE, DISCOVERIES MADE IN THE SOUTH PACIFIC OCEAN PREVIOUS TO 1764 (1767).

³ At every landing point, Captain Cook demonstrated the taking by displaying the British colours and cutting an inscription in a tree. 1 THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY, THE VOYAGES OF THE ENDEAVOUR 1718-1771, at 304-88 (J. Beaglehole ed. 1955).

With the loss of the North American colonies, Britain needed a new place to send troublesome convicts. In 1786, it was decided that Australia would be suitable,⁴ and Captain Arthur Philip was appointed the first governor. The first attempt to occupy the continent was made on January 26, 1788, when a party of 1,030 people landed at what is now Sydney Harbour. Governor Philip held a formal ceremony on February 7 at which the British flag was raised.⁵ The colonization of Australia had begun, but during the next three decades, the British settlement remained confined to within about 50 to 100 miles of Sydney. Between 1824 and 1851 expansion was fast, and the British population of Tasmania and New South Wales rose to 400,000.⁶ With regard to Western Australia, it was not until May 2, 1829 that Captain Fremantle took formal possession.⁷ The first British settlers arrived there in 1829 and 1830.

II. INTERNATIONAL LAW RULES ON ACQUISITION OF TERRITORY

A. *Inter-Temporal Law*

Because the acquisition of Australia occurred some 200 years ago, it will not be analyzed here on the basis of contemporary rules of international law; rather, inter-temporal law requires that the analysis focus on the 1770s. In the *Right of Passage over Indian Territory* case,⁸ the International Court of Justice ruled that the validity of the Treaty of Poona of 1779 between Portugal and the indigenous

⁴ An expedition to Southern Africa found that place to be unsuitable. The decision to deport convicts to Australia was made pursuant to an Act of 1784, 24 Geo. III ch. 56.

⁵ This ceremony was in accordance with instructions of April 25, 1786. See 1 GOVERNMENT OF AUSTRALIA, HISTORICAL RECORDS OF AUSTRALIA 1788-1796 1, 9 [hereinafter H.R.A.].

⁶ New South Wales originally comprised the eastern half of the continent. It was later divided into four colonies. Tasmania became a separate colony in 1825 (population, all British, was 5000); Victoria became a separate colony in 1851 (population 70,000); South Australia received colonial status in 1836 (its population in 1850 was 63,700). See Evatt, *infra* note 116, at 30.

⁷ Vancouver first laid claim to King George's Sound in 1791. 1 G. VANCOUVER, A VOYAGE OF DISCOVERY TO THE NORTH PACIFIC OCEAN AND ROUND THE WORLD 35 (rev. ed 1967)(1798) (describes the symbolic acts of possession performed). See also DIARY AND LETTERS OF ADMIRAL SIR C.H. FREMANTLE, G.C.B. RELATING TO THE FOUNDING OF THE COLONY OF WESTERN AUSTRALIA 1829 (Lord Cottesloe ed. 1928).

⁸ *Right of Passage over Indian Territory* (Port. v. India), [1960] 3 I.C.J. Pleadings 6.

Indian entity of Maratha "should not be judged upon the bases of practices and procedures which have since developed only gradually."⁹ Again, in the *Island of Palmas (or Miangas) Arbitration*,¹⁰ the sole arbitrator made the following finding:

Both Parties are also agreed that a judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled.¹¹

Further, in the *Western Sahara* opinion,¹² the International Court of Justice observed that the questions before it had "to be interpreted by reference to the law in force at that period," namely, "the time of colonization by Spain."¹³

B. The Rules of Acquisition

There are five main modes of acquisition of territory under international law: cession, occupation, prescription, accretion, and conquest.¹⁴ In the Australian context, occupation is perhaps the most relevant and so deserves discussion at some length. One of the difficult questions faced in early international law was whether or not to regard indigenous entities outside Europe as sovereign. A number of propositions were put forward on the question between the sixteenth and nineteenth centuries, the three main ones being 1) recognition that indigenous entities had complete sovereignty over their territory; 2) that these entities had only a restricted or conditional sovereignty over their territory; and 3) total rejection of such sovereignty.

A leading exponent of the first view was a Spaniard, Franciscus A. Victoria. He argued at the time of the discovery of America that the territory could not in law be designated as *terra nullius* because the native American Indians were in possession of the land. Victoria also pointed out that the mere fact that Europeans considered the Indians "sinners" or "infidels" did not preclude the Indians from

⁹ *Id.* at 35.

¹⁰ *Island of Palmas (or Miangas) Arbitration* (Neth. v. U.S.), 2 R.Int'l Arb. Awards 829 (1928).

¹¹ In that case, the effect of the discovery of Spain was determined by the rules of international law of the 16th century. *Id.*

¹² *Western Sahara Advisory Opinion*, 1975 I.C.J. 12.

¹³ *Id.* at 38-39.

¹⁴ See, e.g., R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 6-7 (1963); I L. OPPENHEIM, *A TREATISE ON INTERNATIONAL LAW* 547-78 (H. Lauterpacht 8th ed. 1955).

enjoying their sovereignty like Christians.¹⁵ Four centuries later, the Victorian school was to receive unequivocal support from the International Court of Justice in the person of Judge Ammoun. Commenting on the so-called "scramble for Africa" in the *Namibia* opinion, he said:

It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as *terra nullius* to be shared among the Powers for occupation and colonization, when even the sixteenth century Victoria had written that Europeans could not obtain sovereignty of the Indies by occupation for they were not *terra nullius*.¹⁶

The second proposition was to the effect that sovereignty in native communities was conditional or limited. The Swiss jurist Vattel was a proponent of this view. According to Vattel and his followers, the sovereignty of entities outside Europe should only be recognized where such peoples had a settled life and had made the entire territory productive. Vattel advanced the thesis that "[when] the Nations of Europe which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them."¹⁷

Finally, there was the rejectionist camp which maintained that territories of non-European communities were *terra nullius* pure and simple. For example, Martens-Ferrao, a Portuguese jurist and statesman, took the view that cessions granted by non-European leaders were of no legal effect because their nations did not "possess any constituted sovereignty, that being a political right derived from civilization."¹⁸ In a similar vein, Westlake required "a native gov-

¹⁵ M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 12 (1926). Similarly, other writers like Ayla observed that communities outside Europe should be recognized as sovereign because "sovereignty over the earth was not given ordinarily to the faithful alone but to every reasonable creature". *Id.* at 13.

¹⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 6, 86 (the *Namibia opinion*). See also Judge Ammoun's comments in the Western Sahara Opinion, 1975 I.C.J. at 86.

¹⁷ 1 E. VATTEL, *THE LAW OF NATIONS* 37-38 (C. Fenwick trans. 1916)(1758). Vattel's view has been used as one of the justifications for the acquisition of Australia. See *infra* notes 111-16 and accompanying text.

¹⁸ M. LINDLEY, *supra* note 15, at 19.

ernment capable of controlling white men or under which white civilization can exist."¹⁹

After a detailed analysis of the three schools of thought, Lindley concluded that "there had been a persistent preponderance of juristic opinion in favor of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belong to no one."²⁰ He observed further that how "crude and rudimentary" one perceived such governmental institutions to be did not matter. The relevant factor was whether "there is some kind of authoritative control of a political nature which has not been assumed for some merely temporary purpose, such as a war."²¹

C. *State Practice*

In accordance with the juristic opinion just discussed, imperial European powers generally acquired their territories by cession or conquest. In spite of the belief held by some Europeans that Africa, Asia, and what is now commonly called the developing world, were *geschichtslos* (lacking history), with the consequence that they could be treated as being in *völkerrechtlichhorrenlos*²² (that is, in a legal vacuum), the evidence is that African or Asian indigenous nations were regarded as territorially sovereign and dealt with as such.

1. *Africa*

The claim has been made that Africa at the time of its colonization lacked politically organized entities. For instance, Syatauw writes:

In this respect Asia differs from Africa. At the time of the first sea voyages to Asia, Africa did not consist of well-organized states,

¹⁹ J. WESTLAKE, *COLLECTED PAPERS ON PUBLIC INTERNATIONAL LAW* 39-57, 157 (L. Oppenheim ed. 1914). Generally speaking, it seems that scholars up to the eighteenth century did not have trouble recognizing the sovereignty of native communities. See, e.g., M. LINDLEY, *supra* note 15, at 18. It was in the nineteenth century, when Europeans needed an *ex post facto* rationalization for the territories they were colonizing around the globe, that they attempted to elevate "civilization" to a legal postulate.

²⁰ M. LINDLEY, *supra* note 15, at 20.

²¹ *Id.* at 30. Earlier on in his work, Lindley had expressed his conclusion more lucidly: "It appears that their opinion may be fairly said to amount to this: that wherever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by occupation." *Id.* at 17.

²² Alexandrowicz, *Empirical and Doctrinal Positivism in International Law*, 47 BRIT. Y.B. INT'L L. 286 (1974-5).

though it had known some important states in its past.²³

On the contrary, there is overwhelming evidence to refute that claim. The historical fact is that at the time of arrival of the Europeans on the African shores, there were flourishing within these shores independent, well-organized units with stable governments of varying political and social development.²⁴ In the circumstances, the predominant mode of acquisition became cession and hundreds of treaties were concluded between the Europeans and the African nations.²⁵ Where the Africans were not willing to negotiate treaties, the Europeans resorted to military combat. For example, the British fought the West African Kingdom of Asante three times; it was only in 1900 that superior British military might prevailed. Similarly, Samori Toure's Empire and Shaka's Zulu land had to be defeated by the French and British respectively before these two powers could legitimately lay claim to the land based on annexation or *prise de possession*.²⁶

Although the Berlin Act of 1885²⁷ was not clear on the point, the practice of European colonists clearly indicates that Africa was not regarded as *terra nullius*, notwithstanding the fact that in 1888 the *Institut de droit International* meeting at Lausanne failed to accept the proposal "that occupation by a civilized state ought to have as its basis arrangements with the chiefs of the Aboriginal tribes."²⁸ The now infamous "scramble for Africa" did not provide a primary mode of acquisition. At best, it was a strategy aimed at preventing

²³ J. SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 18 (1961).

²⁴ Wallace-Bruce, *Africa and International Law - The Emergence to Statehood*, 23 JOURNAL OF MOD. AFRICAN STUD. 575 (1985) (and authorities cited therein).

²⁵ E. HERTSLET, *THE MAP OF AFRICA BY TREATY* (1986); C. ALEXANDROWICZ, *THE EUROPEAN-AFRICAN CONFRONTATION, A STUDY IN TREATY MAKING* (1973).

²⁶ Wallace-Bruce, *supra* note 24.

²⁷ Article 34 of the Berlin Act merely provided for notification the other powers of territorial acquisitions, while Article 33 required them to ensure the establishment of authority on the acquired lands, particularly to protect existing rights, freedom of trade, and freedom of transit under agreed conditions. 76 BRIT. FOREIGN & STATE PAPERS 19 (1885). The U.S. delegate noted: "Modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle my government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of in all cases where they had not provoked the aggression . . ." J. WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 138 (1894).

²⁸ *Session de Lausanne 1888*, 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 712 (1928).

the European rush for territories from degenerating into chaos and inter-European conflict in full view of the "backward" people. In the words of Alexandrowicz, the scramble was "for legal titles in international law."²⁹

2. Asia

Like Africa at the time of the European "discoveries", Asia at that time possessed independent or semi-autonomous political units. They included the Marathas and other Indian nations, Kotte, Kandy, Tamil Patam, Siam, and China. Again, the Europeans found the doctrine of *terra nullius* inapplicable.³⁰ In the *Island of Palmas (or Miangas) Arbitration*, the Netherlands based its claim (successfully) on the conventions between the Dutch East India Company and the native princes of Tabukan and Taruna.³¹

3. New Zealand

New Zealand is of immense interest to the present inquiry because of its proximity to, and close relations with, Australia. The indigenous Maoris call the country now known as New Zealand, Aotearoa. It is believed that Abel Tasman (Dutch) was the first European to discover the territory in December 1642, but it was the British Captain Cook who charted the islands in 1769 and 1770 and claimed them on behalf of the British Crown. On February 6, 1840, the United Kingdom signed the Treaty of Waitangi with 80 indigenous tribal chiefs.³² Article 1 reads:

The chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of sovereignty which the said Confederation or individual chiefs respectively exercise or possess or may be supposed to exercise or possess over their territories as the sole sovereigns thereof.³³

²⁹ ALEXANDROWICZ, *supra* note 25, at 12.

³⁰ C. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (16TH, 17TH AND 18TH CENTURIES) 41-49 (1967).

³¹ 2 R. Int'l Arb. Awards at 829 (1928).

³² This applied largely to the densely populated North Island. See Evatt, *infra* note 116.

³³ This was to ward off the French from laying immediate claims to the territory. The treaty comprising the two texts (English and Maori) were sent around the country to be signed by the Maori leaders; over 500 signed. Both texts are reprinted in C.

4. *The Americas*

The existence in North America of a wide variety of indigenous political systems, ranging from the simple to the complex, as manifested, for example, in the *Haudensaunee*,³⁴ presented the colonizers with no alternative to cession and conquest as methods of acquisition. In Canada, perhaps the most important document on the matter is the *Royal Proclamation of 1763* in which King George III referred to "the several Nations and Tribes with whom we are connected and who live under our protection."³⁵ After 1867, the Indians agreed, with some minor exceptions, to cede their rights to designated territories. In the United States, even after the revolution in 1776, the Federal Government continued to negotiate such treaties, and between 1778 and 1868 no less than 394 were concluded.³⁶ It appears that in South America the Spanish resorted to conquest rather than claim *terra nullius*.³⁷

D. *Analysis of State Practice*

From this brief account, it is clear that in the relevant period under consideration, if any territories were regarded as *terra nullius* they were indeed few, and may be seen as the exception rather than the norm. In the *Clipperton Island Arbitration*,³⁸ the arbitrator held that a small coral lagoon reef in the Pacific Ocean, some 670 miles south of Mexico was *terra nullius*, and France's proclamation of sovereignty

ORANGE, THE TREATY OF WAITANGI 257-266 (1987). See E. SCOTT *infra* note 114. Busby, the British resident, had arranged for the Maori chiefs to declare New Zealand an independent state. H.R.A., *supra* note 4, at 562-63; see also J. WARD, BRITISH POLICY IN THE SOUTH PACIFIC 75-76 (1950).

³⁴ In the *Haudensaunee* the Iroquois Confederacy had an unwritten yet formal constitution which was committed to memory and recited every five years by the elders. There was a bicameral legislature and a code of laws which governed behavior. A Council of Elders saw to the general affairs of the polity; leadership was hereditary. See REPORT OF THE SPECIAL COMMITTEE OF THE CANADIAN HOUSE OF COMMONS No. 40, INDIAN SELF-GOVERNMENT IN CANADA 13 (1983).

³⁵ See generally Mason, *Canadian and United States Approaches to Indian Sovereignty*, 21 OSGOODE HALL L.J. 423 (1983); P. CUMMING & N. MICKENBERG, NATIVE RIGHTS IN CANADA (2d ed. 1972).

³⁶ See G. BROWN & R. MAGUIRE, INDIAN TREATIES IN HISTORICAL PERSPECTIVE (1979). However, in 1871 Congress ended this practice. Indian Appropriations Act of 1871, 16 Stat. 570 (1871).

³⁷ H. HERRING, A HISTORY OF LATIN AMERICA, FROM THE BEGINNING TO THE PRESENT 117-49 (1963).

³⁸ Arbitral award on the subject of the difference relative to the sovereignty over Clipperton Island (France v. Mexico) (1931), reprinted in 26 AM. J. INT'L L. 390 (1932) (the *Clipperton Island Arbitration*).

in November 1858 was therefore valid.³⁹ But the territory at issue in that arbitration was a desolate reef. Wherever there were people with some form of socio-political organization, the European colonists generally acquired the territory by cession or conquest.

When the International Court of Justice faced the issue in the *Western Sahara* opinion, it provided what may be said to be the *locus classicus* on the subject of *terra nullius*:

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 *terra 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 agreements with the 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 *terra nullius*.⁴⁰

It is noteworthy that the Court did not make any reference to "civilization", and the positivist doctrine of the nineteenth century was thus dealt a fatal blow.⁴¹ In modern times, there are rare situations in which *terra nullius* may be claimed.⁴²

A comment is in order here on the validity of the various treaties of cession referred to. In the *Island of Palmas (or Miangas) Arbitration*, arbitrator Max Huber commented that cessions granted by

³⁹ *Id.*

⁴⁰ 1975 I.C.J. at 39.

⁴¹ For detailed discussion, see Andrews, *The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century*, 94 LAW Q. REV. 409 (1978); see also Note, *Sovereignty Over Unoccupied Territories - The Western Sahara Decision*, 9 CASE W. RES. J. INT'L. L. 135 (1977).

⁴² One such area is the creation of new islands. Dingley, *Eruptions in International Law: Emerging Volcanic Island and the Law of Territorial Acquisition*, 11 CORNELL INT'L L. J. 121 (1978); Comment, *The U.S. Claim to Wrangel Island: The Dormancy Should End*, 11 CAL. W. INT'L L.J. 140 (1981); Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221 (1974).

leaders of indigenous communities "are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties."⁴³ Without going into the details of this debate, it suffices to say that at the very minimum the parties to the agreement were *ad idem* as to the fact that they were creating binding legal relations. In the *Rights of Passage over Indian Territory* case, the International Court did not have difficulty finding that the Treaty of Poona of 1779 and the two *sanads* of 1783 and 1785 were regarded by both the Portuguese and the Marathas as "valid and binding upon them, and [both] gave effect to [their] provisions."⁴⁴ Even the sole arbitrator in the *Island of Palmas* arbitration conceded that such treaties are "not wholly void of indirect effects on situations governed by international law." In effect, he upheld the conventions of 1677 between the Netherlands and the native princes of the Islands of Sangi.⁴⁵

It would seem that in the *Western Sahara* opinion the International Court implicitly accepted the international validity of treaties made with indigenous leaders. Spain did not argue that the Rio de Oro and Sakiet El Hamia were *terra nullius*. Instead, Spain based its claim on the treaties with the independent African nations, of which the Bonelli Treaty of 1884 was a prototype. The form in which the question was put to the Court did not allow it to pronounce on the issue. But neither Morocco nor Mauritania challenged the validity of the treaties as international law instruments, and this validity was apparently assumed by all, including the Court.

III. ABORIGINAL AUSTRALIA — THE EMPIRICAL EVIDENCE

In light of the foregoing, the primary factual issue in the present analysis is whether at the time that Governor Philip established the convict colony at Sydney Cove there were people living in Australia, and if so, whether they were politically organized so as to qualify

⁴³ 2 R. Int'l Arb. Awards at 858.

⁴⁴ [1960] 3 I.C.J. Pleadings at 35. "There is no denying that at the time neither the Maratha Government nor the Portuguese government had any doubt that the said Treaty had in fact been concluded and was valid. The two Governments were agreed on that." *Id.* at 78 (Armand-Ugon, J., dissenting).

⁴⁵ 2 R. Int'l Arb. Awards at 858. Other instances where the treaties have been relied upon include the Bulama Arbitration (Britain v. Portugal) (1870), in 3 E. HERTSLET, *MAP OF AFRICA BY TREATY* 988 (3d ed. 1909); Delagoa Bay Arbitration (1875) in *id.* at 996; *Contra Cayuga Indian Claims*, 6 R. Int'l Arb. Awards 173, 186-87 (1936) (where the treaty was treated as a contract).

as territorially sovereign. In answering this question, it will be necessary to take a brief look at the relevant anthropological and historical material. An international tribunal seized of the matter will surely have to examine that background material to be able to resolve the legal issues. In the *Namibia* advisory opinion, the point was made by the International Court that, "Normally to enable a court to pronounce on legal questions, it must also be acquainted with, take into account, and if necessary, make findings as to the relevant factual issue."⁴⁶ This was reaffirmed in the *Western Sahara* opinion.⁴⁷

It is not in dispute that there were people living in Australia in 1788: an estimated 300,000 Aborigines comprising over 500 indigenous communities were scattered about the continent.⁴⁸ Each group had a recognized territory which it claimed as hunting, religious, and food-gathering grounds, the size of which varied according to such factors as fertility, quantity and quality of natural resources. Large amounts of these territories—much of which is desert—were in northwestern South Australia, the middle-eastern part of Western Australia, and the central-west of the Northern Territory. Some of the groups with large territories were the Aranda, Walbiri, and Wuradjeri, to name a few. At the other end of the spectrum were the smaller communities generally found along the coast such as the Canjani, Wogeman, Djamindjund, and Gorindji.⁴⁹

With regard to Aboriginal political organization, two opposing views have been put forward. On the one hand, there are those who argue that the Australian Aborigines did not have any political organization. L.R. Hiatt, for example, writes that Aborigines had "no formal apparatus of government, no enduring hierarchy of authority and no recognized political leaders."⁵⁰ Similarly, Lauriston Sharp,

⁴⁶ 1971 I.C.J. at 15.

⁴⁷ 1975 I.C.J. at 11.

⁴⁸ This figure has recently been substantially revised. Reynolds, for example, states that there were as many as a half million Aborigines. H. REYNOLDS, *THE LAW OF THE LAND* 8 (1987).

⁴⁹ Throughout this paper the past tense is used for consistency, but much of the material is still relevant today. On Australian Aborigines, see A. ELKIN, *THE AUSTRALIAN ABORIGINES* (1938 & reprint 1979); R. & C. BERNDT, *THE WORLD OF THE FIRST AUSTRALIANS* (1964, 1977, & reprint 1982); K. MADDOCK, *THE AUSTRALIAN ABORIGINES: A PORTRAIT OF THEIR SOCIETY* (1972); A. CAMPBELL, *THE ABORIGINES AND TORRES STRAIT ISLANDERS* (1958); G. BLAINY, *THE TRIUMPH OF THE NOMADS* (1976).

⁵⁰ Hiatt, *Authority and Reciprocity in Australian Aboriginal Marriage Arrangement*, 6 *MANKIND* 468 (1967).

who studied the Yir-Yoront nation, stated that there were no institutions for government in the whole of North Queensland. He observed, "all of this is simply kinship. In the field of conduct, there is no distinguishable social organization for economics, for religion, or for government."⁵¹ In a similar fashion, Megitt, who studies the Walbiri, or "desert people", concluded: "In short, the community had no recognized political leaders, no hierarchy of government."⁵²

On the other side of the debate are those who contend that Aborigines did possess political organization. Peter Sutton, in a study of the Cape York Peninsula in 1978, reported the existence of clans with senior persons, "big men" or "bosses" at regional levels.⁵³ Next, von Sturmer, studying the Kuju-Nganychama community of Queensland came across the ceremonial "big man" or "boss" (*pama manu thaiyan*).⁵⁴ In 1979, John Bern launched a fierce attack on the Sharp-Megitt-Hiatt formulation. Bern insisted that the latter ought to be faulted on two grounds: first, their conclusions were false, and second, the wrong questions were posed in their investigations.⁵⁵ Bern's view has since been endorsed by other anthropologists.⁵⁶

⁵¹ Sharp, *People Without Politics* in AM. ETHNOLOGICAL SOC'Y, PROCEEDINGS OF THE 1958 ANNUAL MEETING, SYSTEMS OF POLITICAL CONTROL AND BUREAUCRACY 1, 7 (1958).

⁵² M. MEGITT, DESERT PEOPLE, A STUDY OF THE WALBIRI ABORIGINES OF CENTRAL AUSTRALIA 250 (1962 & reprint 1984). One of the early explorers, Eyre, who reportedly travelled widely among the Aborigines, was categorical that they were "without government or restraint". 1 J. EYRE, JOURNALS OF DISCOVERY INTO CENTRAL AUSTRALIA AND OVERLAND FROM ADELAIDE TO KING GEORGE'S SOUND 1840-1, at 384 (1845).

⁵³ P. Sutton, Wik: Aboriginal Society, Territory and Language at Cape Keerweer, Cape York Peninsula Australia (Ph.D. thesis, University of Queensland 1978).

⁵⁴ J. von Sturmer, The Wik Region: Economy, Territoriality and Totemism in Western Cape York Peninsula North Queensland (Ph.D. Thesis, University of Queensland 1978).

⁵⁵ Bern, *Ideology and Domination: Towards a Reconstruction of Australian Aboriginal Social Formations* 50 OCEANIA 118 (1979). In 1974 he had reached a similar conclusion after studying south-eastern Arnhem Land. J. Bern, Blackfella Business, Whitefella Law (Ph.D. Thesis Macquarie University 1974).

⁵⁶ In 1982, Peter Sutton and Bruce Rigsby pointed out that political organization was definitely known and practiced by the Aborigines. According to Sutton and Rigsby, traditional Aboriginal political life has been misrepresented because anthropologists have preferred to believe that Aborigines lack the competitiveness and shrewdness of urban industrial peoples. Sutton and Rigsby, *People with Politics: Management of Land and Personnel on Australia's Cape York Peninsula* in N. WILLIAMS & E. HUNN, RESOURCE MANAGERS: NORTH AMERICAN AND AUSTRALIAN HUNTER-GATHERERS 155, 156 (1982). In 1984, Athol Chase also found the "big man" and "boss" in the eastern Cape York area. Chase, *Belonging to Country: Territory, Identity, and Environment in Cape York Peninsula Northern Australia* in L. HIATT, ABORIGINAL LAND OWNERS (1984).

The remaining issue is whether in 1788—when the British laid the nucleus of the Australian colonies in Sydney—the Eora, Duruk, and other indigenous entities in the immediate area had a social and political organization. From the evidence the answer should be affirmative. It is indeed pointless to go so far as to unearth the “big man” or “boss”. Political organization, certainly in the eighteenth century and prior, ought not to be characterized solely in terms of a visible centralized governmental system. There were societies outside Europe which, though not exhibiting the paraphernalia of European-style government, were nonetheless not treated as *terra nullius*.⁵⁷ Today, such societies can be looked upon as democracy *par excellence*. The argument that, “there is no state in the sense of an institution standing over and above the various local and kin groupings and asserting a monopoly on the use of force”,⁵⁸ is clearly inappropriate in the context of pre-twentieth century non-European political organization. It should be remembered that in the earlier period at issue here, the economic, social, religious and political aspects of life were inseparable.

At any rate, there is evidence indicating that religious leaders exercised authority which extended into secular areas. Berndt and Berndt in an excellent work on Australian Aboriginal life have established that there was no hard-and-fast demarcation between the religious and the secular in that Aboriginal society. The society was primarily concerned with maintenance of order. In the event of disputes, there was “intervention by recognized leaders or by men acknowledged as having considerable experience in social affairs.”⁵⁹ In substance, it is not really disputed that Aborigines had a means of regulating their society long before European arrival. Even writers like Meggitt, who maintain that Aborigines did not have a political organization, concede that law did operate in that society.⁶⁰ The people who are believed by Hiatt and others to have had no settled legal system clearly did not have difficulty distinguishing between

⁵⁷ See *infra* notes 77-84 and accompanying text.

⁵⁸ K. MADDOCK, *supra* note 49, at 42-3.

⁵⁹ R. & C. BERNDT, *supra* note 49, at 366. Strehlow who studied the Aranda of Central Australia reached similar conclusions. Strehlow, *Geography and the Totemic Landscape in Central Australia: A Functional Study* in R. BERNDT, AUSTRALIAN ABORIGINAL ANTHROPOLOGY 105, 109, 116 (1970).

⁶⁰ Meggitt writes: “The totality of the rules expresses the law, *djugarum*, a term that may be translated as ‘the line’ or ‘the Straight or true way.’” M. MEGGITT, *supra* note 52, at 251. See also N. TINDALE, ABORIGINAL TRIBES OF AUSTRALIA (1974).

accepted modes of behavior and unauthorized ones. The Aborigines were also conservationists who preserved their environment well.

Therefore, it is my respectful submission, based on the available evidence, that the Australian Aboriginal society had a social and political organization. These Aborigines did not have a centralized political system such as the Asante and Swazi of Africa, the people of Siam, the Marathas of Asia, or the Maoris of New Zealand, but they had a "segmentary lineage system"⁶¹ in which governmental power was diffused. In the *Gove Land Rights Case* Justice Blackburn held that there existed among Aborigines a governmental system with laws which "provided a stable order of society."⁶² I concur with Berndt and Berndt: "Our conclusion has been that despite the weakness of law in a general sense and in its maintenance (along with its socio-spatial limitations) it was certainly not lacking, even though central authority was on the whole ill-developed."⁶³

IV. WAS AUSTRALIA A TERRA NULLIUS?

In *Cooper v. Stuart*,⁶⁴ the Judicial Committee of the Privy Council had to decide on appeal from the Supreme Court of New South Wales whether a reservation in a Crown grant of lands in fee simple was valid. The Committee held that New South Wales was a *terra nullius* because it was "a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions."⁶⁵

The Australian courts have reaffirmed this decision on a number of occasions. Perhaps the most celebrated case is *Coe v. The Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland*.⁶⁶ The appellant, an Aborigine from Sydney, argued that the British "wrongfully claimed possession and occupation" of the land which his ancestors had possessed since time immemorial. The majority of the High Court of Australia rejected the appeal and reaffirmed *Cooper v. Stuart*. Justice (later Chief

⁶¹ See *infra* notes 77-84 and accompanying text.

⁶² *Milirrpum v. Nabalco*, 17 F. L. R. 141, 267-9 (1971) (the *Gove Land Rights Case*).

⁶³ R. & C. BERNDT, *supra* note 49, at 365 (2d ed. 1977).

⁶⁴ *Cooper v. Stuart*, 14 App. Cas. 286 (1889).

⁶⁵ *Id.* at 291.

⁶⁶ 53 A.L.R. at 403 (1979).

Justice) Gibbs described the notion of Australia as *terra nullius* as "fundamental"⁶⁷ to the legal system of Australia.

In *Wacando v. The Commonwealth and the State of Queensland*,⁶⁸ the plaintiff desired to develop *beche-de-mer* fishing on the seabed surrounding and between Darney Island and other islands, and to engage in the exploration for and the exploitation of petroleum resources therein. Both the Federal and State Governments sought to prevent this on the ground that the plaintiff did not have a license pursuant to the Federal Continental Shelf (Living Natural Resources) Act of 1968, the Queensland Fisheries Act of 1976 and other associated legislation. The plaintiff Mr. Wacando, an inhabitant of Darnley Island (situated about ninety-two miles northeast of Cape York Peninsula), brought an action in the High Court against both Governments, claiming, *inter alia*, that Darnley Island (on which he and his father were born and owned land) and all islands in Torres Strait beyond 60 miles did not fall within the boundaries of the State of Queensland, and that consequently their respective statutes had no application to the islands and the submerged lands adjacent to them. The principal argument of the plaintiff was that as Darnley Island was never part of New South Wales, the island did not become part of Queensland in 1859 when the colony of Queensland was separated from the colony of New South Wales. Moreover, argued the plaintiff, the Letters Patent of 1878 and the Queensland Coast Islands Act of 1879 were not effective to achieve that result, as the boundaries had already been fixed by an Imperial Act. The High Court held that although it was "true that the boundaries of Queensland were misdescribed in the Letters Patent", Darnley island had been part of Queensland since August 1, 1879.⁶⁹

In 1985 in *Gerhardy v. Brown*⁷⁰, Justice Deane stated, "Yet, almost two centuries on, the generally accepted view remains that the common law is ignorant of any communal native title or other legal claim on the Aboriginal clans or peoples even to ancestral tribal lands on which they still live".⁷¹

It is evident from the above analysis that the attitude adopted by the Australian courts⁷² is difficult to reconcile with international law.

⁶⁷ *Id.* at 408. For a useful discussion, see Hookey, *Settlement and Sovereignty* in P. HANKS & B. KEON-COHEN, *ABORIGINES AND THE LAW* 1 (1984).

⁶⁸ 148 C.L.R. 1 (1981).

⁶⁹ *Id.* at 19.

⁷⁰ *Gerhardy v. Brown*, 59 A.L.R. 311 (1985).

⁷¹ *Id.* at 346.

⁷² See *Council of the Municipality of Randwick v. Rutledge*, 102 C. L. R. 54

Since the Aborigines had a political and social organization, their lands could not properly be characterized as *terra nullius*. When Captain Cook was departing England to "discover" Australia he had specific instructions from the Admiralty:

You are also *with the consent of the Natives* to take possession of convenient situations in the country in the name of the King of Great Britain or if you find the country uninhabited take possession for His Majesty by setting proper marks and inscriptions as first discoverers and possessors⁷³

Instead, he cut an inscription in a tree, raised the British flag and ignored the Aborigines totally. Not only did Captain Cook act contrary to established international law, he also violated the instructions of his superiors.

Apart from one recorded attempt to obtain land from the Aborigines, the practice was to settle the country without regard to them. In 1835, John Batman acquired some 600,000 acres in the Port Philip area by way of a "treaty" with the Dutigulla people; the consideration was some blankets, other sundry items, and an annual rent.⁷⁴ However, Governor Bourke who shared the view that Australia was *terra nullius*, by the Proclamation of August 26, 1835, declared that, "every such treaty, bargain or contract with the Aboriginal Natives . . . is void and of no effect against the rights of the Crown."⁷⁵ The attempt by Batman to comply with the dictates of international law was nipped in the bud.

What then was the justification for classifying what was at the time known as New Holland as a *terra nullius*? The claim has been that the Aborigines lacked a political organization with settled law.

(1959); *Milirrpum v. Nabalco*, 17 F. L. R. 141 (1971) (the *Gove Land Rights Case*). In the *Gove Land Rights Case*, although Justice Blackburn held that the Aborigines had a socio-political organization, he took the view that he was bound by *Cooper v. Stuart*. *Id.* This view has been criticized. See, e.g., Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 F. L. R. 85 (1972).

⁷³ These instructions were dated July 30, 1768. JOURNAL OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY, *supra* note 3, at cc/xxii (emphasis added). Similarly, Governor Philip was instructed to "open an intercourse with the natives and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them." H.R.A., *supra* note 5.

⁷⁴ John Batman's "treaties" are reprinted in J. BONWICK, PORT PHILLIP SETTLEMENT 212-15 (1983).

⁷⁵ *Proclamation of August 26, 1835*, quoted in 17 F. L. R. at 257. See also S. HARRIS, IT'S COMING YET 1 (1979).

First and foremost, it must be remembered that like Africa, Asia, and the Americas (not to mention Europe), Aboriginal Australia comprised various communities numbering over 500 "nations". It is therefore inaccurate to talk of one Aboriginal nation; rather, there were separate and independent nations,⁷⁶ probably connected with each other. More importantly, although the Aborigines were hunter-gatherers leading a nomadic life, they nevertheless had a system of law and government, and for purposes of international law this was sufficient. In the *Western Sahara* opinion, evidence before the International Court indicated that at the time of Spanish colonization, the Rio de Oro and Sakiet El Hamra consisted of nomadic tribes with social and political organization. The sparsity of the resources and the spasmodic character of the rainfall compelled the people to traverse the desert, and on occasions this situation occurred in Morocco, Mauritania, and Algeria, but significantly, authority in the tribes was vested in a sheikh and an assembly of its leading members (*Jumaa*). A combination of Koranic and African customary law was applied in the territory.⁷⁷

Furthermore, Britain's practice elsewhere operates against it as a kind of estoppel. In Africa, for example, three types of political system have been identified:

1. "[P]olitical relations are coterminous with kinship relations and the political structure and kinship organization are completely fused";⁷⁸
2. Institutionalized administrative machinery with king, military, etc.;
3. Uncentralized political authority with no holders of political power at the center. This type has been referred to as the "segmentary lineage system."⁷⁹

These different types of political systems, particularly the unc centralized ones, were not exclusive to Africa. In South America, the

⁷⁶ As a political concept in recent times "the Aboriginal nation" perhaps exists. In law, however, its existence is doubtful. In *Coe v. The Commonwealth of Australia*, 53 A. L. R. 403, counsel made the mistake of referring to the Aboriginal nation. In the *Western Sahara* opinion, the I.C.J. accepted the existence of independent and autonomous emirates and tribes but rejected the sovereignty of the *Bilad Shinguitte* (or Mauritanian entity) because it was not a state, a federation, nor even a confederation. 1975 I.C.J. at 49-52, 55.

⁷⁷ 1975 I.C.J. at 33-55.

⁷⁸ M. FORTES & E. EVANS-PRITCHARD, *AFRICAN POLITICAL SYSTEMS* 6-7 (1940).

⁷⁹ *Id.* at 5. See also J. MIDDLETON & D. TAIT, *TRIBES WITHOUT RULERS* 3-16 (1958 & reprint 1964).

Maya, Techuelche, and other Patagonian and Pampean peoples of the Chilean archipelago, in sharp contrast to the highly centralized Aztec Empire, had uncentralized administrative machines.⁸⁰ For present purposes, it is important that whatever one's perception of these political systems, their lands as a general rule were not regarded as *terra nullius*. The British who acquired Iboland (later Biafra and now divided into states in the eastern part of Nigeria) did not settle it as an *occupatio* despite the fact that the Ibos did not have kings and queens. The Tallensi of what is today Northern Ghana, the Kikuyu of Kenya, the Nuer of Sudan, the Tiv of West Africa, and many others who had no centralized political systems did not lose their lands on the grounds that these lands were ownerless. A number of examples can be cited from various parts of the world to buttress the point.⁸¹

This evidence raises questions about Australian courts that hold in the late twentieth century that at the time of British colonization of Australia there was "no established system of law of European type [and that Australia was] a territory which by European standards had no civilized inhabitants or settled law."⁸² It is doubtful if this position can be sustained in international law. There has never been a requirement that all governmental institutions be modelled after those of the Europeans. Even writers who talked of "civilization" did not provide a yardstick by which it was to be measured. It is tantamount to Eurocentrism⁸³ to insist, as do the Australian courts, on the existence of "civilization". The International Court of Justice

⁸⁰ See, e.g., J. STEWARD & L. FARON, *NATIVE PEOPLES OF SOUTH AMERICA* (1959); H. HERRING, *supra* note 37.

⁸¹ There is abundant authority for British recognition of prior ownership of land by indigenous people. *St. Catherine's Milling and Lumber Co. v. R.*, 14 App. Cas. 46 (1888)(Canada); *Attorney-General for Quebec v. Attorney-General for Canada*, 1 App. Cas. 401 (1921)(Canada); *Fletcher v. Peck*, 10 U.S. 48 (Cranch) (1810)(U.S.A.); *Johnson v. McIntosh*, 21 U.S. 240 (Wheat) (1823)(U.S.A.); *Worcester v. Georgia*, 31 U.S. 405 (Pet.) (1832)(U.S.A.). *Treaty of Waitangi Hoani Teheuheu Tukino v. Aotea District Maori Land Board*, (1941) App. Cas 308 (New Zealand).

⁸² *Coe v. The Commonwealth of Australia*, 53 A. L. R. 403, 408 (1979)(opinion of Gibbs, J.). Similar language was used by Justice Blackburn in *Milirrpum v. Nabalco*, 17 F. L. R. 141, 243-45 (*Gove Land Rights Case*).

⁸³ Eurocentrism may be defined as the practice whereby there remain "settled habits of thought which have led to the acceptance, mostly uncritical, of European (and Western) intellectual and socio-cultural traditions as the invariable, if not superior frameworks for enquiry." Baxi, *Some Remarks on Eurocentrism and the Law of Nations* in R. ANAND, *ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW* 3 (1972); see also Andrews, *supra* note 41. It is more accurate to talk of "Aussiecentrism" in the Australian context.

debunked the "civilization" theory in the *Western Sahara* opinion. Judge Forster in his separate opinion observed that if one arbitrarily required that the socio-political systems of non-European nations "should be a carbon copy of European Institutions",⁸⁴ then on that basis alone almost all territories outside Europe would be declared *terra nullius*.

His Honor Justice Murphy was quite correct when he stated that the holding in *Cooper v. Stuart* "may be regarded as having been made in ignorance or as convenient falsehood to justify the taking of aborigine's land."⁸⁵ In the 1830s the British realized the enormity of the illegality that was being committed by their representatives "down under". A Report of the House of Commons Select Committee in 1837 concluded: "In the formation of these settlements it does not appear that the territorial rights of the natives were considered"⁸⁶ To be fair, there were some isolated parts of the continent which could quite properly be classified as *terra nullius*. For example, King Island, situated in the middle of the Bass Strait between Tasmania and the mainland, was *occupatio*.⁸⁷

To summarize, the mere fact that the Australian Aborigines did not have a visibly centralized institutional structure like the Maoris across the Tasman—or in fact like the many Polynesian kingdoms in the Pacific region—provided no justification for declaring their lands ownerless. Both under international law and Britain's own practice, it is clear that the Australia was acquired in violation of the rule that wherever there were people living in a territory with a social and political organization, however "crude and rudimentary",⁸⁸ those territories were not *terra nullius*.

With regard to the present discussion, several additional issues require comment. First, some Australians, unable to justify the settlement theory, have resorted to classifying the acquisition of the country as one of conquest. As recently as 1983, the Federal Minister for Aboriginal Affairs stated: "We have to face the fact that Australia

⁸⁴ 1975 I.C.J. at 103.

⁸⁵ 53 A. L. R. at 412.

⁸⁶ *Report of the House of Commons Select Committee, quoted in Milirrpum v. Nabalco*, 17 F. L. R. 141, 257 (1971)(the *Gove Land Rights Case*). This document was written two years after John Batman's "treaty" had been declared illegal.

⁸⁷ For details and other examples consult the pre-British map of Australia in N. TINDALE, *ABORIGINAL TRIBES OF AUSTRALIA* 327 (1974).

⁸⁸ See *supra* notes 19-22 and accompanying text.

as a country was conquered, not settled.”⁸⁹ Even if one accepts for the sake of argument that the continent was conquered,⁹⁰ it can be argued *pari passu* that since the Aborigines never acquiesced in, nor conceded, defeat, a war situation technically still exists. Due to the vastness of the territory, the small size of the Aboriginal population, the difficulty of the terrain, and above all the absence of a centralized governmental system with an army, it was not possible for the Aborigines to engage the British in a full scale war as the Asante and the Zulus, for example, did in Africa. Rather, resort was made to guerilla warfare, or what has been described as “frontier violence”,⁹¹ which was “frequent”⁹² throughout the continent. His Honor Justice Murphy summarized it in the *Coe* case: “Although the Privy Council referred in *Cooper v. Stuart* to peaceful annexation, the Aborigines did not give up their lands peacefully; they were killed or removed forcibly from their lands by United Kingdom forces or the European

⁸⁹ Statement by Clyde Holding at a seminar, May 7, 1983, on Aboriginal Customary Law, cited in C. TATZ, *ABORIGINES AND THE AGE OF ATONEMENT* 5 (paper for the 3rd Int'l Conf. on Hunter-Gatherers, Bad Homburg, F.R.G., June 13-16, 1983). As the colonization was in progress some British residents expressed concern:

Our brave and conscientious Britons whilst taking possession of of their territory, have been most careful and anxious to make it universally known that Australia is not a conquered country . . . and . . . have repeatedly commanded that it must never be forgotten ‘that our possession of this territory is based on a right of occupancy. A Right of occupancy. Amiable sophistry!’ Why not say readily at once, the right of power? We have seized upon the country, and shot down the inhabitants, until the survivors have found it expedient to submit to our rule. We have acted exactly as Julius Caesar did when he took possession of Britain. But Caesar was not so hypocritical as to pretend any moral right to possession . . . We have a right to our Australian possessions; *but it is the right of conquest and we hold them with the grasp of power.*

E.W. LANDOR, *THE BUSHMAN OR LIFE IN A NEW COUNTRY* 187-9 (1847), quoted in H. REYNOLDS, *ABORIGINES AND SETTLERS* 102 (1972) (*emphasis added*).

⁹⁰ Under British (and thus Australian) common law there are benefits to be derived by the Aborigines in having the country reclassified as conquered, in that the people of a conquered colony are recognized as such, and consequently their laws and rights are recognized until abrogated by legislation of the conqueror. On the contrary, in the case of a settled colony the laws of the settlor take immediate effect, overriding any existing law. See Latham, *The Law and the Commonwealth*, in *SURVEY OF BRITISH COMMONWEALTH AFFAIRS* 1, 7 (1937), quoted in Windeyer *A Birthright and Inheritance*, [1962] *TASMANIA UNIVERSITY LAW REVIEW* 635.

⁹¹ H. REYNOLDS, *THE OTHER SIDE OF THE FRONTIER* 200 (1981).

⁹² 1 C. ROWLEY, *THE DESTRUCTION OF ABORIGINAL SOCIETY* 5 (1980). See also C. TURNBULL, *BLACK WAR—THE EXTERMINATION OF THE TASMANIAN ABORIGINES* (1974).

colonists in what amounted to attempted (and in Tasmania almost complete) genocide."⁹³

Second, it has been suggested that "if there were any defect in Australia's title, the rule of prescription would apply to overturn the defect and to vest sovereign title in the Commonwealth Government."⁹⁴ Prescription has been explained as a possession or situation which "had been consolidated by a constant and sufficient long practice in the face of which the attitude of governments bears witness to the fact that they do not consider it to be contrary to international law."⁹⁵ It is doubtful if prescription can be applied in the Australian context. As it was pointed out in the *Eastern Greenland Case*,⁹⁶ prescription is normally relied upon to demonstrate superior title. In that case, the Permanent Court of International Justice held that Denmark's claim to Eastern Greenland was superior to Norway's. The contest was for *superior* title between Denmark and Norway, not between either of these states and the Eskimos.⁹⁷ The Aborigines have been in Australia since time immemorial. They do not have the burden of proof. Prescription would be relevant if there were competition between the British and, say, the French⁹⁸ or Dutch. To make the point clearer, assume that the Netherlands were to stake claim to Tasmania on the ground that the territory was "claimed" by Abel Tasman in 1642.⁹⁹ It is submitted that the British (and so the Australian Government) would be able to argue convincingly that since they have had "continuous and peaceful display of the functions of state,"¹⁰⁰ for a long time, prescription has operated to perfect their title to Tasmania.

⁹³ *Coe v. Commonwealth of Australia*, 53 A. L. R. 403, 412 (1979). In *Davis v. Commonwealth of Australia*, 61 A. L. R. 32 (1987), the plaintiff in paragraph seventeen of the Statement of Claim referred *inter alia* to "the genocide and extermination of all full-blooded Aborigines in Tasmania and the attempted genocide of Aborigines in other parts of Australia." *Id.* at 34.

⁹⁴ PARLIAMENT OF AUSTRALIA, TWO HUNDRED YEARS LATER . . . REPORT BY THE SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS ON THE FEASIBILITY OF A COMPACT, OR "MAKARRATA" BETWEEN THE COMMONWEALTH AND ABORIGINAL PEOPLE 46, ¶ 3.37 (1983). [hereinafter SENATE MAKARRATA REPORT.]

⁹⁵ *Anglo-Norwegian Fisheries case* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

⁹⁶ *Legal Status of Greenland Case* (Den. v. Nor.), [1933] P.C.I.J. (ser. A/B) No. 53 (Apr. 5) (hereinafter *Eastern Greenland Case*).

⁹⁷ *Id.*

⁹⁸ See *infra* note 114.

⁹⁹ See *supra* note 2 and accompanying text.

¹⁰⁰ *Island of Palmas* (or *Miangas*) Arbitration (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829 (1928); Arbitral Award on the Subject of the Difference Relative to

In any case, if prescription were applicable to the Australian situation, it is equally well established in international law that in order successfully to rely on that rule, the purported display of state authority must be peaceful and unchallenged. In the *Chamizal Arbitration*,¹⁰¹ the United States sought to rely on, among other things, "undisturbed, uninterrupted and unchallenged possession."¹⁰² The International Boundary Commission dismissed the argument because Mexico had "constantly challenged and questioned" the United States claim through diplomatic protests which were appropriate in the circumstances.¹⁰³ Similarly, the Aborigines have never conceded defeat.¹⁰⁴ By way of illustration, the Central Australian Aboriginal organizations in a submission to the Australian Senate in 1983 stated:

Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to defeat our people and destroy our law and culture and seize, without compensation, our land. We have never conceded defeat and will continue to resist this on-going attempt to subjugate us. The crimes against our nation have been carefully hidden from those who now make up the constituency of the settler state The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The settler state has never recognized the prior ownership of this land belonging to the Aboriginal nation.¹⁰⁵

The exercise of authority over the Aborigines has been anything but peaceful. These days, the struggle is fought largely in the courts and through street marches and demonstrations.¹⁰⁶ At the time of the bicentenary celebrations, there were at least two relevant cases in the High Court of Australia. In *Mabo v. State of Queensland*,¹⁰⁷ the

the Sovereignty Over Clipperton Island (France v. Mexico)(1931), *reprinted* in 26 AM. J. INT'L L. 390 (1932)(the *Clipperton Island Arbitration*); 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

¹⁰¹ *Chamizal Arbitration* (U.S. v. Mexico), *reprinted* in 5 AM. J. INT'L L. 782 (1911) (proceedings of the International Boundary Commission); *see generally* Johnson, *Acquisitive Prescription in International Law* 27 BRIT. Y. B. INT'L L. 332 (1951).

¹⁰² *Chamizal*, 5 AM. J. INT'L L. at 791, 806.

¹⁰³ *Id.* at 806.

¹⁰⁴ *See infra* notes 105-110 and accompanying text.

¹⁰⁵ SENATE MAKARRATA REPORT, *supra* note 94, at 10.

¹⁰⁶ The year 1987 was declared by some Aborigines as a year of mourning, a prelude to the bicentennial, and demonstrations on Australia Day (Jan. 26) are a matter of course. *See, e.g.*, The Daily Telegraph, Jan. 27, 1987, at 3, 6-7.

¹⁰⁷ *Mabo v. State of Queensland*, 60 A. L. R. 255 (1986) (preliminary judgment).

plaintiffs, who are Murray Islanders and heads of families of the Miriam people, directly challenged the validity of the acquisition of the islands of Mer, Dawar, and Waier, situated in the Torres Strait and forming part of the State of Queensland. The plaintiffs' case included a declaration that since the islands were acquired without compensation to the indigenous people, that acquisition is invalid.¹⁰⁸ The second case is *Davis v. Commonwealth of Australia*¹⁰⁹ in which three Aborigines challenged the Australian Bicentennial Authority Act of 1980, as amended, as invalid. The functions of the Bicentennial Authority are stated as follows:

The primary object for which the Authority is established is to formulate, to plan, to develop, to promote, to co-ordinate and to implement consistently with applicable legislation of the Parliament of the Commonwealth, a national programme of celebrations and activities ("the Programme") to commemorate the bicentenary in 1988 of the first European settlement in Australia . . .¹¹⁰

One of the grounds of the challenge was that, as descendants of the indigenous inhabitants of Australia, the Aborigines have a special interest in objecting to legislation designed to assist the celebration of the settlement and occupation of the country by people who are not indigenous to the continent.

The issue has also been raised, indirectly but ingeniously, in the case *R. v. Walker*,¹¹¹ Denis Walker, a member of the Nunukel tribe who live on Stradbroke Island in Queensland, was charged with breaking into a dwelling and with two counts of wilful destruction of property. He refused to enter a plea on the ground that the Queensland Criminal Court had no jurisdiction to try him. Representing himself, he argued that Captain Cook claimed possession of Australia illegally by breaching his instructions. Walker was found guilty of the two counts of wilful destruction and he appealed to the Queensland Court of Criminal Appeal. Again, he represented himself.

¹⁰⁸ *Id.*

¹⁰⁹ *Davis v. Commonwealth of Australia*, 61 A. L. R. 32, 36 (Jan. 1987). In a preliminary judgment handed down in late 1986, Chief Justice Gibbs struck the parts of the complaint directly dealing with the acquisition of Australia on the ground that they would tend to prejudice or delay the fair trial of the action. *Id.* The case was finally disposed of in December 1988. 63 A.L.R. 35 (1989).

¹¹⁰ Memorandum of Association of the Authority, cl. 3, registered under *The Companies Ordinance 1962 (A.C.T.)*, quoted in 61 A. L. R. at 33 (1987).

¹¹¹ Unreported Judgment. A summary is reported in 2 ABORIGINAL LAW BULLETIN 14 (April 1989).

On December 1, 1988, the appeal was dismissed. Two points are noteworthy about the case. First, it was admitted on behalf of the Crown, as a matter of historical fact, that the Nunukel people occupied Stradbroke Island prior to and after 1770; that they had a system of government and law; and that the defendant is a descendant of the Nunukel people. The Crown also admitted that Captain Cook failed to comply with his instructions to take possession of "convenient situations" on the continent "with the consent of the native peoples". In dismissing Walker's appeal, the Queensland Court of Criminal Appeal held that Captain Cook's claim has since been validated by a combination of imperial, colonial, state and federal statutes. The second point of note is the observation made by the court that the British claim of sovereignty over Australia "raises the issue of how it is that judges and others in Queensland apply . . . these laws to Stradbroke Island; and, conversely, why the Nunukel people, who in times long past once exercised sovereignty over Stradbroke Island, are, without any formal displacement of their own legal system, now expected and obliged to submit to laws not of their own making".¹¹² When the matter came before the High Court by way of an application for special leave to appeal, the Court avoided tackling the issue head-on on the ground that the issues which counsel sought to put before the High Court had not been fully argued in the court below.

In a nutshell, prescription is inapplicable in the Australian context. Even if it were relevant, it is clear that the continuing protests of the Aborigines would have undermined it. "A significant justification for the British taking of Aboriginal land was that the Aboriginal people weren't using it or cultivating it in a European sense. As a consequence, according to European concepts, they had forfeited any right of possession."¹¹³ This is perhaps the least legitimate argument of all, and it does not merit any serious comment.

There is also the issue of the degree of effective occupation. Australia was actually settled in states over a long period of time. Since the Aborigine peoples were separate, autonomous entities, the loss of one community did not necessarily mean the loss of all. However,

¹¹² *Id.*

¹¹³ SENATE MAKARRATA REPORT, *supra* note 94, at 38, para. 3.21. "They bestowed no labour upon the land and that—and that only—it is which gives a right of property to it." Herald Sydney (1838), *quoted in* FIRST REPORT OF THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON ABORIGINES 33 (1980).

no useful purpose would be served by pressing this argument further since the British did not face any real competition in occupying and acquiring the country.¹¹⁴ The difficulty, rather, was that at the appointment of Governor Philip as the first Governor of New South Wales (the eastern half of the country), his jurisdiction was defined as extending from the extreme north all the way south to Tasmania, "including all the islands adjacent in the Pacific Ocean."¹¹⁵ It would seem that the British claim to the whole eastern half was much more extensive than what Captain Cook had in fact "discovered" and "claimed" in 1770.¹¹⁶ The attempt to establish, and the later exercise of, jurisdiction over Van Diemen's land (Tasmania) was extraordinary as no British had at the time landed in the territory. The Dutch had first "discovered" and "claimed" it in 1642. How then could the British claim "all the islands adjacent in the Pacific"? Once again, as there is no contest by either the Dutch or the French, this issue is now a moot point.

Finally, a comment on a "critical date" is not out of place. An international tribunal seized of the matter will have to establish an appropriate point in time at which the colonization of Australia became crystallized. In both the *Clipperton Island* and *Eastern Greenland* cases, it was found necessary to establish such a date. In the *Western Sahara* opinion, the International Court of Justice did not think it necessary to establish a "critical date" as it was not deciding a contentious issue. Rather, it was appropriate to talk of a "critical period" defined as "not only the beginning of the colonization whether *de facto* or *de jure*, but also the time of its consolidation by occupation or pacification."¹¹⁷ In the Australian context, such a "critical period" will need to be established because the colonization occurred over many decades.

V. FINAL COMMENTS

Some might ask: Even if the acquisition of Australia was made contrary to international law, so what? Two hundred years have

¹¹⁴ There were attempts by the French to claim parts of Australia. For instance, Baudin in 1800 on board *Le Geographé*, assisted by *Le Naturaliste*, tried to land in Tasmania, and later in Western Australia. See E. SCOTT, *THE LIFE OF CAPTAIN MATTHEW FLINDERS*, R.N. (1914)(especially Chs. 13, 15, and 18).

¹¹⁵ 1 H.R.A. 1-2.

¹¹⁶ For a fuller discussion, see Evatt, *The Acquisition of Territory in Australia and New Zealand* in GROTIAN SOCIETY PAPERS 1968, at 16 (C. Alexandrowicz ed. 1970).

¹¹⁷ 1975 I.C.J. 12, 137 (separate opinion of Judge De Castro).

passed. What is the utility of raising and pursuing the matter when we are less than two decades away from the twenty-first century? In the *Western Sahara* opinion, Spain argued strenuously that the questions put to the Court were academic, irrelevant, and devoid of purpose.¹¹⁸ The learned judges disagreed and satisfied themselves that their opinion was sought "for a practical and contemporary purpose."¹¹⁹ Of course, the Australian case is not "on all fours" with *Western Sahara*. In the latter, the controversy was between the independent states of Spain, Morocco, and Mauritania (Algeria and Zaire participated). In the former, only Australia is recognized as a state. The Aborigines for international law purposes have no separate *locus standi*; under contemporary international law, they will at best be entitled to some special rights as a minority or indigenous group.¹²⁰ A powerful weapon for the Australian Government is Article 2(7) of the United Nations Charter,¹²¹ for it can be argued that the Aboriginal question is a matter essentially within the domestic jurisdiction of Australia and therefore not an appropriate subject for an international tribunal.

Nevertheless, one cannot dismiss the matter summarily.¹²² The issue is constantly arising and if the attitude of the High Court of Australia

¹¹⁸ *Id.* at 20, 21, 29.

¹¹⁹ *Id.* at 20.

¹²⁰ See Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); G. BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* (1978). See also Nettheim, *Indigenous Rights, Human Rights and Australia*, 61 AUSTR. L.J. 291 (1987). Coincidentally, 1988, the bicentennial year of European settlement of Australia, was also significant for the development of indigenous rights. The United Nations Working Group on Indigenous Populations (Subcommission on Prevention of Discrimination and Protection of Minorities) considered an initial draft for a Universal Declaration on Indigenous Rights. Secondly, the International Labor Organization completed the first stage of the two-year revision of its 1957 Convention No. 107 (Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries). In addition, the Aborigines may be entitled to special treatment as a minority.

¹²¹ The U.N. CHARTER art. 2, para. 7. Article 2(7) provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id.

¹²² On November 2, 1976, in a melodramatic demonstration of the absurdity of classifying Australia as *terra nullius*, a party of Aborigines landed in a boat at Dover Beach, England, and in the presence of witnesses proclaimed sovereignty over the entire United Kingdom on behalf of the Australian Aborigines. *Coe v. Commonwealth of Australia*, 53 A. L. R. 403, 407 (1979).

(the highest judicial body) is any indication, then it is clear that the Australian courts are not the appropriate forum in which to question the validity of the acquisition of the continent. The logical conclusion is that such legal flexing of muscles will have to be done outside the Australian jurisdiction. It should be noted that the matter is raised almost annually before the Human Rights Commission in Geneva.¹²³ However, the issue of whether the Aborigines will have access to the International Court of Justice is beyond the scope of this paper.¹²⁴

Assuming that the Aborigines are able to find an appropriate forum and their claim is vindicated, what next? It is inconceivable that political power would be handed over to the indigenous people on a silver platter. It is also unlikely that Australia would be Balkanized or dismembered into *bantustans*. For a start, with the possible exception of the northern parts of the country, the Aborigines are in the minority. In a total population of about 16 million Australians, the Aboriginal population is no more than a quarter of a million.

Nevertheless, successful litigation by the Aborigines would bring pressure to bear on the Federal Government to seek a negotiated settlement. In April 1979, the National Aboriginal Conference passed a resolution calling for a *Makarrata*¹²⁵ between the Australian Government and the Aborigines. After extensive investigation, the Australian Senate in 1983 recommended *inter alia* that:

The Government should, in consultation with the Aboriginal people, give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision along the lines of section 105A, which should confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people.¹²⁶

¹²³ The National Aboriginal and Islander Legal Services Secretariat in Sydney has N.G.O. Category 2 Status with ECOSOC, and this entitles it to participate in the proceedings of the Human Rights Commission.

¹²⁴ See, e.g., Hodgson, *Aboriginal Australians and the World Court I - Sovereignty by Conquest*, [1985] NEW ZEALAND L.J. 33; Hodgson, *Aboriginal Australians and the World Court II—The Advisory Jurisdiction of the World Court*, [1985] NEW ZEALAND L.J. 64.

¹²⁵ *Makarrata* is an Aboriginal word that translates as "a coming together after a struggle". The resolution originally used the term "Treaty of Commitment" but this was later abandoned because of the international implications of the word "treaty". See Keon-Cohen, *The Makarrata, A Treaty Within Australia Between Australians, Some Legal Issues*, 57 CURRENT AFFAIRS BULLETIN 4 (1981); ABORIGINAL TREATY COMMITTEE, *A MAKARRATA THE LEGAL OPTIONS* (1981).

¹²⁶ SENATE MAKARRATA REPORT, *supra* note 87 at xii (Recommendation 1). Earlier,

Thus far nothing has happened, and Australia is still a long way from the recognition accorded to indigenous people in the United States,¹²⁷ Canada,¹²⁸ and New Zealand.¹²⁹ But one should not lose sight of the fact that over the last decade a number of Federal Government-funded Aboriginal organizations have been formed across the country. In September 1987, the Australian Prime Minister announced that his government is open to discussion of a "Compact of Understanding" with Aborigines. It remains to be seen if the government has the political will to see this process through.¹³⁰

POSTSCRIPT

Since this paper was written a number of important developments have occurred which ought to be noted here. On June 12, 1988, the Prime Minister of Australia, after discussions with Aboriginal representatives, made the following statement at Barunga in the Northern Territory:

1. The Government affirms that it is committed to work for a negotiated treaty with Aboriginal people.
2. The Government sees the next step as Aborigines deciding what

on Feb. 20, 1975, the Senate unanimously adopted the following motion of Senator Neville Bonner, the only Aborigine to have sat in the Australian Parliament:

That the Senate accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, were in possession of this entire nation prior to the 1788 First Fleet landing at Botany Bay, urges the Australian Government to admit prior ownership by the said indigenous people and introduce legislation to compensate the people now known as Aborigines and Torres Strait Islanders for dispossession of their land.

AUSTRALIAN SENATE JOURNALS 267, *reprinted in id.* at 12.

¹²⁷ Article 1 of the U.S. Constitution authorizes Congress to legislate regarding the Indians. U.S. CONST. art. I, § 8. In *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 12 (Peters) (1831), Chief Justice Marshall described the Indians as "domestic dependent nations." *Id.*

¹²⁸ The Canadian Constitution provides, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." CAN. CONST. art. II, § 35(1).

¹²⁹ The Treaty of Waitangi Act, 2 N.Z. Stat. 825 (1975), *as amended by* 3 N.Z. Stat. 1335 (1985), provides for the "observance and confirmation of the principles of the Treaty of Waitangi." There is a separate tribunal for achieving this goal. See *New Zealand Maori Council v. Attorney General* [1987], 1 N.Z.L.R. 641, which affirmed the importance of the treaty. The Maoris are nevertheless still fighting for *rangatiratanga* or self-determination.

¹³⁰ See Malone, *A Test of Labor's Commitment*, Canberra Times, Sept. 5, 1987, at 2.

they believe should be in the treaty.

3. The Government will provide the necessary support for Aboriginal people to carry out their own consultations and negotiations: this could include the formation of a committee of seven senior Aborigines to oversee the process and to call an Australia-wide meeting or convention.

4. When the Aborigines present their proposals the Government stands ready to negotiate about them.

5. The Government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed treaty in the life of this Parliament.¹³¹

As of the time of going to press with the present article, nothing concrete had been done towards achieving the proposals in this statement.

Second, on August 23, 1988, a joint resolution of both Houses of the Federal Parliament enjoined the Federal Government to "further promote reconciliation with Aboriginal and Torres Strait Islander citizens providing recognition of their special place in the Commonwealth of Australia".¹³² On the next day, the Minister for Aboriginal Affairs placed before the House of Representatives the Aboriginal and Torres Strait Islander Commission Bill.¹³³ This legislation will establish the new Aboriginal and Torres Strait Islander Commission (ATSIC), "a black pseudo-parliament",¹³⁴ a twenty-member Commission with 17 zonal representatives elected by 1200 councillors from 60 regional councils around Australia. In a speech, the Minister stressed that the legislation "represents the product of a very extensive and exhaustive consultative process"¹³⁵ and is "a significant and major step towards the achievement of self-determination for the indigenous peoples of Australia".¹³⁶

Paragraphs 2-4 of the final version of the Bill read:

¹³¹ Statement of Bob Hawke, reprinted in Crawford, *The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal*, 63 AUSTL. L. J. 392, 399-400 (June 1989). The Aboriginal statement in reply is reprinted at 402-03. The two together are known as "The Barunga Statement".

¹³² COMMONWEALTH PARLIAMENTARY DEBATES, HOUSE OF REPS., Aug. 23, 1988, 137; COMMONWEALTH PARLIAMENTARY DEBATES, SENATE, Aug. 23, 1988, 56.

¹³³ COMMONWEALTH PARLIAMENTARY DEBATES, HOUSE OF REPS., Aug. 24, 1988, 251-56.

¹³⁴ Owen, *Aboriginal Bill Lacks Grassroots Support*, *The Weekend Australian*, September 2-3, 1989, 5.

¹³⁵ Statement of Gerry Hand, Minister for Aboriginal Affairs, *supra* note 133 at 256.

¹³⁶ Gerry Hand, *supra* note 133 at 252.

. . . *whereas* the people whose descendants are now known as the Aboriginal and Torres Strait Islander peoples of Australia were the prior occupiers and original owners of this land;

And whereas they were dispossessed by subsequent European occupation and have no recognized rights over land yet recognized by the Courts other than those granted or recognized by the Crown;

And whereas that dispossession occurred without compensation and no serious attempt was made to reach a lasting and equitable agreement with them on the use of their land . . .

. . . [it should be] the intention of the people of Australia . . . to ensure for all time that the Aboriginal and Torres Strait Islander peoples receive that full recognition and status within the Australian nation to which history, their prior ownership and occupation of the land, and their rich and diverse culture entitle them to aspire . . . [and that there should] be reached with the Aboriginal and Torres Strait Islander peoples a real and lasting reconciliation of these matters.¹³⁷

¹³⁷ The proposal to establish ATSIC (a statutory body which will amalgamate the current Department of Aboriginal Affairs and the Aboriginal Development Commission, and incorporate the Aboriginal Hostels Ltd. and the Institute of Aboriginal Studies) was first announced to the Parliament on December 10, 1987. The original draft preamble and the details of the proposal are set out in G. HAND, FOUNDATIONS FOR THE FUTURE [POLICY STATEMENT] (1987). The bill, which has since been amended, has passed the House of Representatives and after some more amendments it is expected to be passed by the Senate by the end of 1989.

THE DEAN RUSK AWARD

The Dean Rusk Award is presented each year to the student whose paper is chosen by a panel of distinguished judges as the best student international law article submitted by students from Georgia law schools. The Award program is administered in honor of Dean Rusk, formerly United States Secretary of State, and currently professor of law at the University of Georgia School of Law.

The judges for the 1988-89 Award were Professor Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law and Beemis Professor of International Law Emeritus Harvard Law School; Professor Thomas M. Schoenbaum, Rusk Professor of Law and Director of the Dean Rusk Center for International and Comparative Law, University of Georgia School of Law; and Mr. Kenneth W. Hansen, Senior Commercial Counsel, Overseas Private Investment Corporation, Washington, D.C..

The 1988-89 Award was presented to Mr. Jeffrey D. Stieb for his paper, *Survey of United States Jurisdiction Over High Seas Narcotics Trafficking*. The *Georgia Journal* congratulates Mr. Stieb for his achievement and is pleased to print his paper in the following pages.

The *Journal* also is grateful to Professor Rusk for his service to the School of Law and the *Journal*. Throughout his numerous years in government, including positions at the United States Department of State as Director of the Office of United Nations Affairs, Assistant Secretary of State for Far Eastern Affairs, and as Secretary of State from 1961 to 1969, Professor Rusk served our country selflessly and with great distinction.

In the same manner, he has served since 1970 as the Samuel H. Sibley Professor of International Law at the University of Georgia School of Law, and as Advisor to the *Georgia Journal* from its inception that year. The *Journal* has benefited tremendously from his guidance, and the 1988-89 Managing Board expresses its deepest gratitude to Professor Rusk for his invaluable support and assistance to the *Journal* over the last twenty years.

