

# THE ROLE OF 'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE IN INTERNATIONAL BOUNDARY CLAIMS

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## 1. Introduction

### 1.1 Importance

The relationship between the concept of 'folk' and that of territorial boundaries has been central to international politics for centuries, and the issue is far from closed. For example, the 'unification' of territories occupied by a given ethnic group has been a major preoccupation of some states. Many states today continue to have 'irredentist' aspirations, based upon the presence of members of their own predominant ethnic group in a neighbouring country. The consequences for international stability and security need no emphasis.

Friction between states may arise not only from uncertainty of land boundaries, but also from doubt over seas and waterways. The recent confrontation between British and Icelandic vessels over fishing rights is an example; the current war between Iran and Iraq, triggered by a dispute over the Shatt al-Arab waterway, is an even more extreme example.

Unfortunately no degree of development in doctrines of international law can avert all such crises, at least in the foreseeable future. However, it is hoped that the clarification of the principles underlying various boundary claims will make the situation less volatile, and hence improve the prospects for orderly negotiated settlements.

This paper will propose that use and occupancy of a maritime area by an ethnic group is a legitimate basis for a claim by a state to territorial sovereignty. The proposition is hardly revolutionary in cases where the group is a 'mainstream' ethnic group. Under standard international law use and occupancy by such a group can, for example, be the basis for a 'historic title' over waters which would otherwise fall outside a coastal state's jurisdiction. However, this paper will address the case of popu-

lations which have not been regarded as "mainstream", the most eminent example being an aboriginal population. It will be proposed that, under the proper circumstances, such a group can be extremely useful in substantiating national boundary claims, particularly where it has a folk law which claims to be applicable to the contested area. It will also be submitted that the utility of folk law for this purpose has been largely overlooked by political authorities.

## 1.2 Terminology

In this paper expressions and concepts primarily have the meanings which are usual in the Anglo-Canadian legal tradition. For example, 'sovereignty' is used here of states, not of peoples. 'Folk law' can refer to either of two concepts. First, it can refer to 'custom', which in English common law is a "usage, which obtains the force of law, and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns".(1) In some cases 'custom' has a narrower sense: "custom may be explained as the doctrine under which an undefined class of persons or a fluctuating class can, within a definite district, claim and establish certain rights in the nature of incorporeal hereditaments (i.e., rights which are inheritable even when unaccompanied by physical possession)" (Carson 1907: 112). Secondly, 'folk law' can refer to lex loci (the 'law of the place'), a standard expression in both domestic and international law. Unlike a 'custom', a lex loci is not a law of a part of the realm, but a law from outside the realm. It is nevertheless enforceable by a court of common law. For example, the expression lex loci rei sitae (law of the place where the thing is situated) refers to "the general rule of the common law (...) that the laws of the place where (...) property is situated exclusively govern in respect to the power to contract, the rights of the parties, the modes of transfer, and the solemnities which should accompany them" (Jowitt 1959). Since it is the common law itself which enforces the lex loci, it has been said that strictly speaking "the forum thus enforces not a foreign element but a right created by its own law" (Cook 1942).

Other expressions are also standard legal terminology. Res nullius means something which has no legal owner or holder. One of its most important categories is terra nullius, meaning land which is outside the juridical possession or sovereignty of any person or state. The surface of the high seas is generally akin to res nullius. Among terrae nullius the only major problematic area is Antarctica, over the exact status of which there is some disagreement between the USA and various other countries. One important feature of the term terra nullius is that it connotes a

lack of juridical possession only: as we shall see later, courts have sometimes held that groups may have been in actual possession without having legal rights, thereby leaving the area terra nullius.

One caveat is necessary. While it has been said that the high seas are 'akin' to res nullius, there may be important distinctions. Although some writers do indeed call the seas res nullius (e.g. Gidel 1934: I, 213), others consider this a misleading oversimplification. Res nullius can be appropriated, whereas the high seas usually cannot. Accordingly, some authors insist that the high seas be labelled res communis rather than res nullius (Jennings 1963: 23). Therefore the modes of acquisition of maritime areas may not be "on all fours" with those of terra nullius. In the view of one writer, "it necessarily follows that the requirements for the formation of a maritime historic right (...) should also differ to some extent from those usually enumerated when dealing with the establishment of historic rights over land areas" (Blum 1965: 249).

For the present limited purposes, however, the distinction makes little difference. The role of folk law in substantiating territorial boundary claims has attracted attention only recently. Hence mention of it is absent from older dissertations, whether on claims to res nullius or on maritime claims. This absence does not necessarily indicate a difference in applicable law on this point. There is a second and more important reason for using the analogy between high seas and res nullius. It is also commonly said of the high seas that they are res quae nullius domini esse potest (Gidel 1934: 214), i.e., that which no-one may own. As will be seen later, the impact of folk law on that formulation may be the same as it is on corresponding propositions about res nullius. Therefore this paper will continue to use the analogy between the two.

## 2. Historical development of theories of the Lex Loci

### 2.1 Early history

Broadly speaking, a thousand years ago no system of European law was territorial in its application. The laws applicable to a given person were not those of the territory in which he found himself, but rather those of the tribe to which he belonged. There appeared to be a consensus that a Goth would be judged according to Gothic law, his 'personal law', even if he found himself in Frankish territory. This early period has been called the era of la personnalité des lois (David and Brierley 1978: 34), or Stammesrecht as opposed to Landrecht (Huebner 1918).

This tendency was opposed by what remained of legal scholarship left from the Roman Empire. There were attempts, largely based upon Roman teachings, to reintroduce territoriality as a basis for law in Italy (2) and Spain (3). But the establishment of order in the feudal period, and the decline of the old rule of personnalité des lois, did not restore the notion of territoriality. The judicial system came to be perceived as being appurtenant to an overlord's person, rather than to a territory. In short, law (such as it was) was a collection of customs belonging to defined groups and enforceable by a feudal lord, rather than an abstract concept binding upon certain areas of the earth's surface. That view did not change until the later Middle Ages, when increasing Romanist influence on the continent as well as the embryonic emergence of nationalism and the concept of nation-state began to entrench the notion of territoriality of laws.

Just at this point the so-called Age of Discovery began. The rush for colonial empires is often perceived as having occurred in a legal vacuum. That is because colonial expansion rarely aroused qualms concerning the legal rights of the colonized. A handful of major works, such as those of Franciscus de Vitoria and Bartolomé de las Casas, challenged this view, but even those had almost no effect on the Spanish conquistadors or their counterparts from other countries. However, the rush for colonies generated two considerable legal questions among the Europeans themselves. First, how did the travels and occupancy of various Europeans affect the boundaries of the respective colonial empires among themselves? Secondly, how did these travels and occupancy affect the legal system applicable in any given settlement?

In the early part of the colonial period juristic writings on this subject had a certain air of unreality, arising from the discrepancy between theory and practice. By the twentieth century, however, an enormous body of writing and jurisprudence has been accumulated and applied in practice. Two notable features of this work are immediately applicable today.

- (1) The legal systems which once discounted folk law are now seen to contain doctrines which tend towards its confirmation and enforcement.
- (2) The doctrines which governed the European takeover of supposed terrae nullius are now seen to apply to certain takeovers of another area akin to res nullius, namely the high seas.

These two propositions will now be studied in greater detail.

## 2.2 Res Nullius during the 'Age of Discovery'

During the so-called Age of Discovery the European powers were disposed to treat the territories of their prospective conquests as res nullius. The most extreme case of terra nullius is that in which no-one holds either sovereign power (imperium) or ownership (dominium) or possession. This is, for example, the current status of the moon.(4) Today the largest category of area akin to res nullius is the surface of the high seas. The status of the moon and the high seas are affirmed in international law. However, the status of other alleged res nullius has not enjoyed such clear definition. During the Age of Discovery it was asked, whether they could be appropriated, and if so, how? While in the time of James I of England there was little distinction between imperium and dominium, there was substantial discussion of the legalities of annexing an alleged terra nullius to the dominions of the Crown (Lester 1982).

Previously the feudal theory of tenures (whereby all lands were held ultimately of the Crown) had admitted of only two ways of expanding the dominions of a ruler: inheritance or conquest. The expeditions of Columbus changed all that. Vast areas were labelled res nullius by various European powers, which then proceeded to appropriate them.

Competing European powers did not necessarily acknowledge such annexations. Challenges could be based on one of two legal grounds. They might express doubts as to whether an area had been terra nullius initially. For example, James I raised questions about the legal rights of the Inca of Peru (James I 1615). However, that argument was relatively rare among European diplomats. A more frequent challenge to the appropriations was on procedural grounds.(5) Consequently the various countries became rather careful in defining their methods of annexation.

Spain and Portugal argued for a "right of discovery", by which discovery ipso facto constituted annexation. They also invoked Papal authority. For good measure they followed a ceremonial procedure which was supposed to symbolize the acquisition of sovereignty. They advanced claims not only to lands, but also (as in the case of Balboa's claim to the Pacific) to the high seas. France developed a practice of sovereignty at particular locations. One author gives an instance of the use of this practice:

In the dispute between the English and the French over title to the bottom of Hudson Bay (...), as it was put by M. de Denonville in a paper discussing the French title to Hudson

Bay in 1686, all of the facts in support of the French claim could be 'proved' by the 'certificates' of those who had been commissioned to perform the symbolic acts "and by the procès-verbal of taking of Possession" (...) What concerned him was that notarized memorials of English claims could not be found in the register of legal instruments in Quebec. (Lester 1982: 336-338).

The practice left the natives in an odd legal position. Their lex loci was not acknowledged, but neither was it altogether discounted. As the same author explains:

In Spanish and Portuguese acts, the Indians usually appeared as witnesses; in French acts, they always did, and the Indians shared in proclaiming the act consummated. The Indians' presence was crucial: for when they declined to challenge these symbolic acts, they were regarded as having borne witness against themselves. They had either denied their own rights or else surrendered them to the appropriate European power. If the Indians did not understand this hocus pocus, this did not matter. If they resisted by force, Europeans resorted to trickery. If this was discovered, it was bound to be discredited in the eyes of rivals, but this was all part of the game. (Lester 1982: 362).

The Elizabethan English discounted all these methods. They insisted that sovereignty could extend no further than the area which was actually occupied by the state in question. By 1610, however, the English position had been reversed, largely as a result of changing political fortunes. England now adopted the view that it could legally appropriate both imperium and dominium as against any people guilty of "heathenism".(6) That view prevailed until 1774, when it was judicially overthrown.(7)

By the seventeenth century, however, the English view was being modified as the result of a growing recognition of the distinction between imperium and dominium. English law recognized that, although the king had become ruler of Ireland by conquest, he had not necessarily become the owner.(8) The seventeenth century constitutional upheavals led to increasing emphasis on the distinction. By the end of the century it was recognized that, while the Crown could acquire imperium over a territory relatively easily, dominium, in the sense of ownership to the exclusion of antecedent property rights under the lex loci, required some legal ground for overriding that lex loci. That was the core of legal debate on the subject over the next two hundred years.

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

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### 2.3 Treatment of the Lex Loci

Initially the "heathenism" argument was a convenient excuse to dismiss the lex loci. Accordingly, the lands of various non-Christians such as Amerindians were appropriated without regard to any lex loci. When the argument became increasingly untenable, the colonists sought another way of excluding the lex loci. This was not easy: the rule eventually laid down in 1774 was very clear:

... the law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there: whosoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants.(9)

The response of the colonists was to argue that there were no "laws of the place" on the ground that the various aboriginal populations were too "barbaric" to have leges locorum which could be recognized by a court.(10) This view in turn was gradually undermined by scholarly research into aboriginal legal systems. Although the British Privy Council postulated as late as 1919 that some cultures might be so "primitive" as to be divided by an "unbridgeable gulf" from any concept of a lex loci,(11) this view was superseded. The "gulf" had been crossed, in the case of the East Indies and the New Zealand Maoris, in the nineteenth century. It was crossed for African groups in 1921,(12) and even more forcefully in 1957.(13) The aborigines of Australia were judicially recognized as having a lex loci giving them land rights in 1971.(14) Finally the Inuit of Canada's Keewatin District were given similar recognition in 1979.(15)

What is the effect on the concept of terra nullius? It means that there are now remarkably few places in the world (at least on dry land) where a state can claim a wholesale confiscation of lands on the basis that there is no recognizable lex loci.

### 2.4 Results for National Doctrine

If the modern view were applied retrospectively, the consequences for international boundary claims would be startling. Many countries which portray themselves as possessing lands by virtue of "peaceful annexation" of terrae nullius would have to be re portrayed as possessing them by conquest, unless some accommodation had been made with the lex loci. The consequences for the international negotiation of boundary claims are obvious.

Perhaps the most interesting example of the continuing importance of this issue affects the USA. British law took the view that the American colonies were acquired by conquest from the Indians.<sup>(16)</sup> However, this status had legal consequences for Parliament's capacity to tax the colonies, which the colonists could not accept. Accordingly they argued that the colonies had been acquired either by (a) occupation of terrae nullius, or (b) agreement with the natives. This argument, advanced most vigorously by John Adams (who became the second President of the USA), was rejected by the British lawyers, and the results in 1776 are history.

In his 1775 work Novanglus Adams stated the American position in the following terms:

Discovery, if that was incontestable, could give no title to the English king, by common law, or by the law of nature, to the lands, tenements, and hereditaments of the native Indians here. Our ancestors were sensible of this and, therefore, honestly purchased their lands of the natives." (Adams 1856: IV, 124-125)

In later years Adams was more guarded. He drew a distinction between predominantly uninhabited lands and those which were the property of Indians. The latter were allegedly acknowledged or purchased, the former were merely taken over as terrae nullius:

But will you infer from this, that the Indian had a right of exclusive dominion and property over immense regions of uncultivated wilderness that he never saw, that he might have the exclusive privilege of hunting and fishing in them, which he himself never expected to enjoy?

These reflections appear to have occurred to our ancestors, and their general conduct was regulated by them... They considered the right to be in the native Indians, And, in truth, all the right there was in the case lay there. They accordingly respected the Indian wigwams and poor plantations, and their clam-banks and muscle-banks and oyster-banks, and all their property. (Adams 1856: Letter to William Tudor)

That view would have caused difficulty where natives who occupied lands were unwilling to sell. Consequently the official American position was modified in the nineteenth century as "pioneers" took over Indian lands.<sup>(17)</sup> However, if Americans today were to abide by the view over which they started a revolution, the consequences would be important. The USA would be



'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

able to appropriate the Alaskan offshore only if it could demonstrate that the area was res nullius, or that an agreement had been made with the users, i.e. the Inupiat population. That issue is currently before the American courts.(18)

3. Modes of annexation under international law

The colonial powers used various forms of evidence to assert title to alleged terrae nullius: papal donations, discovery, contiguity, continuous displays of sovereignty, occupation and settlement, conquest and cession (although to rely on the last two after asserting that land was terra nullius is a non sequitur) and combinations thereof. It is difficult to assess the respective weight of these arguments because disputes exist even to this day. Although the colonial powers have largely withdrawn, the independent countries which they left in their wake often resort to the same arguments in boundary disputes among themselves, viewing themselves as "successors in title" to the claims of the previous colonial powers. Thus discussion of boundaries between African countries refers to the claims of their French and British predecessors. The number of irredentist claims which continue throughout the world is testimony to the failure of these arguments to provide clear direction.

Some arguments can, however, be given more credence than others. The papal donation argument obviously belongs to another era. Discovery is more problematic, but, "according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered."(19) Conquest and enforced cession, while undoubtedly a reality (Brierly 1963: 171-173), tends to cause more irredentist problems than it solves and gives rise to "an obvious moral objection" (Brierly 1963: 172). In any event, it is a juridical impossibility to "conquer" or obtain a cession of a terra nullius because there is no legal possessor to be conquered or to perform the cession. Contiguity has weaknesses as an argument because "international arbitral jurisprudence in disputes on territorial sovereignty ... would seem to attribute greater weight to - even isolated - acts of display of sovereignty than to continuity of territory".(20) One may note that this issue is part of the dispute over the Falkland Islands.

Two major arguments remain: continuous displays of sovereignty, and occupation and settlement. These can both found an acquisition of terra nullius, and also "consolidate" a claim which has been made on other grounds. It is submitted that proven long use is the strongest possible foundation for a successful claim.

Such use means "a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into account by the judge in order to decide in concreto on the existence or nonexistence of a consolidation by historic titles." (De Visscher 1968)

What is the role of folk law in continuous displays of sovereignty, occupation and settlement, and the consolidation of claims on other grounds? The value of folk law to a state is obvious if it can be invoked in aid of claims to territory. It is possible, however, to go further, and to argue that folk law is not only an evidentiary item for those other grounds of claims, but that it is also a basis for a claim of historic title in its own right.

Before this possibility is studied in further detail, it should be noted that use and occupancy of an area by a group such as an aboriginal population can reinforce boundary claims even without reference to the group's lex loci. That possibility will be discussed next.

#### 4. Aboriginals and state sovereignty: arctic case studies

##### 4.1 Background

At the beginning of the twentieth century, Canadian sovereignty claims were under challenge in many areas of the Canadian Arctic. An American expedition had laid claim to central Ellesmere Island on behalf of the USA; a Danish official had challenged Canadian claims on eastern Ellesmere; and Otto Sverdrup had claimed a major part of the central High Arctic for the King of Norway on expeditions in 1900 and 1902 (Smith 1980: 14-15).

By the 1920s Danish and American claims had ceased to be of major concern, but Norwegian claims continued to cause concern even in the Canadian Parliament.(21) Although Norway did not claim outright sovereignty in the "Sverdrup Basin", she nevertheless asserted a vested right to carry on certain operations there, and demanded that Canada impose no "obstacles to Norwegian fishing, hunting or industrial and trading activities."(22) These claims clearly threatened to fetter Canadian sovereignty in the lands and seas in question.

#### 4.2 Sovereignty Attributed to a Mandate for Protection

In response to Norway's challenge Canada relied on the Arctic Islands Game Preserve (AIGP). Established in 1926, (23) the AIGP imposed the status of native "game preserve" on most of the area north of Hudson Bay and Hudson Strait. The original limiting reference to "lands" was deleted in 1929.(24) Thereafter (after some adjustments) the boundaries were described on maps as extending well beyond the twelve-mile limit. In fact they corresponded to claims under the so-called "Sector Theory", whereby Canadian boundaries were supposed to project to the North Pole.(25) The rationale of the AIGP was to protect "the interest of natives".(26) It prohibited non-native hunting, trapping, trading and trafficking,(27) and "entry" by any "corporation or newcomers".(28) The barring of outsiders from waters at so great a distance from shore has clear implications for boundary claims in international law.

Canada communicated this policy to Norway.(29) In reply Norway rejected the Sector Theory,(30) but acquiesced in the Canadian action on the ground that the area was reserved to protect native interests.(31) The exchange of diplomatic notes constitutes a treaty between Canada and Norway.(32) It was not a new development to cite the "interests" of an aboriginal population in support of a claim pertaining to sovereignty. This had been done already in the nineteenth century.(33) However, it was new for these "interests" to figure so prominently in international boundary claims. The second important feature of the treaty is the absence of a distinction between land and sea, just as in the AIGP. Given that Norway was prepared to renounce any rights on land, there was no overwhelming reason why she should acquiesce in the ban on non-native entry over the entire zone, or on hunting and fishing in the waters of the Sverdrup Basin. The silence of the Norwegians on this point is all the more remarkable in that they went to pains to deny that they were acquiescing in the Sector Theory. What basis could the treaty have had other than native interests?

Claims based on the protection of "native interests" can arguably be regarded as an extension of the so-called "vital interests" doctrine. According to some writers, a state can lay claim to a maritime area "founded on the vital needs of the population and attested by very ancient and peaceful usage."(34) The doctrine appears to have a growing number of proponents (e.g. O'Connell: 1, 438). However, there is some disagreement.(35) Moreover, in one notable instance where the doctrine was relied upon it was explicitly rejected. The Canadian Arctic Waters Pollution Prevention Act (AWPPA) (36) was intended to cover a 100-mile pollution prevention zone in Arctic waters. "Vital inter-

ests" were invoked in support.(37) It was met by a diplomatic protest from the country whose activities were causing the most concern, the USA.

What happens, however, when there are not only "vital interests", but also a lex loci which regulates those interests? It might perhaps be assumed that the existence of a lex loci would be merely a supplementary piece of evidence pointing to the indispensability of those vital interests. However, it is contended that a pre-existing folk law changes the argument qualitatively as well as quantitatively, that is, it changes the entire juridical nature of the situation.

First it is necessary to deal with a preliminary objection: is it possible for any lex loci to exist in an offshore area? To answer this we need to examine whether authority shows that valid rights under folk law may exist in such an area independently of, and even prior to the establishment of sovereignty by a state over the area.

#### 4.3 Lex Loci and Res Nullius: Jurisprudence

US authorities have gone further than their Canadian counterparts in defining the "interest" of native peoples in the Arctic offshore. Whereas the Canadian treaty with Norway and the AWPPA refer to Inuit "welfare", the US Department of the Interior issued in 1945 a statement referring to "rights":

A careful study of the cases and statutes confirms ... that submerged lands in Alaska are susceptible to such claims of aboriginal possession as were recognized by the act of May 17, 1884, and by subsequent legislation of the same tenor; that such rights, whatever they may be, have not been destroyed by the course of congressional legislation since 1884; whether such rights have been abandoned and or otherwise extinguished or whether they still exist as valid rights today is entirely a question of fact to be decided on the available evidence in each particular case.

It is the duty of this Department to respect existing rights in disposing of the Federal public domain. This is true whether the public domain is land or water or a mixture of both, and whether the existing rights were established under Spanish, Mexican, Hawaiian, Danish, Choctaw or Tlingit law. It makes no difference whether the evidence of such rights is found in papers sealed and notarized or in custom and the fact of possession, which is older than seals and notaries. Having attempted to discover the exact facts in

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

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these cases, the Department will govern its future actions accordingly.(38)

This has not been overruled, and hence still represents the "official" position. It is consistent with the views of one US Attorney General who rendered the following legal opinion on the effect of Alaskan lex loci on offshore areas:

Unless the rights which natives enjoyed from time immemorial in waters and submerged lands of Alaska have been modified under Russian or American sovereignty, (it) must be held that the aboriginal rights of the Indians continue in effect ... In the first place, it must be recognized that the mere fact that common law does not recognize several rights of fishery and ocean waters or rights in land below the high water mark does not mean that such rights were abolished by the extension of American sovereignty over the waters in question. It is well settled that Indians' legal relations, established by tribal laws or customs antedating American sovereignty, are unaffected by the common law.(39)

Two leading cases dealt with the effect of lex loci on waters off Hawaii. In one Mr. Justice Holmes considered a folk-law system which subdivided the surface of water in metes and bounds with the assistance of a "taboo". This lex loci was enforced by the Supreme Court on the following grounds:

The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or alternatively, to put a taboo on all fishing within limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit à prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit.(40)

Those conclusions not only confirm the feasibility of a lex loci in an offshore area. They further recognize that: (a) the lex loci may be native in origin; and (b) the lex loci may be valid notwithstanding its dissimilarities to the legal system of the majority. These three conclusions demonstrate the potency of "folk law", at least vis-à-vis American jurists.

The American jurists have in effect recognized that an aboriginal population can carry its law from shore into an offshore area so that the latter ceases to be akin to res nullius. This view has parallels in Anglo-Canadian law. It was once assumed that the capacity to "carry one's law on one's back" into a terra nullius was enjoyed only by the predominant ethnic group. For example, English law assumed that Englishmen carried English law into a colonial settlement,(41) but would not make the same assumption for more "primitive" ethnic groups, because among British subjects they did not have the same position as Englishmen.(42) However, as the British Empire expanded, that proposition became increasingly untenable. The courts became increasingly disposed to treat all British subjects alike, regardless of ethnicity.(43) Inevitably the question came to be asked: if an Englishman could carry his own legal system into a terra nullius, why could not a British subject with a different lex loci carry his law into what the common law would otherwise consider res nullius?

The answer is implicit in the judgment in Tito v. Waddell (no.2).(44) That case concerned Ocean Island, a small island in the Western Pacific. It is part of a British protectorate and is occupied by an aboriginal people, the Banabans. The dispute was over phosphates. Had there been no lex loci independently of the establishment of British sovereignty, normal common law alone would have applied. There were no deeds showing that the islanders held their property by Crown grant. There were certainly no deeds indicating a Banaban right to the phosphates, for which, indeed, they had no use. Normal common law rules would therefore have held that the phosphates were not under the ownership or possession of the Banabans, and hence were akin to res nullius. In that case, they would be vested in the Crown.

That conclusion had been expressed by a spokesman for the government, Sir Murchison Fletcher,(45) and it was advanced at one stage by the Attorney-General.(46) The evolution of the common law on the point is demonstrated by the court's response:

I mention (the argument of Crown ownership of the phosphates) merely to dispose of it. Whatever may be said about the logic of the proposition, it is clear that no claim to Crown ownership of the phosphates is now made. (Counsel for the Attorney-General) was quite explicit on that. Apart from a few sporadic statements in minutes and so on, at long intervals, Sir Murchison was on his own in making this assertion, for which I can see no support at all... Whatever difficulties there are in determining the nature and quality

of the ownership of land by the Banabans on Ocean Island, they do not include any claim by the Crown to ownership of the phosphate. (47)

Hence the British government was no longer even attempting to deny the possibility that the Banabans could have had a valid law, which as the lex loci could have disposed of ownership of the phosphates. Although it may be unsafe to assume that aboriginal populations can now gleefully extend their leges locorum to various other res nullius, one can at least say that the door is not shut in British law.

#### 4.4 Lex Loci and Res Nullius: Convention

The cases in which aboriginal populations "carry" a legal system into an area akin to res nullius are not confined to jurisprudence. Perhaps the most striking example of the process by convention is the Agreement on the Conservation of Polar Bears, (48) which entered into force in 1976. It was signed and where necessary ratified by the five arctic countries: Canada, the USA, the USSR, Norway and Denmark (for Greenland). Polar bears are maritime animals which hunt on ice, frequently at distances from land far beyond the so-called twelve mile limit. Article III (1) of the Convention provides:

Any Contracting Party may allow the taking of polar bears when such taking is carried out ...

- (d) by local people using traditional methods in the exercise of traditional rights and in accordance with the laws of that Party; or
- (e) wherever polar bears have or might have been subject to taking by traditional means by its nationals.

The expression "the exercise of traditional rights" occurs also in the interpretive Declaration which Canada deposited at the time of ratification:

2. As regards the hunting rights of local people, protected under Article III, paragraph 1, sub-paragraphs (d) and (e), Canadian practice is based on the following considerations:

(a) Research data ... compiled annually by the Federal-Provincial Polar Bear Technical Committee, indicate that there is, in Canada, a harvestable quantity of polar bears. On the basis of these biological data the Committee recommends annual management quotas for each sub-population.

(b) The polar bear hunt in Canada is an important traditional right and cultural element of the Inuit (Eskimo) and Indi-

an peoples. In certain cases this hunt may extend some distance seaward. Traditional methods are followed in this hunt. (c) In the exercise of these traditional polar bear hunting rights, and based on the clause "in accordance with the laws of that Party", the local people in a settlement may authorize the selling of a polar bear permit from the sub-population quota to a non-Inuit or non-Indian hunter, but with additional restrictions providing that the hunt be conducted under the guidance of a native hunter and by using a dog team and be conducted within Canadian jurisdiction. The Government of Canada therefore interprets Article III, paragraph 1, sub-paragraphs (d) and (e) as permitting a token sports hunt based on scientifically sound settlement quotas as an exercise of the traditional rights of the local people. (49)

It might perhaps be argued that the "rights" referred to are not legal, but merely juridically-meaningless "moral" rights. That is doubtful because in international practice conventions (which are legal documents) may be expected to use expressions in their legal sense.

However, if the rights are legal, the crucial question arises: what is the law on which these rights are based? It is clear, first, that it is not statute law because, if it had been, there would have been no sense in calling them "traditional" rights. But, secondly, they cannot be based on the normal common law, since most bear hunting is done on the high seas outside the territorial reach of the common law. There is only one possibility left, and the wording of the Convention admits only one plausible explanation: it refers to rights under the traditional lex loci. Thus the Convention acknowledges, wittingly or unwittingly, that a lex loci has existed in the offshore and has given rise to juridical consequences.

It is also noteworthy that the Convention returns to the ancient notion of personnalité des lois, since it assumes that the national law of a country follows its citizens, regardless of how far offshore they go. The individual Inuit hunter of Canada, Alaska, Greenland or Siberia is in a certain sense put on the same legal footing as a vessel of the country's registry. Consequently the five states are exercising jurisdiction in areas which the US State Department would classify as the high seas.



5. Lex Loci as a Basis of National Sovereignty

5.1 The Hypothesis

Thus we see that the protection of an aboriginal group can be used as an argument for a national claim to sovereignty or jurisdiction in a debate over national boundaries on land and at sea. However, this argument has a special character when an assertion of sovereignty is based not merely upon moral considerations for the welfare of the inhabitants, but also upon the legal rights of the local population under a lex loci. This is partially the basis of the provisions of the Agreement on the Conservation of Polar Bears. It is the full basis of the claim where the common law acknowledges the application of a lex loci to a res nullius, as in the case of the Banabans and that of the US Department of the Interior declarations concerning the Alaskan offshore.

The special character of the argument can be summarized as follows:

1. A res nullius to which a legal system is applicable ceases, by definition, to be res nullius. Hence it can become the legitimate object of a territorial claim.
2. This claim is not based solely on the classic argument of use and occupancy by an ethnic group which is part of the claimant state's mainstream population (i.e., the most widespread irredentist argument), nor on the argument of "consolidation" of the state's interest.
3. Instead, the claim is based on the more powerful argument that the area has already been annexed to the claimant state's legal system by virtue of the customary law applicable in the area, in some cases since time immemorial.
4. The state is "successor" to the lex loci of its inhabitants through the movement from the notion of personnalité des lois to that of territoriality of laws (Stammesrecht to Landrecht). Assuming that the state does not repudiate the lex loci, it normally becomes part of the Landrecht of the state.
5. The state as successor to the lex loci can trace its title to the origins of that lex loci. It can therefore formulate an appropriate claim to historic title.
6. Conversely no other state can argue that the area was terra nullius, since the area indeed has had an applicable legal system. Specifically it could not be claimed that offshore areas are res quae nullius domini esse potest,<sup>(50)</sup> in the face of the conclusion that there has been a dominus by virtue of the lex loci. The effect of the foregoing argument is

that there is no historical point at which the area was akin to res nullius.

This hypothesis assumes, of course, that the claimant state is successful in demonstrating the existence of the lex loci on the evidence. Before that issue is discussed, it will be useful to indicate the extent to which the above hypothesis is accepted in international thinking.

#### 5.2 Indicia of Growing Recognition

To date there have been no clear instances in which the above proposition was argued. However, some instances in international jurisprudence and writing suggest that juridical thinking is moving towards it.

Until the early twentieth century the legal arrangements of natives had very uneven impact on judicial thinking, even when they were directly involved in international transactions.(51) The shift in judicial thinking is therefore all the more marked in the Western Sahara case,(52) decided in 1975. The evidence there introduced before the International Court of Justice included lengthy analysis of local customary rules, including those defining feudal loyalties and those derived from the Koran. It was found that no area which had organization could, by definition, be terra nullius.(53) One of the judges used the opportunity to attack the very notion of terra nullius, to emphasize the importance of the local concepts, to defend those local concepts against the encroachment of European legal assumptions, and to equate the suppression of local concepts by European norms with a self-serving rationalization for wholesale appropriation.(54)

Various writers show similar tendencies (e.g. Munkman 1972-1973; Wooldridge 1979). Two Canadian authors have gone so far as to present the following hypothesis in respect of the Canadian Inuit:

Inuit have exercised dominion and control over Arctic ice for thousands of years. Since ice to the Inuit has been like land to Europeans, Inuit may pass a sovereign international title to ice-covered waters to a national government through a maritime claims settlement agreement ...

As a pre-condition to claiming total sovereignty through Inuit cession of offshore rights, Canada would likely have the difficult task of proving that the Inuit themselves possessed a historic title to Arctic waters. Such an evidentiary burden might not be impossible, however, since international

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

tribunals have tended to require less evidence of political authority in remote areas. (Van der Zwaag and Pharand 1983).

This argument was prefaced by language indicating that it was still tentative. Nonetheless, it is a further sign that the international community may soon be ready to acknowledge folk law as an important, and perhaps pivotal element in international boundary claims.

The effectiveness of the argument in the international community will depend on a wide variety of factors, not all of which are legal. Certain international consequences, however, will inevitably flow from the legal treatment of that lex loci in the country's domestic courts, as described below.

## 6. State Policies and their Effects on State's Claims

### 6.1 General

If a state wishes to use a lex loci to reinforce a claim to a certain boundary, it must anticipate counter-arguments. The most damaging of these asserts that the alleged lex loci does not have the character of law. To refute that challenge the claiming state needs to show evidence that the lex loci gives rise to justiciable legal consequences. Perhaps the most interesting precedent for such a demonstration is that of England.

### 6.2 The Absorption of Lex Loci: Common Law and European Law Before the Codifications

At the time of the Norman Conquest a "law common to all England ... did not exist" (David and Brierley 1978: 290). Courts "decided, according to custom, which of the parties had to establish his claim by submitting to a system of proof that had no pretensions to rationality" (David and Brierley 1978: 290). The growth of the common law through royal courts did not suppress local custom: it frequently entrenched it. As early as 1066 William the Conqueror declared that Anglo-Saxon laws would continue to apply except where expressly superseded. To this day various local customary laws continue to be enforceable by the ordinary courts of the realm. They constitute "local common law .... Local common law, like general common law, is the law of the country (i.e., particular place) as it existed before the time of legal memory ...".(55)

Blackstone described custom in these terms:

Whence it is that in our law the goodness of a custom depends upon it's having been used time out of mind ... This it is that gives it it's weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta (unwritten law), of this kingdom. (Blackstone 1765: 67)

For example, the law on perhaps the most important issue of all in earlier times, the inheritance of land, was different in Kent. There, instead of land being inherited by the eldest son, it was inherited by children equally, because local custom so provided. Elsewhere the custom of "burgage" existed in various communities: under it land was inherited by the youngest son.

Under common law there is no great difficulty in proving an enforceable custom.

The usual course taken is this: persons of middle or old age are called, who state that in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that the usage has prevailed from all time.(56)

The effect of such proof is as follows:

Once a custom is proved to exist, it immediately becomes cognizable by the common law. And so while a person pleading a custom is in one sense claiming a privilege or exemption from what would otherwise be a liability imposed by the common law, once the custom is proved, then it is incorporated into the common law and becomes the law for that class of persons or particular locality. A court of common law is therefore not administering something which is foreign or alien to it, but is rather giving effect to the common law itself. (Lester 1982: 886)

The USA developed a similar doctrine of custom, particularly in business practices, designated "usage acquiring force of law".(57) In continental Europe before Napoleon the situation was comparable, despite the efforts of universities to standardize law in terms of the Roman model. Indeed, French law was divided into systems named coutumes (customs). Hence the Quebec Civil Code of 1866 was essentially a codification of one such system, the Coutume de Paris (Custom of Paris).

It was not only the customs of the predominant ethnic group which were enforced. Rather, the history of European legal systems (which are the basis of laws in many of the world's countries) frequently displays strong policies of accommodating the

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

customs of non-dominant groups, as witnessed by William the Conqueror himself. Moreover, as mentioned earlier, English courts enforced customary law even when it belonged to a people outside the realm. The restrictions on this applicability were "heathenism" and "barbarism". The former collapsed in 1774, and the latter has been so undermined by scholarship that it can now be considered atrophied. In common law it now appears that, unless superseded by statute, any lex loci which can be demonstrated by evidence, and which is not grossly offensive to the conscience of the court, is enforceable.

### 6.3 The Effects of Absorption

First, the absorption of a lex loci into the common law, making it enforceable by the ordinary courts, placed that lex loci on the same level of authenticity as the rest of the laws of the realm. That lex loci could not be dismissed by a foreign power any more lightly than the English law of torts or contracts.

Second, the absorption of a lex loci implied a judgment of the status of the group which had developed it. The group could no longer be indicted of "heathenism" or "barbarism". It was now to be treated in the same manner as the ethnic "mainstream" of the country. The country thereby repelled any irredentist claim by a neighbour, and (if so desired) laid the groundwork for a potential irredentist claim of its own.

### 6.4 Codification

Another method of accommodating the lex loci is to "codify" and promulgate it in statutory form. Despite various vicissitudes, Canada appears to be moving towards this method.

Initially the Canadian government professed a desire to "extinguish" aboriginal rights such as those of the Inuit in the Arctic Archipelago. Moreover, its statements of policy referred only to lands, and offshore areas were hardly mentioned, suggesting that no antecedent lex loci was acknowledged in those areas. Neither of these positions would have assisted Canadian claims to historic title in the offshore areas of the Archipelago: the first would have admitted to a gap in applicable legal systems pending comprehensive Canadian legislation, and the latter would have totally excluded any contention that Canadian nationals had appropriated the area since time immemorial. Those positions have now been modified. The word "extinguishment" has, under Inuit pressure, largely disappeared.<sup>(58)</sup> Furthermore, the Canadian

government now acknowledges that Inuit use of the offshore areas will be an essential component of the eventual settlement.(59)

A settlement which "codified" Inuit legal rights in the Arctic offshore areas could strengthen Canada's sovereignty claims. Canadian claims dating from 1906 have failed to move certain shipping nations (most notably the USA), particularly in respect of the Northwest Passage. Attempts to substantiate Canadian claims by reliance on the need for pollution control and protection of natives (as in the AWPPA), or on "baselines" (claiming waters on the ground that they are enclosed by lines joining headlands to each other)(60) have met no more success. Codification of an Inuit lex loci applicable to the offshore, dating from time immemorial and confirmed by agreement between the local population and the government, could provide more arguments and more evidence. This lex loci would be indicative of a physical presence and reliance by certain Canadian nationals since time immemorial, and would also undercut the argument that the offshore has been akin to res nullius. It is arguable, of course, that no degree of legal argument will be conclusive: law per se has often taken second place to politics in the settlement of contested maritime boundaries. But that is no reason for Canada to leave such an important argument out of her arsenal. There is every indication that Canada is waking up to its potential.

The use of this hypothesis would be timely, because international law still appears to be in a state of development concerning the doctrine of "historic title". No established formula defines an historic title to waters. In the words of one American text, "there is considerable doubt ... as to the factors necessary to support or to deny a claim based thereon" (Friedmann, Lissitzyn and Pugh 1969: 550). The USA itself claims an "historic title" to Delaware and Chesapeake Bays, despite the fact that they are similar to areas which the USA normally classified as high seas. It is not clear exactly what argument, if any, will persuade the USA to accord the same treatment to the Arctic. However, it is this writer's view that the longstanding Inuit lex loci is among the strongest arguments that Canada can muster.(61) It is not unlikely that other countries find themselves in a comparable situation with relation to their own boundary claims.

#### 6.5 The Effects of Non-absorption

One may also speculate on the effects of national policies which depart from both the British precedent and the policy of codification. Many countries have a history of offshore use by minority ethnic groups under their leges locorum. Such a country

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

may seek to invoke that use to substantiate a claim to the off-shore area by "historic title". However, if that same country's domestic courts refuse to give effect to that lex loci - and particularly if the legal validity of the lex loci is challenged by the state itself - than the state's representatives are likely to face devastating arguments from foreign powers.

First, a foreign power may argue that, in the absence of any lex loci, the area remains res nullius, and that the original state has barred itself from arguing otherwise. Secondly, the foreign power may argue that the original state is tacitly classifying the minority group as "heathens and barbarians", or subjects otherwise outside the country's mainstream. This would impugn not only the country's territorial ambitions but also its existing occupation of any lands occupied by the minority group. This argument could be diplomatically damaging, particularly if a neighbouring state included members of the same ethnic group and claimed a mandate to "protect" them: these are classic ingredients for an international incident. Even if the neighbouring state claimed no such mandate, the original state's refusal to enforce the minority's lex loci could enable foreign powers to argue that the minority's territory was "occupied land" to which the original state had no more right than anyone else.<sup>(62)</sup> In short, a refusal to enforce a lex loci, may create a risk of "open season" on certain areas, both at sea and on land.

#### 7. Conclusion

There are, of course, no certainties, legal or otherwise, in international boundary disputes. In many cases they are settled on grounds which have far more to do with expediency than with law. In those cases the issue of lex loci will appear trivial or even irrelevant. There are, however, many cases in which the legalities of the situation are a prime concern. In those cases "folk law" may conceivably play a decisive role in arguments pertaining to historic title. The possibility of peaceful settlement of boundary claims is vastly improved in a context where the respective arguments of the states are based on clear rather than ambiguous rules. To that extent, the study and application of folk law, along with an understanding of its role in such sovereignty disputes, may be of growing importance internationally in the years to come.

Notes:

1. Tyson v. Smith (1838), 9 Ad.&L. 406 at 421, 112 E.R. 1265 at 1271, per Tindal C.J. (Exch.Ch.). Explorations of this concept underlie much of the argument in Lester 1982.
2. Edict of Theodoric, 500 A.D.
3. Fuero Juzgo, 654 A.D.
4. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967, art.2.
5. An excellent example is Scott 1623, quoted in Lester 1982: 493 ff.
6. Calvin's Case (1608) 7 Co. Rep. 1a, 77 E.R. 377 (Exch.Ch.).
7. Campbell v. Hall (1774) Lofft. 655 at 741, 98 E.R. 848 at 895-896, per Lord Mansfield:  
The laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is uncontroversial; and the absurd exception as to pagans, in Calvin's Case, shews the universality of the maxim. The exception could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Croisades.
8. Case of Tanistry (1608) Davis 28, 80 E.R. 615 (K.B.).
9. Per Lord Mansfield, Campbell v. Hall, note 7 above, at 741, 895.
10. This was, for example, the rationale for dispossessing Amerindians: the notion of their having a lex loci, according to William Samuel Johnson in the mid-eighteenth century, "is perfectly ridiculous and absurd ... They remain but little superior in point of civilisation, to the Beasts of the Field". Quoted in Lester 1982: 568.
11. "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law." Per Lord Sumner, In re Southern Rhodesia (1919) A.C. 211 at 233-234. The case dealt with Matabeles (Sindebeles) and Mashonas (Shonas) in what is now Zimbabwe.
12. Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 A.C. 399.
13. Oyekan v. Adele (1957) 2 All E.R. 784 at 788:



'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws (in a ceded territory) enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants entitled to compensation who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

14. Milirrpum v. Nabalco (1971) 17 R.L.R. 141 (SCNT).
15. Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1980) LFC 518.
16. Campbell v. Hall, above note 7. It is not surprising that the case was decided in 1774.
17. The cases on which Chief Justice Marshall ruled in the 1830s are interesting examples and continue to cause much ink to flow in American legal circles.
18. Ukpeagvik Inupiat Corp. v. U.S.A. et al. and Village of Gamble v. Watt, still in litigation: see U.S. District Court (Alaska) A81-019.
19. Islands of Palmas Case (1928) 2 U.N. Rep. INT'l Arb. Awards 829 at 846.
20. Ibid. at 855.
21. See House of Commons Reports (Canada) March 31, 1930, p.1092.
22. See Dominion of Canada Treaty Series, Diplomatic Note of Aug.8, 1930, no.17.
23. This exercise and its results are described in detail in Denhez 1984. The events leading to the establishment of the AIGP are fully described in Hunt 1976. The statutory references are P.C. 1146, July 19, 1926; Canada Gazette July 31, 1926. The authority for game reserves was found in the Northwest Game Act. R.S.C. 1906 c. 151, as amended 7 & 8 Geo. 5 c.36.
24. P.C. 807 May 15; see Canada Gazette vol. 62 p. 4021.
25. For example, the boundaries were described at their fullest extent in Canada Gazette 1945, p. 4345. Pharand states that "the first clear statement by the Secretary of State for External Affairs that Canada considered the arctic waters to be internal waters was made in May 1975 by Allan MacEachan" (Pharand 1984: 98). With all due respect, it must be pointed out that the Minister of the Interior in 1925 announced this policy in the House of Commons (House of Commons Reports (Canada) p.4093). Senator Pascal Poirier had expounded it in the Senate as early as 1907 (Feb. 20), and Captain Joseph Bernier had announced it in the arctic itself in 1909 (Smith 1980: 18-20). Throughout the 1930s and '40s

corresponding boundaries of the AIGP are found on Canadian maps and in the legal description recited in the Cabinet Regulations.

26. S. 6 (B).
27. An exception was made for prospectors, who were permitted to hunt for food. A later exception was also made to protect rights of non-native trappers already living in the area: P.C. 6115, Sept. 20, 1945, s. 49 A.
28. S. 6 (B). As explained by Hunt (1976), no guidelines interpreted this requirement. In 1929 the Minister took over direct control of the issue of authorizations "to enter any native preserve". Again there was a condition that the entry be for a "purpose not opposed to the interests of the natives". P.C. 807 May 15, s. 41.
29. The Canadian government position was communicated by the British Ambassador by formal diplomatic note:

It is the established policy of the Government of Canada, as set forth in an Order in Council of July 19, 1926, and subsequent Orders, to protect the Arctic areas as hunting and trapping preserves for the sole use of the aboriginal population of the Northwest Territories. (Diplomatic Note (British) of Nov. 5, 1930).
30. The Norwegians specified this in their note of August 8th, 1930:

At the same time, my Government is anxious to emphasize that their recognisance of the sovereignty of His Britannic Majesty over these islands is in no way based on any sanction whatever of what is named The Sector Principle.
31. Norway stated:

The Norwegian Government has noted that it is a leading principle in the policy of the Canadian Government to preserve the Arctic regions for the sole use of the aboriginal populations of the Northwest Territories, in order to prevent their being in want as a consequence of the exploitation of the wild life by white hunters and trappers and that they have drawn up more definite regulations to this end by means of several Orders in Council. (Diplomatic Note (Norwegian) of Nov. 5, 1930).
32. Dominion of Canada Treaty Series, 1930, No. 17. For further discussion see Cumming and Aalto 1974.
33. It was, for example, a long-standing British practice in justifying the declaration of "protectorates". For example, in reference to New Guinea the British Colonial Office was advised by its Law Officers that

... one of the reasons, if not the principal reason, which induced Her Majesty to assume a Protectorate in New Guinea has been the desire to protect the Natives in the enjoyment of their lands, and to protect their

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

- persons and property from outrage at the hands of unprincipled white men. (Law Officers to Colonial Office, Dec. 11, 1884, quoted Lester 1982: 851).
34. Anglo-Norwegian Fisheries Case (1951) I.C.L. Rep. 116, at 142. The argument is elaborated by Van der Zwaag and Pharand (1983), basing themselves on the North Atlantic Coast Fisheries Case, the Gulf of Fonseca Case, and the Grisdabarna Case. At the time of writing, Dr. Pharand was going to press with a further work (in cooperation with Leonard Legault) expanding on this subject: Pharand and Legault 1984.
35. Van der Zwaag and Pharand (1983) quote the following passage as being contrary to their view:  
The mere fact that the coastal State advances the claim that specified waters should be recognized as its property does not in itself oblige other States to accept that claim ... Such claims can only be borne out by evidence of international acquiescence; as a general rule, prolonged usage will afford the necessary proof.  
This quote from Gidel appears in a Memorandum by the Secretariat of the United Nations on Historic Bays (Preparatory Document No. 1), U.N. Doc. A/Conf. 13/1 at p. 29 (Sept. 30, 1957).
36. R.S.C. 1970, 1st Supplement c.2.
37. It is exceedingly rare for Canadian statutes to carry a Preamble. In this case, however, it is clear that Canada foresaw possible challenges, and took the unusual precaution of building in a clause specifically alluding to an assortment of vital interests:  
Parliament at the same time recognizes and is determined to fulfill its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian Arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Eskimo and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic. (Emphasis added).

After the rejection of this argument by the U.S.A., Canada persisted in its reliance on the doctrine of vital interests: Strands of the doctrine appeared in the Canadian reply to the US Government's protest: Canada reserves to itself the same right as the United States has asserted to determine for itself how best to protect its vital interests, including in particular its national security. ... In discussions between Canada and the United States from time to time over the last ten years, Canada has made clear its serious concern over

the unresolved questions of the breadth of the territorial sea and the rights of coastal states to assert limited forms of jurisdictions beyond the territorial sea for the purpose of protecting vital interests. ... The proposed anti-pollution legislation is based on the overriding right of self-defence of coastal states to protect themselves against grave threats to their environment. (Van der Zwaag and Pharand 1983: 77, quoting from 9 Int'l Legal Materials 607 at 608-610).

This second attempt by Canada to invoke the "doctrine" still did not change the US position.

38. Memorandum Opinion of the Secretary of the Interior re Claims of Natives of Hydaburg, Klawok and Kake, Alaska (July 27, 1945).
39. 59 E.D. p. 462, 464. See also 1 Op. Attorney General 465 (1821).
40. Damon v. Hawaii, 194 U.S. 154 (1904) at 157-158. See also Carter v. Hawaii, 200 U.S. 255 (1906) at 256-257.
41. Let him go where he will, an Englishman carries as much of the English law and liberty with him as the nature of things will bear.  
Richard West, Opinion to the Board of Trade, 1720, quoted Lester 1982: 942.
42. See note 10.
43. It may be stated as iron-clad propositions of law, therefore, that the aboriginal inhabitants of a settled colony become subjects of the Crown. That they have the same rights as other subjects. (Lester 1982: 942).
44. (1977) Ch. 106.
45. Any minerals under the land belonged to the Government which can do what it pleases with them. The surface owners had not planted the minerals nor were they responsible for them, therefore they belonged to the Crown. (Address of Sir Murchison Fletcher, High Commissioner, to the Banabans, July 29, 1931, quoted (1977) Ch. 106 at 177.)
46. Referred to (1977) Ch. 106 at 132.
47. (1977) Ch. 106 at 177.
48. Canada Treaty Series 1976 No. 24.
49. The Declaration is appended to the Instrument of Ratification. See Treaty Series 1976 No. 24 p. 10.
50. "A thing which no-one may own": standard legal expression for the high seas (Gidel 1934: 214).
51. This applied, for example, to "contracts" between the natives and the Dutch such as those which the Island of Palmas Case gave little weight to:  
As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the inter-

'FOLK LAW' AS EVIDENCE OF HISTORIC TITLE  
Marc Denhez

---

national law sense, treaties or conventions capable of creating rights and obligations such as may in international law, arise out of treaties. ((1928) R.I.A.A. 831 at 858.)

If international dealings had such little weight, local legal systems were likely to be totally ignored.

52. Western Sahara, Order of Jan. 3, (1975) I.C.J. Rep. 3.
53. 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 ... Such "cessions" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius. (1975) I.C.J. Rep. 39.
54. Mr. Bayona-Ba-Meya (for the inhabitants) goes on to dismiss the materialistic concept of terra nullius, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr. Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or "mother nature", and the man who was born therefor, remains attached thereto, and must one day return further to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a condemnation of the modern concept ... which regards terra nullius territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward and whose political organization is not conceived according to Western norms ... In short, the concept of terra nullius, employed in all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned ... (Judge Ammoun (1975) I.C.J. Rep. 85-86).
55. Per Jessel M.R. in Hammerton v. Honey (1876) 24. W.R. 603.
56. Hammerton v. Honey, above note 55, at 604.
57. Corpus Juris Secundum, Vol. 10A p. 536ff.
58. The nature of this exercise is for the various parties to agree on a definition of their respective rights in certain key areas. Neither side is abolishing its rights; it is clarifying them, in an area which currently suffers from a lack of clarity. (Inuit Tapirisat 1980: 9).
59. That commitment was stated to the House of Commons by the

then Parliamentary Secretary to the Minister of Indian Affairs and Northern Development:

The Minister of Indian and Northern Affairs and his officials are now negotiating a variety of claims made by groups which represent the native people of Canada. Several of these claims concern the control of the territories now governed and regulated under the Arctic Waters Pollution Prevention Act. For instance, the Inuit have always based the whole of their society and economy on the harvesting of wildlife resources which depend directly and indirectly on the Arctic Waters, and any regulation concerning these resources must therefore be considered relevant to the final legal settlement of the claims presented by the Inuit to the government. M. Bernard Loiselle, House of Commons Reports (Canada), July 11, 1980.

60. This practice was approved, for certain circumstances, in the Anglo-Norwegian Fisheries Case (1951) I.C.J. 116.
61. The fact that the US Government has already accorded a tacit acknowledgement to Inuit lex loci under the Agreement on the Conservation of Polar Bears, as explained earlier, may have some bearing on this; but the amount of influence is hardly certain.
62. In the past a country might disregard the lex loci of a minority (particularly an aboriginal group) on the ground that the group was under a kind of tutelage protectorate or paternalistic rule. This argument no longer carries much weight. A more common situation is that where the lex loci has been suppressed as part of a generalized legal reorganization, particularly in "revolutionary" states. That raises different problems which are beyond the scope of this paper.

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