THE ONLY LEGAL WAYS BY WHICH SOVEREIGNTY MAY BE TRANSFERRED IN INTERNATIONAL LAW

Any acquisition of Sovereignty must be in the clearest and most unequivocable terms (23)

There are two fundamental classes for acquisition of Sovereignty:

a) Inhabited land
b) Uninhabited land

a) INHABITED LAND

Sovereignty can be acquired by:

1. CESSION or the formal transfer of a territory (by a Treaty). Indigenous rights still remain in place. Aboriginals still retain ownership, giving up only those areas they want to give up by Treaty. (24)

2. CONQUEST or the military subjugation of a territory over which the 'ruler' clearly expresses the desire to assume Sovereignty on a permanent basis. Conquest would leave all laws in force (including those regulating land, at least until a new sovereign changed them.) War has to be officially declared. (25)

3. ANNEXATION or the assertion of Sovereignty over another political entity *without* military action or Treaty. (26)

Discovery and annexation allowed the colonising State to exclude all other European powers from the territory annexed and gave the Sovereign power sole right of acquiring the land from the inhabitants. Derivative root title was claimed by the Crown but the indigenous peoples did not lose everything by the annexation. Their rights were circumscribed insofar as they could only dispose of the land to the Crown. In effect, it gave the Crown exclusive pre-emptive right, that is the right to purchase from a willing vendor (27).

Aboriginal possessory right was clearly defined by in 1823 by Justice Marshall in the authoritative ruling:

> ... in no instance entirely disregarded; but were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will ... was denied by the original fundamental principle that discovery gave exclusive title to those who made it. (28)

Britain was fully aware of the peculiar illegality of its position in Australia . This is highlighted by the Treaty of Waitangi in New Zealand in the 1840s in which Britain gained title by 'cession',(the giving up of Maori title), then proclaimed title over the whole area by right of 'discovery', then annexed this colony to New South Wales. It is well to remember discovery does not create 'Aboriginal title' it actually confirms Aboriginal title, which already is existent and has its source: ' ... in the Law of Nations, now incorporated into the common law.' (29)

A weaker power does not surrender its independence, its right to self-government, by associating with a stronger power and taking its protection. Justice Chapman stated in 1847:

> Whatever may be the opinion of the jurists to the strength or weakness of the native title it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished ... otherwise than by free consent of the native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain and the Courts to assert, the Queen's exclusive right to extinguish it. It follows, from what has been said, that in solemnly guaranteeing the native title, the Treaty of Waitangi ... does not assert, either in doctrine or practice anything new or unsettled.

Justice Chapman also added that: 'the practice of extinguishing native title by fair purchase is certainly more than two centuries old'. (30)

In fact by 1700 the recognition of superior possessory right was imbued as a natural and inalienable right of indigenous inhabitants and such recognition was an established legal practice in British law. (31)

Five years before Cook received his first direct Admiralty Order to '... *take possession with consent...*' in Australia, the King of England had declared the rights of the Indians of Canada to the undisturbed use of their land.(32)

Thus Britain was well aware of the natural inherent rights of indigenous peoples to their land.

4. SUCCESSION or the mutually agreed transfer of sovereign title by legislative act, eg. Britain withdrawing constitutional ties from Australia.

5. SECESSION is when a new State is formed by separation of a territory from a State or by the union of two or more States or parts of States eg.under sections121-124 of the Australian Constitution, new States may be established.

International legal principle now acknowledges that:

'While secession from a lawful State is prohibited, if the national unity claimed and the territorial integrity invoked are merely legal fictions which cloak real colonial and alien domination, resulting from actual disregard of the principle of self-determination, not only secession, but even armed struggle are lawful means of liberation."(33)

In effect, where there is an enclave sovereign indigenous people, such people have as much right to decolonisation and self-determination as those countries which have already been decolonised but were considered a priority in decolonisation because their territories were separated 'by blue water'.

b) UNINHABITED LAND

1.SETTLEMENT or OCCUPATION were legally an original means of peacefully acquiring sovereignty over territory otherwise than by cession or succession. It was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* - land belonging to no-one- at the time of the act alleged to constitute 'occupation'. (34)

In effect, *terra nullius* meant a land that was not used by humans for purposes such as hunting, camping, living ceremony. It was desert, wasteland without human habitation, without human rights being exercised over it.

First discovery by a nation was considered adequate protocol for that nation to possess and defend the newly found land from other nations, provided that nation lawfully occupied it.

The difference in legal position between inhabited and uninhabited lands is clearly stated by Blackstone (1765) in his *Commentaries on the Laws of England*:

> ... if an uninhabited country be discovered and planted by English subjects, all the English laws are there immediately in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the kingdom remain ... (35)

By 1700 it had become settled British policy to acquire indigenous lands by formal cession.

The International Court of Justice advisory opinion in the *Western Sahara Case* confirmed this principle in 1975. Territories inhabited by tribes and peoples having a social and political organisation were not regarded as *terra nullius*. In the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original root title but through agreements concluded with local rulers. (36)

With the single exception of Australia all of England's ex-colonial countries have upheld the basic principle of recognition of the title of their indigenous people.(37)