

TITLE-DEEDS OF FOREIGN POWERS FOR LEGITIMIZATION OF COLONIAL BOUNDARIES IN AFRICA

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Introduction

Most African States if not all have a similar history regarding the evolution of their international boundaries,⁽¹⁾ the expedients invented by colonial diplomacy for African expansion,⁽²⁾ and the modes (the so-called title deeds or other documents) by which the colonial powers acquired territories in Africa. Though it is true that the question of modes of acquisition of territory is different from that of boundaries, the line of distinction between the two subjects is rather blurred in any legal study of boundaries in Africa. As Allott has correctly noted, "it is unfortunate that a general discussion of boundaries in international legal relations is often confused (often misleadingly) with discussions of modes of acquisition of territory"⁽³⁾.

The present boundaries in Africa represent, for the most part, the international boundaries which were established by the colonial powers. Such boundaries were based upon the legal modes for acquiring territory recognised by the law of nations at different times. Indeed any attempt to study the legal sources of boundaries in Africa must be based upon the

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- (1) B.A. El-Gaali, "The Historical Evolution of Boundaries in Africa". *The Arab Journal of Social Sciences*, Vol. 3. No. 1 (1988) pp. 108-24.
- (2) El-Gaali, "The Legal and Diplomatic Evolution of Sudan-Zaire Boundary". *The Arab Journal for the Humanities*, Vol. 7 No. 25 (1987) pp. 262-81.
- (3) A.N. Allott, "Boundaries and the law in Africa" (in) *African Boundary Problems*, ed. by C.G. Widstrand, Uppsala, 1969, p. 13.

treatment of the classic modes of acquisition of territory in international law. The point to be made is that the legal sources of boundaries on one hand and the acquisition of territory by colonial powers on the other, are so closely linked in the case of Africa as to make a study of the one almost impossible without special reference to the other.

The purpose of the present Article is to discuss and consider the colonial process for legitimization of their territorial acquisitions in Africa. Accordingly, the subject will be divided into four sections and conclusion. Section One is devoted for considering the search for title-deeds by colonial powers and in the subsequent three sections it is intended to consider classic modes of acquisition of territory in international law i.e. occupation, conquest and treaties of cessions, with special reference to their employment by colonial powers in Africa.

SECTION ONE

THE SEARCH FOR TITLE-DEEDS

During the different stages of the evolution of international boundaries in Africa, and particularly in the preliminary stages,⁽⁴⁾ the colonial powers were especially concerned with establishing a legitimate basis for their holding of territory in the African Continent. The Portuguese had been pioneers in devising titles to their acquisitions in Africa. In the fifteenth century, they appealed chiefly to religion, or rather to the superstition of the age, by virtue of the principle that land conquered by a Christian power from infidels became the property of the victors.⁽⁵⁾ This claim was rendered available by a grant obtained from the vatican, which at that time still claimed to be the master of the world by divine right.⁽⁶⁾ Thus, by a Bill of 1454, the Pope granted the King of Portugal the discoveries made and to be made on the west coast of Africa.⁽⁷⁾ By another Bill in 1492, the Pope opened the entire field of oceanic discoveries to Portugal, as well as to Spain; the latter, however, was to navigate only westward and not to intervene in the African monopoly of the Portuguese⁽⁸⁾.

In the course of time and as a result of the decline in the influence of the Pope upon the Catholic European States,⁽⁹⁾ and of the rise of the Protestant States, the justification for the acquisition of territory overseas was shifted to the right of discovery.⁽¹⁰⁾ Because most of the new world, including Africa, in

(4) In fact these are two stages. The first one may be described as that of the limited and nominal presence of some of the European powers. This can be traced back to the fifteenth century, when the European explorers and traders began to set up stations for the provisioning of their vessels and maintaining overseas routes to the New World and the Orient. The second stage is that of the territorial arrangements that were made in the African continent. It represents the first phase of the rearrangement of European interests in Africa-from scattered and vaguely defined footholds along the coast to carefully defined blocks of territory, comprising almost the whole vast of the continent.

(5) H. Murray, **The African Continent, a narrative of Discovery and Adventure**, London, 1853, p. 60.

(6) M.F.Lindley, **The Acquisition and Government of Backward Territory in International Law**, London, 1962, p. 124; see also J. Goebel, **The Struggle for the Falkland Islands**, New Haven, 1927, pp. 49-54.

(7) J. Westlake, **International Law, Part I, Peace**, Cambridge, 1910, p. 96; see also C.H.M. Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', 25 *British Year Book of International Law*, (1948), p. 311.

(8) E.J. Payne, "The Age of Discovery", **The Cambridge Modern History** Vol. 1. (1943), p. 23.

(9) Even Spain and Portugal, the beneficiaries, did not regard the Pope's authority as final, for in 1494 they ignored his ruling and moved the line which had already been marked by the Pope 270 leagues to the west; see Westlake, *op. cit.*, p. 97.

(10) England, France and Holland denied that the Pope had the right to make such grants. =

the sixteenth century was regarded as a **res nullius**, the emphasis was placed upon the mere fact of discovery as a root of legal title.⁽¹¹⁾ Under this doctrine, many claims were made. For example: Spain used the right of discovery to exclude the European nations, except Portugal, from the New World,⁽¹²⁾ and the English based their claim to North America upon the discoveries of Henry Cabot.⁽¹³⁾ Since the claims based upon discoveries were extravagant and it was very difficult to fulfil them, this sort of title came to be considered as inadequate.⁽¹⁴⁾ In the words of Chief Justice Marshall:

The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new world, by bestowing on them civilisation and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the Law by which the right of acquisition which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the Government by whose subjects or by whose authority it was made against all other European Governments, which title might be consummated by possession.⁽¹⁵⁾

Such title, though for shortness, it might be spoken of as one by discovery, was always understood to be one by discovery and occupation; and occupation, with the consequent acquisition of dominion, could in the nature of things be only the act of a state.⁽¹⁶⁾ Eventually throughout the eighteenth and nineteenth centuries, the colonial powers sought to restrict the claims based upon discoveries.⁽¹⁷⁾ The result was to shift the emphasis to actual physical occupation or possession.⁽¹⁸⁾

= According to Westlake, "It was superfluous to remark that as the protestant state arose such papal grants could not be pleaded against them", see Westlake, *op. cit.*, p. 97.

(11) N. Hill, **Claims to Territory in International Law and Relations**, Oxford, 1945, p. 146; see also L. Oppenheim, **International Law**, Vol. 1, 8th ed. by H. Lautherpacht, London, 1955, pp. 558-59.

(12) Lindley, *op.cit.*, p. 130.

(13) *Ibid.*

(14) Hill, *op. cit.*, p. 146; see also I. Brownlie, **Principles of Public International Law**, 2nd ed., Oxford, 1973, p. 149.

(15) **Johnson and others v. M'Intosh** (1823), 8 Wheaton, p. 573.

(16) Westlake, *op.cit.*, p. 101.

(17) F. A. Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law", 29, *American Journal of International Law*, (1935). pp. 452-57.

(18) Westlake, "Territorial Sovereignty, especially with relation to Uncivilized Regions", (in) **The Collected Papers of John Westlake on Public International Law**, ed. by L. Oppenheim, Cambridge, 1914, pp. 163-65.

Because of the ambitions, philosophy, and view of international legal relations, of the colonial powers in the nineteenth century, the European powers were anxious to support their **de facto** claims to territory, deriving from discovery, conquest and occupation, by some kind of **de jure** title based on documents.⁽¹⁹⁾ For the first few centuries this was not very pronounced; but in the nineteenth century the demand for a documentary basis for colonial title led to the conclusion of treaties of protection or cession by the European powers with local African rulers.⁽²⁰⁾ In the last quarter of the nineteenth century, this demand led to severe competition between different powers to make treaties with rulers of the African communities over which they had territorial ambitions. This is well shown in the case of the Cameroons. In 1884, Bismarck sent Dr. G. Nachtigal to cruise down the western coast of Africa on a mysterious mission. To Britain, he announced that Nachtigal was to secure information regarding German commerce; to Nachtigal, he gave secret instructions, drafted by the "Royal Merchant" to hoist the German flag in Angra Peguena and other places. Nachtigal arrived at Popo, on the Gulf of Guinea, on 2 July, 1884, and hastily made a treaty with the local native King and hoisted the flag of the Kaiser on 5 July, for the first time in Africa. This gave Germany what later became known as Togoland. In the Cameroons region, German merchants had already made treaties with some of the native chiefs, anticipating Nachtigal's arrival. When he appeared on 11 July, he hastily concluded a treaty with the chief of the tribe and hoisted the German flag. On the other hand, Britain decided to place the region of the Cameroon under British protection at the end of 1883. When the English Consul reached the Cameroons to declare the British protectorate, he found that treaties had been completed with the local chiefs by the German Consul, whereby the country had been placed under the protection of Germany. "The too late Consul", he was later called in England. There was in this, as the German Ambassador subsequently remarked, something like a race between the representatives of the two countries. The British Foreign Minister complained of the way in which he had been misled by the German authorities in regard to the mission of Dr. Nachtigal, but the German title under the treaties so secured was not disputed.⁽²¹⁾

The five traditional and generally recognised modes of acquiring territorial sovereignty are: occupation, annexation (conquest), accretion,

(19) Hill, **op. cit.**, pp. 1-16; see also D. Whittlesey, **The Earth and the State**, New York, 1944, 9th ed., pp. 335-41.

(20) R. A. Oliver, **Sir Harry Johnston and the Scramble for Africa**, London, 1957, pp. 159-61; see also S. Touval, 'Treaties, Borders, and the Partition of Africa', 7, *Journal of African History*, (1966), pp. 279-92.

(21) See Keltie, **op. cit.**, Chapter XIII, State Papers, Vol. 76, p. 755, Lindley, *op. cit.*, p. 35.

(22) W.E. Hall, **A Treatise on International Law**, 8th ed., (ed. by Higgins), Oxford, 1924, section 31 Oppenheim while basically adopting this classification, substitutes the term "subjugation" for "conquest"; see Oppenheim, **op. cit.**, pp. 566-67; see also J.L. Brierly, **The Law of Nations**, 6th ed., (ed.) by H. Waldock, pp. 163-73.

prescription, and cession.⁽²²⁾ The modern authorities on international law, basing themselves upon the decisions of international tribunals, have emphasised one more mode for the acquisition of territory: consolidation, or historic right.⁽²³⁾ The most important challenge to the traditional classification arises from the fact that the tribunals have declined to endorse the terms and classification traditionally employed by the writers.⁽²⁴⁾ Instead, the recent decisions of international tribunals have turned much more on evidentiary matters than on characterisation of the relevant facts.⁽²⁵⁾ As for Africa, it is worthwhile to quote from Sir E. Hertslet, **The Map of Africa by Treaty**. According to him, the object of his book.

is to show how, by treaty, conquest, or cession, or under the name of a protectorate, European powers have succeeded, at different times, in obtaining a footing in various parts of the african continent, and how those occupations have been greatly extended during the last few years, in other words, to enable all those who are interested in the development of Africa to examine for themselves the Title Deeds by which each foreign power maintains its right to the possessions which it holds, or to territory which it occupies, or claims influence over, in that part of the world.⁽²⁶⁾

Hertslet sought to collect what he considered as the "title-deeds" of European territorial acquisition in the African continent, "by which he meant the treaties, agreements and other public inter-state arrangements assigning territory to one or other power and defining the boundaries of the territory so acquired."⁽²⁷⁾

(23) See D.H.N. Johnson, "Consolidation as a root of title in international law", *Cabridge Law Journal*, Vol. 12 (1955), pp. 215-15; G. Schwarzenberger, **International Law as Applied by International Courts and Tribunals**, Vol. 1, London 1957, pp. 289-9 D.P. O'Connell, **International Law**, 2nd ed., Vol. 1, London, 1970, pp. 405-07; and Schwarzenberger, "Title to Territory: Response to a Challenge", 51, *American Journal of Intl. Law* (1957), p. 311; Y.Z. I. Brownlie, **Principles of Public International Law**, 2nd ed. Oxford, 1972, p. 168.

(24) Johnson, **op. cit.**, p. 215.

(25) D.P.O' Connel, **Internatlnal Law for students**, London, 1971, p. 183.

(26) E. Hertslet, **The Map of Africa by Treaty**, 3rd ed., London 1909, p. vi.

(27) A.N.Allot, 'Boundaries in Africa: A Legal and Historical Survey' a paper prepared for the United Nations Regional Symposium in International Law for Africa, Accra, Ghana, p. 1.

SECTION TWO

OCCUPATION

Occupation means the "fact of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state."⁽²⁸⁾ Thus, it is described as an original, as distinguished from a derivative, method of acquiring territory.⁽²⁹⁾ On the part of the appropriating State, however, there are two essential elements. The first is that there should be an intention to act as a sovereign, and it must be a permanent one.⁽³⁰⁾ The second element concerns the exercise of sovereignty. According to Waldock, the display of sovereignty should be (a) peaceful, (b) actual, (c) sufficient to confer a valid title to sovereignty, and (d) continuous.⁽³¹⁾ What precisely is involved in continuity of display of sovereignty varies from place to place and from time to time.

The point which must be emphasised is that the territory thus appropriated must be, in law, a **terra nullius**, i.e. it must not be under the sovereignty of any other State. As far as the African territories are concerned, what constitutes a State is an important question. There seem to be three views on the subject. The first view - held by Victoria, Las Casas, and Blackstone, among others - is to regard the tribal communities as possessing a title to the sovereignty over the territory they inhabit.⁽³²⁾ The second view, which was held by Vattel and de Martens, admitted such a title in the natives, but only with restrictions or under conditions.⁽³³⁾ The last view, held by Westlake and Hall, does not consider that the natives possessed a right of such a nature which amounted to a bar to any assertion of sovereignty over them.⁽³⁴⁾ Adopting the last view, which unfortunately is generally accepted by most of the modern writers, Jennings is of the opinion that territory acquired by occupation need not be uninhabited.⁽³⁵⁾ The practical result of this view was that most of the African territories could be claimed by the colonial powers as acquired by occupations in the nineteenth century. It is important to note here that, when it comes to the conclusion of

(28) Oppenheim, *op. cit.*, p. 555; see also Brierly, *op. cit.*, p.163.

(29) G.H. Hackworth *Digest of International Law*, Vol. 1, Washington, 1940, p.401.

(30) *Supra*, Note No. 29; see also Brierly, *op. cit.*, pp. 163-4 (footnote).

(31) H. Waldock, 'Disputed Sovereignty in the Falkland Island Dependencies', 25 *British Year Book of International Law*. (1948), p. 335.

(32) Lindley, *op. cit.*, pp. 12-6.

(33) *Ibid.*, p. 17.

(34) *Ibid.*, pp. 18-19.

(35) R.Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963, p. 20.

treaties with some African communities, the same writers, among them Hall, found no difficulty in treating them as having the authority and the sovereignty to cede their territories to the colonial powers.⁽³⁶⁾ It may be of interest to ask how would it be possible to reconcile between the two situations. On the one hand the African communities have no sovereignty to assert on the face of the occupation and on the other they have sovereignty to give up their territories.

The doctrine of occupations as a method for acquiring territorial sovereignty has undergone a considerable development since the early part of the nineteenth century, and for two main reasons. On the one hand, the States involved in territorial expansion (especially in Africa), were faced by the problem of the protection of their settlements, as well as their future expansion. They had to answer the question: how far should a foothold, or small establishment, be regarded as the possession required to confirm a title to the whole? On the other hand, it became clear that the colonial States were, on the whole, more desirous of making their colonial undertakings conform to accepted law.⁽³⁷⁾ Thus, in connection with territorial problems in North-west America between Russia and the United States, the latter government took the position in 1834 that "dominion cannot be acquired but by a real occupation and possession", and an "intention to establish it is by no means sufficient".⁽³⁸⁾

At the time of the partition of the African Continent in the last quarter of the nineteenth century, new principles of law came to be recognised. They were essentially the contribution of the African Congress of Berlin, 1884-85, to the doctrine of occupation. Article 34 of the Act of Berlin provided:

Any power which shall henceforth take possession of territory upon the coasts of the African continent outside of its present possession, or which being hitherto without such possession, shall acquire them, as also any power which shall assume a protectorate there, shall accompany the respective act with a notification addressed to the other signatory powers of the present Act, in order to enable them, if need be, to make good any claims of their own.⁽³⁹⁾

Thus, in accordance with this Article, the old formalities attending discovery and annexation gave way to a definite notification to be made by the occupier of its intention to take over the territory.⁽⁴⁰⁾ The declaration was

(36) W.E. Hall, **The Foreign Powers and Jurisdiction of the British Crown.**, Oxford, 1894, Notes 95 and 101.

(37) C.G. Fenwick, **International Law**, 4th ed., New York, 1965, pp. 408-10.

(38) State Papers, Vol. 82, p. 264. Note from Mr. Blaine, Secretary of State, to Sir J. Pouncefote, 3 June 1890.

(39) **Ibide.**, Vol. 76, p.4.

(40) Fenwick, **op.cit.**, p. 410.

restricted to “new occupations”, and was confined to the coasts of Africa. The Article, however, failed to mention that the limits of the territory occupied should be included in the notification. As a result of the British delegates’ efforts regarding this point that the notification should always contain an approximate determination of the limits of the territory occupied or protected the Conference agreed to put on record that: “it remained understood that the notification was inseparable from certain determination of limits, and that the powers interested could always demand such supplementary information as might appear to them indispensable for the protection of their rights and interests.”⁽⁴¹⁾ Article 35 of the Act provided:

The Signatory powers of the present Act recognise the obligation to assure, in the territories occupied by them, upon the coasts of the African continent, the existence of an authority sufficient to cause acquired rights to be respected and, as the case may be, the liberty of commerce and of transit in the conditions agreed upon.⁽⁴²⁾

By this Article it became a condition that any power taking possession of a territory must establish a local form of government capable of maintaining order and security. The importance of this provision emerges from the fact that it confirmed the doctrine of effective occupation. It was intended that Article 35 should not include any reference to protectorates, as is clear from the text. The result was that, while Article 34 requires a notification in connection with any protectorate, as well as in relation to any actual “taking of possession”, the requirement of the establishment of sufficient authority did not include protectorates, as is clear from the provisions of Article 35.⁽⁴³⁾ Bearing in mind that the omission of the word “protectorate” was originally suggested by the British delegate in the Conference, Westlake at first considered the Conference wise because it had excluded protectorates from the requirement of effective occupation.⁽⁴⁴⁾ At another stage, particularly when the true nature of colonial protectorates had become apparent, the same author found it possible to say “there can be no doubt that the principle (of effective occupation) applies equally to colonial protectorates.”⁽⁴⁵⁾

It remains to be seen to what extent these Articles were carried out by the parties concerned. The problem of implementing them may be illustrated by the controversy between Britain and Portugal in 1887 regarding the territory claimed by Portugal in Central Africa, between her possessions Angola and Mozambique, namely Matabeleland. As a result of the

(41) Westlake, *op. cit.*, p. 108.

(42) State Papers, Vol. 76, p. 4.

(43) Lindley, *op.cit.*, p. 148.

(44) Westlake, *International Law*, Part I. Cambridge, 1910. pp. 122-25.

(45) Westlake, ‘Territorial Sovereignty, Especially with Relation to Uncivilized Regions, (in) *The Collected Papers of John Westlake on Public International Law*, ed. by L. Oppenheim, Cambridge, 1914, pp. 184-85.

publication of an official Portuguese map claiming that region as within the Portuguese sphere, the British authorities protested officially to Portugal. In the controversy, the Portuguese argued that the Berlin Conference had rejected the principle that the requirement of effective occupation applied throughout Africa, and maintained that "with respect to territories in the interior of Africa effective occupation was not a **sine qua non** of possession or political dominion or of demarcation of respective spheres of influence."⁽⁴⁶⁾ Lord Salisbury then clearly stated that no pretensions of Portugal to Matabeleland could be recognised, and that the Zambezi should be regarded as the natural northern limit of British South Africa. The British Prime Minister contended that it had been "admitted in principle by all the parties to the Act of Berlin that a claim of sovereignty in Africa can only be admitted by real occupation of the territory claimed." The Portuguese stressed the point that this applied only to the coast, but Lord Salisbury held firmly to his position.⁽⁴⁷⁾

(46) Lindley, *op. cit.*, pp. 213-14.

(47) J.S. Keltie, *The Partition of Africa*, London 1893, pp.363-65; see also *Foreign Office Handbook*, No. 95, p. 13.

SECTION THREE

CONQUEST

This mode of acquisition has been defined as “the taking of possession of territory of an enemy state by force”.⁽⁴⁸⁾ Conquest is considered as giving an inchoate title, made perfect by the complete subjugation of the defeated State⁽⁴⁹⁾ or by its silent acquiescence in the fact that the conquered land has passed into the control of its former enemy.⁽⁵⁰⁾ In practice, the annexation of the defeated State’s territory is usually carried out by some form of act of cession either in a peace treaty or treaty of cession, or even by a mere declaration.⁽⁵¹⁾ In theory, it is possible to distinguish between conquest in the sense of taking possession of the territory of an enemy through military force in time of war, on one hand,⁽⁵²⁾ and the case of cession following war, i.e. a form of cession under duress, on the other. In reality, the means used for acquiring such territory is in every instance force, and that is why title by conquest has of recent decades come to be used in the same sense as title by cession made under duress.⁽⁵³⁾

As for territorial acquisitions in Africa, the colonial powers, in some cases, relied heavily upon a unilateral proclamation to announce their acquisition, rather than on the making of peace treaties with the defeated communities. In other cases, however, they relied upon cessions under duress. As to the timing of the proclamation of acquisition of the defeated State’s territory, there is an interesting point which deserves special consideration. The generally accepted view is that the declaration of annexation must be made after the complete defeat of the enemy.⁽⁵⁴⁾ But international law is at certain times faced with the problem of the conditions under which a proclamation of annexation is made before the actual conquest is accomplished by the conquering power. For instance, in 1900 the British military command in the Orange Free State issued the following declaration:

The territories known as the Orange Free State are
annexed to, and form part of, Her Majesty’s dominions,

(48) Hackworth, *op. cit.*, p. 427; see also Brierly, *op. cit.*, p. 171.

(49) Oppenheim, *op. cit.*, p. 570.

(50) Fenwick, *op. cit.*, p. 424.

(51) Hill, *op. cit.*, p. 161.

(52) Oppenheim, *op. cit.*, p. 566.

(53) *Supra*, Note No. 50.

(54) Oppenheim, *op. cit.*, p. 566.

and that provisionally and until Her Majesty's pleasure is fully declared, the said territories will be administered by me with such powers as aforesaid..⁽⁵⁵⁾

Juridically, this proclamation was highly controversial. The nub of the controversy was that at the time of the declaration, the Boer forces had by no means been defeated.⁽⁵⁶⁾ Hackworth, adopting the generally recognised view of international law in the issue, says: "the position assumed by the British authorities was juridically invalid, because it was unsupported by conditions *de facto*."⁽⁵⁷⁾ To show the other view, it is appropriate to quote from a British authority. In the words of Westlake; "at the time of the annexation (of the Orange Free State) large tracts of the country were in British occupation, in which the ordinary functions of government had to be provided for", and as such, he concluded:

the proclamation, therefore, may well be justified, although it would have been unfair and improper to apply the penalties of rebellion to troops still holding out in the field or to civilians assisting them outside the British line..⁽⁵⁸⁾

It seems clear that Westlake steered a middle course between accepting the general view advocated by Hackworth on the one hand, and the position taken by the British authorities on the other hand. Perhaps in order to bring the law into line with the facts, this distinguished authority tended to justify British premature annexation on the grounds that the surrender of the remaining Boer bands was only a matter of time.⁽⁵⁹⁾

As far as the African territories are concerned, it may be said that, as in the case of occupation, many, if not most, colonial acquisitions were ultimately based on force. There is no room here to trace all the colonial military campaigns waged in earlier centuries against the African communities; a few examples must suffice. In South Africa, British armed forces occupied the Cape in 1795;⁽⁶⁰⁾ this occupation was followed by a series of wars against the Kaffirs, which ended in 1834 when most of their territories were annexed under the name of the province of Queen Adelaide;⁽⁶¹⁾ the British military invasion of the Orange Free State has already been mentioned. In North Africa, the French military invasions date back to 1830 by the conquest of Algeria. ⁽⁶²⁾ Egypt was occupied by the British armed

(55) Hertslet, *op. cit.*, p. 216.

(56) C. Lucas, *The Partition and Colonisation of Africa*, London, 1922, pp. 145-46.

(57) Hackworth, *op. cit.*, p. 428.

(58) Westlake, *op. cit.*, p. 64.

(59) *Ibide.*, pp. 65-6.

(60) Lucas, *op. cit.*, p. 141.

(61) *Supra*, Note No. 61.

(62) Keltie, *op. cit.*, pp. 94-6.

forces in 1882.⁽⁶³⁾ In West Africa, the French acquired most of their colonies by military force; one must mention the military campaigns of Captain Gallieri in 1880, Colonel Desbordes in 1881, and Colonel Frey in 1885-86.⁽⁶⁴⁾ British forces also drove the Ashantis back across the Pra, and Wolsey entered Kunasi in 1864;⁽⁶⁵⁾ the military occupation of Ashanti itself was not accomplished until 1896.⁽⁶⁶⁾ Moreover, it was not until 1903, and as a result of the armed operations under Captain Lugard, that the rulers of Kano, Katsina and Sokoto, accepted British suzerainty.⁽⁶⁷⁾

It is pertinent to mention that in its modern history, the Sudan has experienced two conquests. In 1820, Mohamed Ali, the Khedive (Viceroy) of the Sultan of Turkey in Egypt, invaded the Sudan and a Turkish-Egyptian rule was established for the next 60 years.⁽⁶⁸⁾ By 1885, a nationalist revolution defeated all the colonial armies and the Mahdist state was established in an independent Sudan.⁽⁶⁹⁾ Again, in 1898 the Sudan was invaded by colonial armies; this time it was an Anglo-Egyptian army under the command of Kitchener. The colonial rule continued until 1956, when the Sudan entered its independence.⁽⁷⁰⁾ With regard to the 1898 invasion of the Sudan by the Anglo-Egyptian military forces, a very interesting legal as well as political issue arose between Britain and France.⁽⁷¹⁾ Having failed to effect the evacuation of Egypt, which had been occupied by the British armies since 1882, the French had decided to make a thrust at the Upper Nile by threatening to interfere with the water supply.⁽⁷²⁾ One may recall that a week after the battle of Karari, six miles north of Omdurman, on 8 April 1898,⁽⁷³⁾ and the fall of Khartoum to Kitchener, news reached him that a French force had installed itself at Fashoda.⁽⁷⁴⁾ The object of the French was:

to remove all pretext for the occupation of Egypt by the English and to put an end to the dream of our dear friends, who wish to unite Egypt with the Cape and their posses-

(63) Lucas, *op. cit.*, pp. 131-33.

(64) Keltie, *op. cit.*, pp. 261-62.

(65) J. A. Hargreaves, **Prelude to the Partition of West Africa**, London, 1966, pp. 168-69.

(66) R. Oliver and A. Atmore, **Africa since 1800**, Cambridge, 1909, p. 118. In 1896, British protectorate was established over Ashanti; in 1901, it was annexed as a colony- cf. W. Tortoff, **Ashanti under the Prempehs**, 1965.

(67) A. Burns, *History of Nigeria*, 4th ed., London, 1948, pp. 187-90.

(68) See P.M. Holt, **A Modern history of Sudan**, 2nd ed., London 1963, pp. 35-49 and pp. 77-92.

(69) Holt, **The Mahdist State in the Sudan**, Oxford, 1958, pp. 81-105.

(70) P.M. Holt, **A Modern History of the Sudan**, 2nd ed., London 1963, p. 170.

(71) See P. T. Moon, **Imperialism and World Politics**, New York 1927, pp. 122-36.

(72) W.L. Langer, **The Diplomacy of Imperialism, 1890-1902**, 2nd ed., New York, 1951, p. 538.

(73) Holt., *op. cit.*, p. 106.

(74) Oliver and Atmore, *op. cit.*, p. 119.

sions in East Africa, with those of the Royal Niger Company.⁽⁷⁵⁾

Hanotaux, the French Foreign Minister as well, told Marchand as the latter left France: "Go to Fashoda. France is going to fire the pistol".⁽⁷⁶⁾ It is important to mention that, as far as France was concerned,

the Sudan and Abyssinia would provide the keystone of the edifice which bold-visioned architects of empire had been patiently constructing .. To complete the realisation of their dream, French imperialists needed only a few million square miles in the Eastern Sudan, the Nile Valley, and Abyssinia. These secured, the French empire would stretch from the Atlantic Ocean to the Red Sea, from the Mediterranean to the Gulf of Guinea.⁽⁷⁷⁾

A major war between Britain and France seemed imminent.⁽⁷⁸⁾ The British authorities, among other things, claimed that upon the destruction of the Khalifa's army at Karari all the territories which were subject to the Khalifa had passed by right of conquest to the British and the Egyptian government, and that the occupation which Major Marchand had purported to make was a violation of the rights of Great Britain and Egypt.⁽⁷⁹⁾

Among the principal arguments of the French authorities were that the country bordering the White Nile, though formerly under the Government of Egypt, had become a **res nullius** through its abandonment by the Egyptian Government, and that the French had a right to a position on the Nile as much as the Germans or the Belgians, and that they had therefore retained a right to occupy the banks of the Nile whenever they thought fit.⁽⁸⁰⁾ In reply to these points, the British authorities added that the Egyptian title to the banks of the Nile had certainly been rendered dormant by the military success of the Mahdi, but that those rights which had been alienated from Egypt had been entirely transferred to the conqueror. What title remained to Egypt, and what had been transferred to the Mahdi and the Khalifa, had been settled on the field of battle. But the controversy did not authorise a third party to claim the disputed land as derelict.⁽⁸¹⁾

(75) General Marign, "Letters de la Mission Marchand" (**Revue des deux Mondes**), September 15, 1931, pp. 214-831, pp.246-47. [The footnote is taken from Langer, op. cit., at p. 538].

(76) **Supra**, Note No. 75.

(77) Moon, op. cit., p. 139.

(78) Lucas, op. cit., pp. 100-03.

(79) Lindley, op. cit., p. 52.

(80) The Marquess of Salisbury to Sir E. Monson, 6 October 1898, **Egypt, No. 3 (1898)**, C. 9055; see also A. Omar, **The Sudan Question based on British Documents**, Cairo, 1952, p. 50.

(81) **Ibid.**

Diplomatic representations and negotiations followed and an agreement was arrived at in March 1899. That Agreement was embodied in a Joint Declaration, which took the form of an addition to Article IV of the Anglo-French Convention of the 14th June, 1898, regulating the boundaries between the British and French Colonies, possessions and spheres of influence to the west and east of the Niger.

It remains to point out that the doctrine of conquest as a root of territorial title has undergone a radical change since 1920. Here it must be remembered that in the era before the League of Nations, international law was a decentralized system. Each State considered itself completely free to decide as well as to act for itself.⁽⁸²⁾ Under such conditions, war was a legal method of furthering national interests, and the fact that the losing power was often forced to make a cession of territory in the so-called "peace treaty" did not affect the legality of the cessions.⁽⁸³⁾ The first genuine attempt to reject conquest as a legitimate basis for territorial acquisition was Article 10 of the Covenant of the League of Nations, which provides:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In cases of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.⁽⁸⁴⁾

In 1928, the contracting powers of the Pact of Paris-the Briand-Kellogg Pact-endorsed the invalidity of conquest as a legal root for territorial title.⁽⁸⁵⁾ In 1932, at the time of the invasion of Manchuria by Japan, it was proposed by the American Secretary of State that States should decline to recognise "any situation, treaty, or agreement which may be brought about contrary to the Covenant and obligations of the Pact of Paris".⁽⁸⁶⁾ His proposal denounced the acquisition of territory by force, whether or not accompanied by the formal acquiescence of the "former" sovereign.⁽⁸⁷⁾ The best demonstration for rejecting conquest as a means for territorial acquisition was given in the declaration of principles which was made by the American States in 1932. It provides:

(The contracting parties) will not recognise any territorial arrangement of this controversy (the hostilities between Bolivia and Paraguay ... which has not been obtained by peaceful means nor the validity of territorial acquisitions

(82) Brierly. *op cit.*, p. 397.

(83) Fenwick, *op. cit.*, p. 425.

(84) Covenant of the League of Nations, Article 10.

(85) Q. Wright, **Three Role of International Law in the Elimination of War**, Manchester, 1961, p. 27.

(86) For Secretary Stimson's Statement, see Sep. Supp. No. 101, p. 155.

(87) *Ibid.*

which may be obtained through occupation or conquest by force of arms.⁽⁸⁸⁾

The same position was adopted by the Conferences of Montevideo in 1933, Buenos Aires in 1936, and Lima in 1938.⁽⁸⁹⁾ In 1945, the Charter of the United Nations made it clear, as one of its principles, that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.⁽⁹⁰⁾

According to the International Law Commission of the United Nations, the principles regarding the threat or use of force laid down in the Charter of the United Nations are rules of general international law which are today of universal application.⁽⁹¹⁾ In accordance with Article 52 of the Vienna Convention on the Law of Treaties:

A treaty is valid if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.⁽⁹²⁾

The Conference, however, confined "force" to military use of force, and declined to accept the amendment of the developing countries that economic and political pressure should also be included.⁽⁹³⁾

(88) J.B. Scott, **The International Conference of American States, 1889-1928**, New York, 1931, p. 144.

(89) *Ibid.*, pp. 169-75.

(90) Article 2 (3) of the Charter of the United Nations, 1945.

(91) **United Nations Conference on the Law of Treaties**, Vienna, 26 March-24 May, 1968, p. 66.

(93) *Supra.*, Note No. 90.

SECTION FOUR

TREATIES OF CESSION

Cession as a term for a mode of acquisition of territory denotes that the sovereignty of the ceding State over the whole of the country, or part of it, is conveyed to the cessionary State by way of an agreement, concluded between the two parties.⁽⁹⁴⁾ Such treaty or agreement may be voluntary-as a result of sale, gift, or exchange - and it may be with or without compensation. For example, the legal basis of American title to Louisiana and Florida was a voluntary cession arranged by agreements in which the United States agreed to pay a sum of money to the former owners.⁽⁹⁵⁾ In 1890, Britain gave Heligoland to Germany in exchange for territory in East Africa,⁽⁹⁶⁾ and in 1850, Britain ceded a portion of Horse-Shoe Reef in Lake Erie to the United States as a free right, on condition that the latter would erect upon it a lighthouse for the benefit of the navigation of both countries.⁽⁹⁷⁾

In contradistinction to the peaceful sort of cession, which may be described as a voluntary transfer of territory, there is also cession of territory which results from the use of force or other means of pressure. This sort of cession may be described as extorted or involuntary cession, or cession under duress.⁽⁹⁸⁾ It must be admitted that in this kind of cession, as has already been remarked when we dealt with conquest - the line is blurred between conquest and involuntary cession as titles for acquisition. If a distinction is to be attempted, one may argue that in reality the acquisition is by way of conquest and the purported cession is no more than window-dressing.

Strictly speaking, treaties of cession should define the conditions under which the transfer is to take place. These conditions may include such matters as the status of the people of the territory under the sovereignty of the new owner or the creation of servitudes upon the territory ceded.⁽⁹⁹⁾ While some of the so called African treaties of cession conform to the requirement of definable boundaries, many of them do not. A specific example of the problem may be cited. By the Convention of 1826 between the Acting

(94) Briely, *op. cit.*, p. 171; see also Brownlie, *op. cit.*, p. 137.

(95) **Treaties, Conventions, International Acts, Protocols and agreements between the United States and other Powers, 1776-1909**, Malloy, pp. 508-21; see also Hill, *op. cit.*, p. 159.

(96) State Papers, Vol. 82, p. 35.

(97) Fenwick, *op. cit.*, p. 424.

(98) *Ibid.*

(99) Oppenheim, *op. cit.*, pp. 550-53.

Governor of Sierra Leone and the King of Barra, Gambia was ceded to Great Britain.⁽¹⁰⁰⁾ Article 2 of the Convention provided::

The said king of Barra .. cedes, transfers, and makes over to His Honour Kenneth MaCaulay .. on the part and behalf of His Majesty the King of the United Kingdom ... his heirs, and successors forever, the full, entire, free and unlimited right, title, sovereignty and possessions of the River Gambia, with all the branches, creeks, and waters of the same, as they have been held and possessed by Kings of Barra from time immemorial.

There was a controversy over the extent of the territory ceded by the above-mentioned Convention, and the treaty of 1827, which extended the territory ceded to embrace the territory of the Brekama.⁽¹⁰¹⁾ The report of the Law Officers of the Crown in 1887 says: "The territory ceded by the Conventions of 1826 and 1827 includes one mile inland from the high-water mark of the northern bank of the River Gambia as distinguished from its tributaries between Jocardo Creek and the Atlantic Ocean. Where the waters of the river flow in a creek, bay, or bend the ceded territory will follow line of the shore or bank of the creek, bay or bend a mile inland at every point, but where a tributary stream joins the Gambia, a line must be drawn from a point to point across the mouth of the tributary stream, and the ceded territory will extend one mile up to the tributary from that imaginary line. The map of 1826, though it cannot of course construe the Conventions, shows, in our opinion correctly their true construction."⁽¹⁰²⁾

As has already been shown, the last three decades of the nineteenth century witnessed a fierce race among the treaty-collectors of the different European powers.⁽¹⁰³⁾ It seems appropriate to try here to throw some light on the methods by which, and the circumstances in which, most of the treaties of cession were concluded with the African rulers. In this regard, one may usefully quote at length from an original account. Writing in 1892, Lugard Says: "Treaty-making occupies a large place in most modern works of African travel, and since there are different methods of treaty-making - I have known a valuable concession purchased by the present of an old pair of boots - I am anxious to explain to geographers the proper procedure followed by responsible and - accredited diplomats in that continent. My pet rifle is held aloft over my head and my interpreter stands forward and repeats my pledge. That I will be a friend of these people; that my men should not molest them; that the chief shall look on the British company 'as his big brother' whom he has to obey, but who have not come to eat up his hand ...

(100) Hertslet, op. cit., Vol. 1, p. 8.

(101) *Ibide.*, p. 10.

(102) **Papers Printed for the Use of Colonial Office, Vol. 4, (1884-1891), No. 102.**

(103) *Supra*, Note No. 20.

then he produces his primest sheep, or goat or ox. Part is eaten by him, part by me; the blood from my arm or chest has ceased to flow, and we rise as 'blood brothers'. Then I put down on paper what was **the pith of the contract** between us; **that is** a treaty as I consider it".⁽¹⁰⁴⁾

The agreements so concluded were almost uniform, and it must be stressed that reference was often made to tribal boundaries which, most probably, could have had no definite meaning in the minds of those who made such reference. However, in some cases, it seems that the treaty collectors forgot to mention the so-called boundaries of the territory ceded in the treaty of cession. One example of such treaties can be found in the treaty which was concluded by the Agent of the National African Company with the Sultan of Sokoto in 1885.⁽¹⁰⁵⁾ By Article 1, the Sultan agreed to::

Grant and transfer to the above people (The National African Company, later to become the Royal Niger Company) or others with whom they may arrange, my entire rights, to the country or both sides of the River Benue and rivers flowing into it throughout my dominions for such distance from its and their bank as they may desire.

Clearly, the dominions of the Sultan of Sokoto were not defined, and controversies were bound to arise. Thus, when Great Britain and France began the business of partitioning the Niger Sudan in 1890 - creating the north-western boundary of the present Nigeria and present Niger, a controversy arose in connection with the tribal limits.⁽¹⁰⁶⁾ Britain, depending on Article 1 of its agreement with the Sultan of Sokoto, maintained that Gando was a part of the Sokoto Empire, and that::

in consequence, the portions of Zaberma and Mauri-provinces which were allotted to Gando on the division of the Empire at the death of Danfodia - falling to the north of the Bay-Barrua line, would 'fall within our sphere'.⁽¹⁰⁷⁾

Sir George Goldie, the "founder of Nigeria", suggested that a limit of 100 miles in every direction from Sokoto should be obtained.⁽¹⁰⁸⁾ The Anglo-French negotiations ended in the conclusion of the Convention of June 14, 1898.⁽¹⁰⁹⁾ By Article III, the two parties agreed that the boundary was to follow the median line of the Dallul Mauri until it met the perimeter of a circle drawn

(104) F.D. Lugard, 'Treaty-Making in Africa,' *Geographical Journal*. Vol. 1,(1893), pp.53-4 (original emphasis).

(105) Hertslet, *op. cit.*, p. 122.

(106) See J.R. Prescott, 'The Evolution of Nigeria's Boundaries,' *Geographical Journal*. Vol. 2, (1959), p. 88.

(107) Foreign Office.

(108) *Ibid.*, p. 133.

(109) Hertslet, *Commercial Treaties*, Vol. 21, p. 374.

from the town of Sokoto as centre, with a radius of 160, 932 metres (100 miles) and then went on along the arc for a certain distance.

CONCLUSION

The colonial powers were very anxious to find means and ways in order to legitimize their colonial ambitions. In all cases such ambitions did not conform with equity and justice. Unfortunately, historians and even jurists contributed to the process. There is abundant evidence that the law appears to have followed the facts and to have developed doctrines which very conveniently suited the book of the expansionist powers. Thus by occupation, conquest and the so-called treaties of cession the European powers established foot-holds on the African continent long before the Berlin Conference.

After 1885, the colonial powers were faced with the task of extending their coastal holdings into the interior of the continent. In order to realise that object i.e. to expand their frontiers, or, as the first step in progression of a frontier; the colonial powers adopted a twofold formula. On the one hand, they expanded by means of what is called the policy of gradual or peaceful penetration; on the other, they relied upon the use of force. In practice, however, the so-called peaceful penetration was in many cases achieved by applying pressure and coercion; the line of distinction between the two methods of expansion was not so sharp as it appears in theory.

Lastly, it would seem that the question as to whether the means employed by the expansionist European powers fall precisely into one or other of the traditional legal modes for acquiring territorial sovereignty is now perhaps of less practical significance than it was when the colonial powers were seeking to satisfy their territorial ambitions in the last quarter of the 18th century. The most important challenge to the traditional classification arises from the fact that the tribunals have declined to endorse the terms and classification traditionally employed by the writers. In addition to the issues arising from division and choice of the modes, the whole concept of modes of acquisition is criticised as unsound in principle and makes the task of understanding the true position much more difficult as most of judgements and awards issued in connection with boundary disputed have proved the issue of territorial sovereignty, or title, is often complex, and involves the application of various principles of the law to the material facts. The outcome of this process cannot always be attributed to any single dominant rule or 'modes of acquisition'.