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ORIGINAL ARTICLE

HAGUE INTERNATIONAL TRIBUNALS: INTERNATIONAL COURT OF JUSTICE

Self-determination in territorial disputes before the International Court of Justice: From rhetoric to reality?

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Abstract

In its jurisprudence, the ICJ has developed a hierarchy of sources it will rely on to resolve territorial disputes: it prioritizes a boundary treaty between the state litigants, followed by agreements between the states' colonial predecessors, and finally state litigants' actions displaying their authority over the disputed territory. The Court's practice therefore leaves no room for local populations to contribute to boundary-making decisions. Given the status self-determination holds in international law today, and the repercussions possibly faced by such populations in certain territorial disputes, there is cause to consider that the desires of local populations should be considered in the Court's legal reasoning. This article first unpacks the reasons that self-determination is not brought up by state litigants on one hand, nor by the Court on the other hand. It notes that self-determination is only rhetorically addressed by states if buttressing their interests. It therefore attempts to reconcile self-determination with territorial disputes, suggesting how peoples' desires may be factored into the Court's approach.

Keywords: effective control; human rights; International Court of Justice; self-determination; territorial disputes

> '*It is for the people to determine the destiny of the territory and not the territory the destiny of the people.*'[1]

1. Introduction

Territorial disputes are commonplace before the International Court of Justice (ICJ, the Court). There are two types: 'frontier disputes' or 'delimitation disputes' centred on delimiting or clarifying the particularities of a line itself, and 'disputes as to attribution of territory' focusing on sovereignty over the areas divided by the line.[2] In its jurisprudence, the ICJ has developed a hierarchy between the sources it will rely on to resolve territorial disputes: it prioritizes a boundary treaty between the state litigants, followed by agreements between the states' colonial predecessors, and

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[1] *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 122 (Judge Dillard, Separate Opinion).

[2] *Frontier Dispute (Burkina Faso/Republic of Mali)*, Merits, Judgment of 22 December 1986, [1986] ICJ Rep. 554, at 563–4, para. 17.

finally state litigants' actions displaying their authority over the disputed territory. The Court's practice therefore leaves no room for local populations to contribute to boundary-making decisions.[3] Given the status self-determination holds in international law today, and the repercussions possibly faced by such populations in certain territorial disputes, there is cause to believe that the desires of local populations should be considered in the Court's legal reasoning.

Self-determination is the right of a people to decide their own fate in the international legal order.[4] The right of local populations to have their interests and desires taken into consideration during boundary-making litigation may indeed fall under the entitlements recognized in the scope of self-determination. Beyond certain entitlements recognized by the UN General Assembly[5] such as the right to territorial integrity[6] or the right to permanent sovereignty over natural resources,[7] scholars have argued that self-determination also encompasses participatory rights in decision-making. Jan Klabbers has argued that 'self-determination is best understood as a procedural right; that is, entities have a right to see their position taken into account whenever their futures are being decided'.[8] Similarly, Gerry Simpson observes that contrary to its original postcolonial aspirations towards 'territorial separation/expansion, historical revision, or nationalist/racist exceptionalism', self-determination has evolved 'towards a more ... participatory ideal' based on the simple need to protect the rights of unrepresented peoples.[9] The Court has also categorically defined self-determination as 'the need to pay regard to the freely expressed will of peoples',[10] and particularly emphasized this in *Western Sahara* where it spoke of the requirement to consult the inhabitants of a given territory.[11] Klabbers explains that the Court 'strongly suggested' in *Western Sahara* that paying regard to the peoples' will was, in fact, what self-determination is essentially about.[12] Modalities such as 'secession or integration or assimilation' were 'later distinguished or invented'.[13] Therefore, for the purposes of this article, self-determination encompasses the right for peoples' desires and allegiances to be factored into a state litigant's pleadings and the Court's decision-making in territorial disputes.

In this vein, the mainstream Anglo-Saxon scholarly approach to self-determination, distinguishing the modalities of external (aspiring towards outcomes that are external to the state, such as independence or irredentism) and internal self-determination (aspiring towards outcomes internal to the state, such as treatment as a full part of the polity or access to democratic socio-political rights),[14] is unfitting for the purposes of this article.[15] This is, in part, because

[3]M. Kohen and M. Tignino, 'Do People Have Rights in Boundaries' Delimitations?', in L. Boisson de Chazournes, C. Leb and M. Tignino (eds.), *International Law and Freshwater: The Multiple Challenges* (2013), 95, at 121.

[4]It is also referred to in French as 'le droit des peoples à disposer d'eux-mêmes'. See A. A. Yusuf, 'Le Droit des Peuples à Disposer D'eux-Mêmes: Ne Sert Qu'une Fois', in A. Pellet and H. Ascensio (eds.), *Dictionnaire des Idées Reçues en Droit International* (2017), 175–80.

[5]See C. Drew, 'The East Timor Story: International Law on Trial', (2001) 12 EJIL 651, at 663.

[6]UN General Assembly, Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES/1514(XV) (1960), para. 6.

[7]UN General Assembly, Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, UN Doc. A/RES/1803 (XVII) (1962); 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, Art. 1(2); 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, Art. 1(2); United Nations Council for Namibia: Decree on the Natural Resources of Namibia, 13 ILM 1513 (1974); Australia–Republic of Nauru: Settlement of the Case in the International Court ofJustice Concerning Certain Phosphates Lands in Nauru, 32 ILM 1471 (1993).

[8]J. Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law', (2006) 28 HRQ 186, at 189.

[9]G. J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age', (1996) 32 *Stanford Journal of International Law* 255, at 258.

[10]See *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 25, para. 59.

[11]Ibid. See also paras. 55, 162.

[12]See Klabbers, *supra* note 8, at 194.

[13]Ibid.

[14]See J. Waldron, 'Two Conceptions of Self-Determination', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 397.

[15]Rather, a Germanic approach to self-determination, making no such distinction, would seem more appropriate. See, for example, J. Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (2015).

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the procedural rights of local populations to have their views considered in a territorial boundary dispute before the Court may fall under both modalities, depending on what exactly the relevant people desire in each given case. Distinguishing such modalities therefore has no relevance for the arguments to be developed herein. Such peoples' desires fall simply under the more rudimentary understanding of self-determination explained above: the right to see their position taken into account in decision-making about their future.[16]

Local populations inhabiting disputed areas in territorial disputes may qualify as a 'people' enjoying the right to self-determination. The Court has explicitly connected self-determination with 'the requirement of consulting the *inhabitants of a given territory*',[17] which all populations in this article are. It has, however, also indicated that it is possible for a certain population to *not* constitute a 'people' entitled to self-determination.[18] While the term is an intentional 'enigma [that] remains unresolved',[19] certain scholars have argued that such a people share common traits – such as a sense of identity, heritage, ethnicity, language or religion.[20] The local populations referred to in this article – such as the Bakassians, the Salvadoreñans or the people of Western Sahara – all without exception share certain traits related to their identity beyond the territory which they inhabit. For the purposes of this article, it is therefore possible to consider them as peoples entitled to self-determination in the sense described above. Other terms such as 'local populations', 'populations', or 'inhabitants' will occasionally be interchangeably employed herein.[21]

Self-determination holds a significant status in international law today. Following post-Second World War secessionist movements, the process of decolonization, and a number of UN resolutions,[22]

[16]D. Thürer and T. Burri, 'Self-Determination', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008), para. 15 ('As such, it includes the right of the population of a territory freely to determine its future political status.').

[17]See *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 25, para. 59 (emphasis added): 'The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory.'

[18]Ibid.; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [2019] ICJ Rep. 95, at 134, para. 158.

[19]C. Tomuschat, 'Secession and Self-Determination', in M. Kohen (ed.), *Secession: International Law Perspectives* (2006), 23, at 25. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 123 ('. . . with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain'); M. Kohen (ed.), *Secession: International Law Perspectives* (2006), 9; G. Zyberi, 'The International Court of Justice and the Rights of Peoples and Minorities', in C. J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013), 327, at 327–8. The ICJ has, however, described the people of South West Africa/Namibia as 'a people' in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 56, para. 127 (the ICJ has noted that 'all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted').

[20]*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, at 613, para. 228 (Judge Cançado Trindade, Separate Opinion); M. Sterio, 'The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law?', (2009) 37 *Georgia Journal of International and Comparative Law* 267, at 277, 287; M. P. Scharf, 'Earned Sovereignty: Juridical Underpinnings', (2003) 31 *Denver Journal of International Law and Policy* 373, at 378–9.

[21]A similar approach is taken in practice: in Security Council Res. 1244 (1999), for instance, the people of Kosovo are interchangeably referred to as 'people', 'population', and 'inhabitants'. See UN Security Council, Res. 1244, UN Doc. S/RES/1244 (1999), at preamble para. 5, operative para. 10, Annex 2 para. 5. See also *Kosovo* case, ibid. (Judge Cançado Trindade, Separate Opinion).

[22]Some of these resolutions are as follows: UN General Assembly, Res. 1514 (XV), *supra* note 6; Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations, UN Doc. A/RES/25/2625 (1970); Res. 1755 (XVII), Question of Southern Rhodesia, UN Doc. A/RES/1755(XVII) (1962); Res. 2138 (XXI), Question of Southern Rhodesia, UN Doc. A/RES/2138 (1966); Res. 2151 (XXI), Question of Southern Rhodesia, UN Doc. A/RES/2151. See also Security Council resolutions: UN Security Council, Res. 183, UN Doc. S/RES/183 (1963); Res. 301, UN Doc. S/RES/301 (1971); Res. 377, UN Doc. S/RES/377 (1975); Res. 384, UN Doc. S/RES/384 (1975).

self-determination has taken the form of customary international law.[23] It is enshrined in Article 1(2) of the UN Charter[24] and in both international human rights covenants.[25] The Court itself has reaffirmed its importance on many occasions,[26] confirming that it has an *erga omnes* character[27] and is 'one of the essential principles of contemporary international law'.[28] Most importantly, the Court has affirmed that it has evolved into a legal norm as opposed to a mere political principle.[29]

While there is described to be a 'haziness' surrounding the normative status of the right to self-determination,[30] it has been considered by some, such as the International Law Commission, to have acquired the status of *jus cogens*.[31] This author takes a more cautious approach, noting that the Court refrained from making such a pronouncement in *Chagos*, much to the dismay of Judges Sebutinde, Cançado Trindade, and Robinson.[32] However, the possibility of self-determination holding *jus cogens* status indicates that, in theory, any territorial boundary treaty contrary to the will of the population concerned could be in conflict with *jus cogens*[33] thereby rendering it null and void, pursuant to Article 66(a) of the Vienna Convention on the Law of Treaties (VCLT).[34]

The repercussions faced by populations in territorial disputes may involve a change of nationality, identity or home, and a loss of family ties or property. For example, many Nigerian inhabitants of the Bakassi Peninsula transferred to Cameroon following the Court's ruling in *Land and Maritime Boundary between Cameroon and Nigeria* 'dreaded the unwelcome consequences of being dislocated from their comfortable connection to Nigeria',[35] experienced an identity crisis,

[23]The Court has clarified that this has been the case since 1960. See *Chagos* case, *supra* note 18, at 131–8, paras. 145–158, especially 152.

[24]It is also reiterated in Art. 55 UN Charter. Malcolm Shaw also notes that 'Chapters XI and XII of the UN Charter deal with non-self-governing and trust territories and may be seen as relevant within the context of the development and definition of the right to self-determination.' See M. Shaw, *International Law* (2008), 252.

[25]ICCPR, *supra* note 7, at Art. 1; ICESCR, *supra* note 7, at Art. 1.

[26]See *Namibia* case, *supra* note 19, at 31, para. 52; *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 31–4, paras. 54–60; *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory opinion of 22 July 2010, [2010] ICJ Rep. 403, at 436, para. 79; *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 171–2, para. 88; see *Chagos* case, *supra* note 18, at 131–5, paras. 146–161.

[27]See *Wall* case, ibid., at 171, para. 88; *East Timor* case, ibid., at 102, para. 29.

[28]See *East Timor* case, ibid.

[29]*Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 31–4, paras. 54–60; *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory opinion of 22 July 2010, [2010] ICJ Rep. 403, at 436, para. 79. Rosalyn Higgins, former President of the ICJ, has noted that the legal findings of the ICJ and successive General Assembly resolutions have facilitated the articulation and acceptance of self-determination as a justiciable right, and not solely as a mere political aspiration. See R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 113.

[30]M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', (2011) 11(4) *Human Rights Law Review* 609, at 612.

[31]D. Tladi, Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*), UN International Law Commission, Special Rapporteur on Jus Cogens, UN Doc. A/CN.4/727 (2019), at 48, paras. 108–115; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1998), 140.

[32]See *Chagos* case, *supra* note 18, at 260, para. 8 (Judges Cançado Trindade and Robinson, Joint Declaration); at 275–7, paras. 11–13 (Judge Sebutinde, Separate Opinion); at 316–22, paras. 70–77 (Judge Robinson, Separate Opinion); and at 193–6, paras. 120–128 (Judge Cançado Trindade, Separate Opinion).

[33]See Cassese, *supra* note 31, 190.

[34]D. Tladi, Third Report on Peremptory Norms of General International Law (*Jus Cogens*), UN International Law Commission, Special Rapporteur on Jus Cogens, UN Doc. A/CN.4/714, (2018), at 12, paras. 31, 32 ('[T]he nullity of treaties is the most obvious, and thus least contested, consequence of *jus cogens* status of a norm.') The procedure for invalidating treaties on account of conflict with *jus cogens* norms is discussed at length in paras. 45–54. See also *East Timor (Portugal v. Australia)*, Counter-Memorial of Australia of 1 June 1992, para. 223; see Cassese, *supra* note 31, at 193.

[35]E. Duruigbo, 'Should Nigeria Have Sought Revision of the Bakassi Decision by the International Court of Justice?', in E. Egede and M. Igiehon (eds.), *The Bakassi Dispute and the International Court of Justice: Continuing Challenges* (2019), 25.

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and lost many rights.[36] This population was entitled to participate in the determination of its future political status. Therefore, in the words of Rosalyn Higgins, '[w]hen a state delimits its territorial boundaries ... individuals are manifestly affected'.[37]

Despite the occasional repercussions of territorial disputes on local populations, and the prominence of self-determination on paper, it is seldom mentioned in territorial disputes before the Court where it may be of relevance. This article aims to explore the reasons for this. Indeed, while much literature has focused on the ICJ's general development of self-determination,[38] its absence in territorial disputes has been underexplored. This article proposes that there is room for peoples' desires to be delicately factored into the Court's established approach to territorial disputes, while allowing the Court to stay true to its character. It first presents the robust approach of the Court in territorial disputes, underlining the lack of consideration for peoples' right to determine their future (Section 2). It then unpacks the reasons that self-determination is not brought up by state litigants on one hand, nor by the Court on the other hand (Section 3). Finally, it attempts to reconcile self-determination with territorial disputes, suggesting how peoples' desires may be factored into the Court's approach (Section 4).

2. 'Fully booked': The Court's established approach in territorial disputes

The ICJ makes its decisions in territorial disputes on the grounds of the applicable title: the legal or factual proof of a state's willed sovereignty over a disputed territory or, in other words, the source of the state's right over a piece of land.[39] A thorough analysis of the Court's jurisprudence indicates that the Court has established a hierarchy of the various types of titles that state litigants may claim.[40]

The most preferred type of titles are generally legal titles. Legal titles emanate from legal acts – typically in the form of a document – that manifest a state's will to own the relevant territory.[41] There are many kinds of legal titles, but the most common and valued of them by the Court is a boundary treaty. This is because as it reflects state consent – a paramount principle as frequently reiterated by the Court[42] – to question the content of the treaty would be tantamount to

[36]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep. 303; C. Odinkalu, 'Stateless in Bakassi: How a Changed Border Left Inhabitants Adrift', *Open Society Justice Initiative*, 2 April 2012, available at www.justiceinitiative.org/voices/stateless-bakassi-how-changed-border-left-inhabitants-adrift; R. Nwapi and E. Akonye, 'Bakassi Peninsula Debacle: A Critical Analysis of the ICJ Verdict on the Issue, and Why Nigeria Lost Bakassi Peninsula to Cameroon', (2019) 6(11) *International Journal of Innovative Science, Engineering & Technology*; E. Akonye, 'Bakassi Peninsula Contestation: The Failure of the Green Tree Agreement to Resolve the Bakassi Issue, 2016–2018', (2019) 9(2) *International Journal of Scientific and Research Publications* 485.

[37]R. Higgins, 'Conceptual Thinking About the Individual in International Law', (1978) 4 *British Journal of International Studies* 1.

[38]Examples include G. Zyberi, 'Self-Determination Through the Lens of the International Court of Justice', (2009) 56 *Netherlands International Law Review* 429; G. Naldi, 'Self-Determination in Light of the International Court of Justice's Opinion in the Chagos Case', (2020) 7 *Groningen Journal of International Law* 2.

[39]See *Burkina Faso/Mali* case, *supra* note 2, at 563–4, para. 17.

[40]While many titles exist, this article presents a simplified account by focusing on those relevant to its scope.

[41]*Burkina Faso/Mali* case, *supra* note 2, at 564, 582, paras. 18, 54; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 350, at 388–9, para. 45.

[42]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 13 September 1990, [1990] ICJ Rep. 92, at 132–3, para. 94; see *East Timor* case, *supra* note 26, at 102, para. 29; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Jurisdiction, Judgment of 22 July 1952, [1952], ICJ Rep. 93, at 102–3; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 February 1995, [1995] ICJ Rep. 6, at 23, para. 43; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 182–3, para. 42; *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of 26 May 1959, [1959] ICJ Rep. 127, at 142; *Armed Activities on the Territory of the Congo*

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questioning and obstructing the parties' desires.[43] Further, the treaty's consequences will continue even if it ceases to exist,[44] it establishes borders creating rights binding upon third states (*erga omnes*)[45] and it is excluded from fundamental change of circumstances.[46] The Court has, therefore, often started and ended its legal analysis in territorial disputes with a treaty if one exists, discarding other arguments presented by states.[47]

The runner-up preferred title of the Court – still in the category of legal titles – is a colonial instrument applied through the principle of the intangibility of boundaries inherited from colonization (*uti possidetis juris*).[48] This principle holds that, for purposes of stability, administrative boundaries established by the state litigant's colonial predecessor and valid during the state's independence will be transformed into modern international frontiers.[49] For example, the common border between Burkina Faso and Niger – both former French colonies (part of French West Africa) gaining independence in 1960 – was delimited by the Court on the grounds of the line established by the Governor-General of French West Africa in 1927.[50]

Treaties, followed by colonial agreements applied through the *uti possidetis juris* principle, are the main legal titles prioritized by the Court.[51] But in the absence of an appropriate legal title in the dispute, the Court will look elsewhere to another (non-legal) title called effective control, or *effectivités*. *Effectivités* is the manifestation of a state's authority over a disputed territory, marking the state's intention to act as sovereign thereon.[52] Examples of such manifestations may include 'legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations'.[53] *Effectivités* therefore differs from legal titles (such as treaties or former colonial agreements) in that it is a demonstration of behaviour, as opposed to legal sources.[54] The Court has explicitly stated on many occasions that legal titles take precedence over *effectivités*,[55] and has applied legal titles over *effectivités* in a number of

(New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, [2002] ICJ Rep. 219, at 241, para. 57; *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Rep Series A No 2, at 16.

[43]B. T. Sumner, 'Territorial Disputes at the International Court of Justice', (2004) 53 *Duke Law Journal* 1779.

[44]*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, [1994] ICJ Rep. 6, at 37, para. 73.

[45]Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) (Eritrea *v.* Yemen), 9 October 1998, PCA Case No. 1996-04 (1998), para. 153.

[46]*Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, [1978] ICJ Rep. 3, at 35–6, para. 85. For more on the principle of stability in territorial disputes see G. Giraudeau, *Les Differends Territoriaux devant le Juge International: Entre Droit et Transaction* (2013), at 281–339.

[47]*Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, Judgment of 20 June 1959, [1959] ICJ Rep. 209, at 222, 230; *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] ICJ Rep. 6, at 27–9.

[48]See *El Salvador/Honduras* case, *supra* note 41, at 380, 567–8, 591–2, paras. 28, 351, 391–392.

[49]See *Burkina Faso/Mali* case, *supra* note 2, at 566, para. 23. For more on the application of this principle in the jurisprudence of the Court see: P. Couvreur, 'Notes sur le 'Droit' Volonial Français dans la Mise en Oeuvre du Principe de l'*Uti Possidetis Juris* par la Cour Internationale de Justice', in M. Kamga and M. Mbengue (eds.), *Liber Amicorum [en l'Honneur de] Raymond Ranjeva: L'Afrique et le Droit International; Variations sur l'Organisation Internationale* (2013), at 111–24.

[50]See *Burkina Faso/Mali* case, ibid., at 565–6, 568, paras. 12, 22, 24, 29.

[51]Certain other legal titles identified in doctrinal scholarship are not addressed in this article. For these see M. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (2018), 145.

[52]*Minquiers and Ecrehos (France/United Kingdom)*, Judgment of 17 November 1953, [1953] ICJ Rep. 47, at 71.

[53]*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment of 19 November 2012, [2012] ICJ Rep. 624, at 655, para. 80. These elements were thoroughly analysed by the Court in: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, [2007] ICJ Rep. 659, at 713–22, paras. 176–208.

[54]M. Kohen, 'Titles and *Effectivités* in Territorial Disputes', in Kohen and Hébié, *supra* note 51, at 145.

[55]See *El Salvador/Honduras*, *supra* note 41, at 398, 566, paras. 61, 347; see *Burkina Faso/Mali*, *supra* note 2, at 586–7, para. 63; see *Cameroon v. Nigeria*, *supra* note 36, at 353–4, para. 68; *Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, [2005] ICJ Rep. 90, at 148–9, para. 141; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44, at 78–9, paras. 73, 78.

decisions.[56] *Effectivités* has only been considered if a legal title was lacking,[57] if an existing legal title was ambiguous and did not provide a clear solution regarding the disputed territory,[58] or if the *effectivités* was subsequent to a valid legal title and indicative of acquisitive prescription.[59]

The Court's hierarchy of titles in territorial disputes therefore ranks treaties first and colonial agreements second – both examples of legal titles. If no legal title is available, it will turn subsidiarily to *effectivités*. Other titles claimed by states that do not fit into this clearly delineated framework have routinely been rejected. For instance, state litigants have made historical claims over a disputed territory, arguing that the latter historically belonged to the state for many generations.[60] For example, Libya had submitted to the Court in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* that, prior to French colonialism, part of the disputed territory (the 'Borderlands') was already inhabited by peoples under Libyan dominion.[61] Similarly, El Salvador argued in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* that the original settlers of the disputed areas were Salvadoreñans.[62] Neither argument was upheld. Expressed concerns for the consequences of the territorial disputes on the lives of state litigants' citizens and inhabitants have, too, been forsaken.[63] In brief, the Court's robust hierarchical system leaves no room for human considerations, including that of self-determination, in the delimitation of a line or the attribution of areas divided by the line.[64] The next section will examine the underlying reasons for this.

3. The unspoken word: Reasons for the absence of self-determination in territorial disputes

In certain territorial disputes, the consideration for peoples' desires would be appropriate, given the repercussions they occasionally face, and the status self-determination holds international law today. This section presents the reasons for the lack of consideration for peoples' aspirations in such contexts. It first examines the Court's reasons (Section 3.1), before turning to those of state litigants (Section 3.2).

3.1 The silence of the Court

There are two reasons for the Court's deliberate choice to not address self-determination in territorial disputes.

[56] See *Belgium/Netherlands*, *supra* note 47, at 229–30; *Temple of Preah Vihear*, *supra* note 47, at 27–9; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, [1999] ICJ Rep. 1045, at 1100, para. 88.

[57] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, [2002] ICJ Rep. 625, at 678, para. 127; *El Salvador/Honduras*, *supra* note 41, at 563, para. 341; *Libya/Chad*, *supra* note 44, at 38–40, para. 76; *Benin/Niger*, *supra* note 55, at 108–10, 127–8, paras. 25–27, 76–77, 82.

[58] See *El Salvador/Honduras*, *supra* note 41, at 558–9, para. 333; *Nicaragua v. Colombia*, *supra* note 53, at 649, para. 55.

[59] See *Cameroon v. Nigeria*, *supra* note 36, at 352–3, para. 67; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12, at 50–1, para. 121. In this judgment, Singapore did indeed acquire sovereignty over Pedra Branca/Pulau Batu Puteh through acquisitive prescription – Singapore's performance of acts displaying *effectivités* and Malaysia's failure to react (see para. 276).

[60] See *Temple of Preah Vihear*, *supra* note 47, at 15; *El Salvador/Honduras*, *supra* note 41, at 392–3, 504–6, paras. 50, 307; *Libya/Chad*, *supra* note 44, at 406–7, para. 75.

[61] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Memorial submitted by the Great Socialist People's Libyan Arab Jamahiriya, 26 August 1991, at 39, para. 3.36.

[62] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Memorial of the Republic of El Salvador, 1 June 1988, para. 7.16.

[63] El Salvador argued that 'the existence of even a few Salvadorian landowners in a disputed sector claimed by Honduras produces a strong argument of a human nature for not delimiting the boundary in such a way that that land becomes part of the Republic of Honduras,' but the Court '[could not] accept this contention'. See *El Salvador/Honduras*, *supra* note 41, at 419, para. 97.

[64] Some commentators have contended that self-determination by the people of the territory can be a supervening act prevailing over a state's territorial claim: J. Crawford, *The Creation of States in International Law* (2007), 639. This, however, would not be applicable in the context of territorial disputes before the Court due to the latter's firm hierarchy.

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The first reason why the Court makes no mention of self-determination in territorial disputes is because it runs counter to interests of stability. This was made clear in the 1986 *Frontier Dispute (Burkina Faso/Republic of Mali)* dispute, where the argument of self-determination was categorically discarded by the appointed Chamber in favour of a legal title in the interests of stability:

> At first sight this principle conflicts outright with another one, the right of people to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.[65]

The Court has emphasized the importance of the principle of the stability of boundaries in its jurisprudence.[66] It has clearly stated:

> Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.[67]

This rule is enshrined in Article 62(2)(a) of the VCLT, which proscribes the possibility of terminating or withdrawing from a treaty establishing a boundary on the grounds of a fundamental change of circumstances.[68] This clause is at the origin of the principle of the stability of boundaries, which aspires for boundaries to be as permanent as possible and therefore not be drawn on the basis of fluctuating circumstances – such as peoples' aspirations or identities – however fundamental.[69]

Concerns for stability in territorial disputes were documented as early as 1902 during negotiations between the Netherlands and Portugal which would precede their 1914 territorial dispute over the Island of Timor.[70] During negotiations, the Netherlands argued that the chieftains of Fialarang (in the middle of the Island of Timor) refused to pass under Portuguese sovereignty. Portugal, however, retorted that one should not allow oneself to be guided by humanitarian motives towards the peoples of the Island of Timor, for such tribes leave their native soil to set up elsewhere and have on several occasions left Dutch territory to establish themselves in

[65]See *Burkina Faso/Mali*, *supra* note 2, at 566–7, para. 25.

[66]See *Temple of Preah Vihear*, *supra* note 47, at 34 ('In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality'); *Libya/Chad*, *supra* note 44, at 37, paras. 72–73.

[67]See *Aegean Sea Continental Shelf*, *supra* note 46, at 35–6, para. 85. See also *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion of 21 November 1925, PCIJ Rep Series B No 12, at 20 ('It is, however, natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety be the establishment of a precise, complete and definitive frontier').

[68]1969 Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, Art. 62. See also 1978 Vienna Convention on Succession of States in respect of Treaties, 1946 UNTS 3, Art. 11 ('a succession of States does not as such affect a boundary established by a treaty').

[69]International Law Commission, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II, at 259, para. 11; Waldron, *supra* note 14, at 407 ('Many people believe that existing boundaries should be respected and maintained, no matter what the requirements of self-determination, simply because the costs of messing with them are so high.').

[70]*Affaire de l'île de Timor (Pays-Bas, Portugal)*, Award, XI RIAA 481 (1914), at 498; M. Aznar, 'The Human Factor in Territorial Disputes', in Kohen and Hébié, *supra* note 51, 291, at 322.

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Portuguese territory, and vice versa.[71] Portugal's position then is shared by the Court today: allowing for such a decision to be made upon the grounds of peoples' desires runs counter to the Court's desire to resolve a dispute for as long as possible. For this reason, such a consideration risks completely eroding stability.[72]

The second reason why the Court makes no mention of self-determination in territorial disputes is because state litigants do not often advance the argument as a supporting ground for sovereignty in their pleadings. This limits the Court's ability to do so *proprio motu*. Indeed, the Court is bound by the principle of *non ultra petita* ('not beyond the request'), which it has recognized in its own jurisprudence.[73] This principle means that the Court may not decide more than it has been asked to, and may not innovate outside of the parties' submissions.[74] It is therefore timely at this stage to explore why state litigants themselves do not consider arguments related to self-determination in their pleadings in relevant instances.

3.2 The silence of states

Self-determination of the inhabitants of a territory has very rarely been argued by state litigants in contentious cases before the Court.[75] In the 1986 *Frontier Dispute (Burkina Faso/Republic of Mali)* dispute cited above, Mali argued in its Memorial that there was room for a boundary established via *uti possidetis juris* to be modified on the grounds of self-determination,[76] while Burkina Faso refuted this.[77] The appointed Chamber acknowledged Mali's argument as depicted in the citation above, but ultimately sided with Burkina Faso in the interests of stability.[78] El Salvador also mentioned in the oral pleadings of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* that, 'There must be a connection between [the law applicable to the determination of land territory] and other related norms, of self-determination, and of basic human rights.'[79] Aside from these incidents, self-determination has more generally been raised by state litigants in two instances, neither of which were territorial disputes.

[71]Translation taken from *Jus Mundi*: www.jusmundi.com/fr/document/decision/en-boundaries-in-the-island-of-timor-the-netherlands-v-portugal-award-thursday-25th-june-1914. The original text reads 'les chefs du territoire de Fialarang, au milieu de l'île de Timor, se refusaient absolument à passer sous la souveraineté du Portugal', the latter replied 'qu'il ne fallait pas trop se "laisser guider par des préoccupations d'humanité envers les peuples de l'île de Timor; pour des cas Peu graves, ces tribus quittent leur sol natal pour s'établir ailleurs, et ils ont plusieurs fois quitté le territoire néerlandais pour s'établir dans le territoire portugais et inversement"'. See *Affaire de l'île de Timor*, ibid.

[72]As early as 1919, US Secretary of State, Robert Lansing, feared that 'fixity of national boundaries and of national allegiance, and political stability would disappear if this principle was uniformly applied'. See A. Cassese, 'Self Determination Revisited', in J. de Aréchaga and M. Rama-Montaldo, *El Derecho Internacional en un Mundo en Transformacion* (1994), 229, at 230.

[73]This principle has been applied by the Court in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, [2010] ICJ Rep. 14, at 72–3, para. 168; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep. 13 at 23–4, para. 19; see *Minquiers and Ecrehos*, *supra* note 52, at 52; *Barcelona Traction Light and Power Company Ltd. (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 34, para. 40.

[74]*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, Judgment of 27 November 1950, [1950] ICJ Rep. 395, at 402. See also *Oil Platforms*, *supra* note 42, at 221, para. 7 (Vice President Judge Ranjeva, Declaration); G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), 531; F. Rosenfeld, '*Iura Novit Curia* in International Law', in F. Ferrari (ed.), Iura Novit Curia *in International Arbitration* (2018), 425, at 453; H. Thirlway, *The International Court of Justice* (2016), 85–6.

[75]It has in advisory cases: *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 414, at 12; *Wall*, *supra* note 26; *Chagos*, *supra* note 18.

[76]*Frontier Dispute (Burkina Faso/Republic of Mali)*, Memorial of Mali, 3 October 1985, at 38 ('Le respect de la frontière laisse une place à la révision par accord des parties, voire par l'effet du principe de l'autodétermination.').

[77]*Frontier Dispute (Burkina Faso/Republic of Mali)*, Counter-Memorial of Burkina Faso, 3 October 1985, at 75.

[78]See *Burkina Faso/Mali*, *supra* note 2, at 566–7, para. 25.

[79]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Oral statements, Verbatim record 1991/33, 29 May 1991, at 52 (Keith Highet). See also Kohen and Tignino, *supra* note 3, at 98.

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The first occasion was in the *East Timor* case. Portugal argued that Australia, in negotiating and concluding the 1989 Treaty with Indonesia (which created a Zone of Co-operation in a maritime area between 'the Indonesian Province of East Timor and Northern Australia'), failed to respect Portugal's powers as the Administering Power of East Timor, and violated the East Timorese people's rights to self-determination.[80] Regrettably, the Court did not have the opportunity to go further on the merits due to a lack of jurisdiction.[81]

The second contentious dispute where a state litigant raised the matter of self-determination was in the 1963 *Northern Cameroons* case. The Northern Cameroons were one half of a territory under the British Mandate after the Second World War (the second half being Southern Cameroons), governed by a UN Trusteeship Agreement. In 1960, the UK organized a plebiscite to ascertain the wishes of its inhabitants, and the outcome was that the Northern Cameroons joined the newly independent Federation of Nigeria. The UN General Assembly therefore terminated the Trusteeship Agreement in 1961. The Republic of Cameroon, previously under French administration and a sovereign state and UN Member since 1960, challenged this outcome, arguing that the UK had poorly administered the plebiscites which 'altered the normal course of the consultation with the people'.[82] The Republic of Cameroon's concern was that the people of Northern Cameroons had not *freely* expressed their will, questioning whether their self-determination had been properly exercised.[83]

Aside from these two cases, neither of which were territorial disputes nor moved to the merits,[84] there has been no further record of state litigants bringing up concerns of self-determination of their inhabitants in territorial disputes – even in the most prompting of instances with palpable repercussions for inhabitants. In *Sovereignty over Certain Frontier Land* for instance, where the Court had to determine whether Belgium or the Netherlands had sovereignty over two amalgamated zones (referred to as plots nos. 91 and 92) in the enclaved communes of Baerle-Duc (Belgian) and Baarle-Nassau (Dutch) on the Belgo-Dutch frontier, the identity of the inhabitants of the two areas was not even mentioned as a consideration, and the dispute was predictably resolved on the grounds of a treaty.[85]

The main reason why state litigants do not raise such concerns in their pleadings is the prioritization of their territorial integrity. The principle of territorial integrity safeguards a state's territorial framework and represents the state's 'oneness' or 'wholeness'.[86] Enshrined in Article 2(4) of the UN Charter,[87] it is 'one of the key constituent principles of the overarching concept of the sovereignty of States'.[88] Territorial integrity has traditionally been understood to belong to an existing state

[80]See *East Timor*, *supra* note 26, at 98, para. 19.

[81]Ibid., at 102, para. 28. The Court, however, considered that Australia's behaviour could not be assessed without entering into the question why it was that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so – something that it could not do without Indonesia's consent.

[82]*Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, [1963] ICJ Rep. 15, at 24.

[83]T. Koivurova, 'The International Court of Justice and Peoples', (2007) 9(2) *International Community Law Review* 157, at 165.

[84]The Court, however, deemed the case inadmissible, as the Trusteeship Agreement in question had already been terminated by the UN General Assembly. *Northern Cameroons*, *supra* note 82, at 32, 38.

[85]See *Belgium/Netherlands*, *supra* note 47, at 209. This is likely because the dispute was prior to international practice linking self-determination with territorial integrity.

[86]S. Blay, 'Territorial Integrity and Political Independence', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), para. 1.

[87]'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, or in any other manner inconsistent with the Purposes of the United Nations'.

[88]M. Shaw, 'Self-Determination, *Uti Possidetis* and Boundary Disputes in Africa', in C. Cheng, *A New International Legal Order* (2016), 99, at 105.

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resisting peoples' claims for the right to self-determination.[89] The tension between territorial integrity and self-determination is therefore a synecdoche of the wider tension between sovereignty and human rights as, in the words of Professor Malcolm Shaw, 'The principles of domestic jurisdiction, non-intervention and territorial integrity would appear to pull in one direction, while the principles of self-determination and human rights may be seen as pulling in precisely the opposite way.'[90]

However, such an understanding of territorial integrity was recently challenged by the Court in *Chagos*, where it was clarified that 'the peoples … are entitled to exercise their right to self-determination in relation to the territory as a whole, the integrity of which must be respected by the administering Power'.[91] Territorial integrity as the peoples' right, under customary international law, is therefore a 'corollary of the right to self-determination'.[92] While this people-centric understanding of territorial integrity was met with understandable resistance by some states,[93] it may weaken the traditional understanding of territorial integrity as the existing state's entitlement in future litigation. Presently, however, self-determination has always been compromised by the traditional understanding of territorial integrity, the latter benefitting solely the state to a greater degree.

Indeed, a state litigant choosing to raise the matter of self-determination before the Court runs the risk of exposing the desires of its people that may be conflicting to its own.[94] Therefore, state litigants will naturally raise the argument of self-determination if the peoples' desires align to the state's, in order to bolster their interests.[95] In such instances, the argument of self-determination is raised as a rhetorical tool – a powerful 'discourse of public persuasion'.[96] Human rights are generally considered to be employed as such in international law, and this has also been observed in international litigation where state litigants have raised human rights arguments in their pleadings to powerfully buttress their principal claims.[97] Self-determination would be employed no differently, particularly as many scholarly works have noted the discrepancies between its promising rhetoric and its more sober and arbitrary practice.[98] Self-determination can therefore serve as part of a state litigant's litigation strategy, reinforcing other arguments more firmly anchored in the

[89]R. McCorquodale, J. Robinson and N. Peart, 'Territorial Integrity and Consent in the Chagos Advisory Opinion', (2020) 69(1) ICLQ 221.

[90]See Shaw, *supra* note 88, at 105.

[91]See *Chagos*, *supra* note 18, at 134, para. 160. Specifically, administering powers should respect the territorial integrity of non-self-governing territories.

[92]Ibid.

[93]*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United States of America, 28 February 2018, at 29–30, paras 4.47–4.50. See also McCorquodale, Robinson, and Peart, *supra* note 89, at 224.

[94]More generally, it could be perceived that the state is excessively compromising its own sovereignty in allowing its people to decide in its place.

[95]I. Brownlie, *Principles of Public International Law* (1966), 162.

[96]Many scholarly works have argued that the general notion of human rights is a powerful 'discourse of public persuasion'. This term is borrowed from such works. See C. Leuenberger, 'The Rhetoric of Maps: International Law as a Discursive Tool in Visual Arguments', (2013) 7(1) *The Law and Ethics of Human Rights* 73; T. Evans, 'International Human Rights Law as Power/Knowledge', (2005) 27(3) HRQ 1046; M. McLagan, 'Human Rights, Testimony, and Transnational Publicity', (2003) 2(1) *The Scholar and Feminist Online*, available at www.sfonline.barnard.edu/human-rights-testimony-and-transnational-publicity/; W. S. Hesford, 'Human Rights Rhetoric of Recognition', (2011) 41(3) *Rhetoric Society Quarterly* 282.

[97]For example: Germany, defending the LaGrand brothers, submitted the argument that Art. 36(1)(b) VCCR 'assumed the character of a human right' as well as conferring individual rights to them. *LaGrand (Germany v. United States of America)*, Memorial of the Federal Republic of Germany, 16 September 1999, para. 4.93. Mexico did the same; in these proceedings as well, Mexico argued that 'the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings'. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, [2004] ICJ Rep. 12, at 60–1, para. 124.

[98]J. Summers, 'The Rhetoric and Practice of Self-Determination: A Right of All Peoples or Political Institutions?', (2004) 73(3) *Nordic Journal of International Law* 325, at 327 ('The rhetoric of self-determination points to a right of peoples, but its practice suggests the hand of political institutions.'); H. Moris, 'Self-Determination: An Affirmative Right or Mere Rhetoric?', (1997) 4(1) *ILSA Journal of International & Comparative Law* 201; M. Gerstein, 'Abandon the Rhetoric of Self-Determination', (1994) 6 *Peace Review* 33.

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Court's practice in territorial disputes. As Rosalyn Higgins described, it is 'part of the armoury of rhetoric in what is essentially a dispute about territorial title'.[99]

4. From rhetoric to reality: Integrating self-determination in territorial disputes

It has been established that although self-determination enjoys prominence in international law, and although territorial disputes can bear significant ramifications for the peoples on the state litigants' territories, the desires of the latter play no role in territorial disputes before the ICJ. From the latter's perspective, this is because self-determination does not fit into the hierarchical title system that the Court has developed and consolidated in its jurisprudence (Section 2), goes against the principle of stability, and because states do not often raise such concerns in their pleadings (Section 3.1). As for states themselves, they do not bring up concerns of their peoples' self-determination in such disputes as it may run counter to their territorial integrity, and is therefore only rhetorically employed if buttressing their interests (Section 3.2).

Is there any way for self-determination to move from rhetoric to reality in territorial disputes? Self-determination is considered by some to enjoy *jus cogens* status and could therefore, in theory, nullify any territorial boundary treaty in conflict with it, pursuant to Article 66(a) VCLT, if a state raised this before the Court. However, given states' esteem for territorial integrity, this seems very unlikely. It is rendered even more unlikely by the fact that the Court's established approach to territorial disputes prioritizes such treaties – whether modern or colonial agreements – regardless of their content that may, in certain instances, conflict with peoples' desires.[100]

Thus, legal titles would not appear to be a way for self-determination to be factored into territorial disputes.[101] The subsequent title, however, yields such potential: in assessing the existence of a state's *effectivités* over a disputed territory, not only could the state's intention to govern a disputed territory be considered, but so could the desire of the people to be governed. This proposal may allow for an acknowledgment of peoples' desires in territorial disputes without upending the Court's firmly anchored approach precast through years of jurisprudence. This proposal is explored below.

4.1 Self-determination in the examination of effectivités

Let us recall that *effectivités* is where a state exercises or displays its authority over a territory and thereby its intention and will to act as sovereign.[102] It may display its authority through adopting or enforcing legislation or administrative measures (such as collecting taxes), building infrastructure or regulating economic activities.[103] For example, Malaysia adopted legislation regulating turtle egg fishing and established a bird reserve on the islands of Ligitan and Sipadan in *Sovereignty over Pulau Ligitan and Pulau Sipadan*.[104] Bahrain drilled artisan wells and navigational aids on the small island of Qit'at Jaradah in *Maritime Delimitation and Territorial Questions between Qatar*

[99]R. Higgins, 'International Trade Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law', (1991/3) 230 *Recueil de Cours*, at 174.

[100]See *Cameroon v. Nigeria*, *supra* note 36, at 303.

[101]It should be noted that the legal title approach was developed without self-determination being firmly before the Court.

[102]*Legal Status of Eastern Greenland*, Judgment of 5 April 1933, PCIJ Rep Series A/B No 53, at 45–6 ('A claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.').

[103]See *Nicaragua v. Colombia*, *supra* note 53, at 655, para. 80. These elements were thoroughly analysed by the Court in *Nicaragua v. Honduras*, *supra* note 53, at 713–22, paras. 176–208.

[104]See *Indonesia/Malaysia*, *supra* note 57, at 684, para. 143.

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and Bahrain.[105] In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Singapore investigated marine accidents, controlled lighthouse visits and installed naval communication on the Pedra Branca/Pulau Batu Puteh islet.[106]

The key to the validity of *effectivités* in the Court's eyes is that such manifested exercises of displays of authority must be carried out *à titre de souverain*: with the intention to act as sovereign.[107] But what about the people living on this territory? Do they desire to be governed by the state? When assessing *effectivités*, only the state's actions and intentions are considered. This is particularly detectable in instances where human behaviour is assessed in order to prove a state litigant's *effectivités*. Acts by human beings can prove *effectivités* as well, if they reflect an *acte de souverain* – in other words, if the people are acting 'on the basis of official regulations or under governmental authority'.[108] Therefore, it is not enough for people to simply be situated on a piece of land, or be nationals of the state litigant, for the latter's *effectivités* to be proven.[109] The state must manifest the exercise of state sovereignty over such people (through legislative, administrative or regulatory acts, for example[110]) as well as its intention to act as their sovereign.[111] In the words of one author, 'adjudicators have distinguished the presence of individuals as private persons on the one hand and from their presence *à titre de souverain*, on the other'.[112]

For example, the 'fishing and piratical activities in the waters in the Straits of Singapore, including in the area of Pedra Branca/Pulau Batu Puteh'[113] of the nomadic people of the sea named the Orang Laut were considered to be evidence of Malaysia's sovereignty over the disputed territory in the 2008 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* case.[114] This is because Malaysia provided evidence – writings of British officials in Singapore – of the 'nature and degree of the Sultan of Johor's authority' over them.[115] It was not the fact that the Orang Laut had made this maritime area their habitat, but the fact that the Sultan exercised authority over them.[116]

Conversely, the use of waters around Ligitan and Sipadan by Indonesian fishermen was not considered by the Court to reflect Indonesia's intention and will to govern those disputed territories in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*.[117] There was no evidence, on the basis of official regulations or under governmental authority, that Indonesia had the intention and will to govern them.[118] Nor were human activities upheld in the 1999 *Kasikili/*

[105] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40, at 99–100, para. 197.

[106] See *Malaysia/Singapore*, *supra* note 59, at 95–6, para. 274.

[107] See *Eastern Greenland*, *supra* note 102, at 45–6 ('A claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.').

[108] See *Indonesia/Malaysia*, *supra* note 57, at 683–4, paras. 140, 142.

[109] See Section 4.2, *infra*.

[110] See *Nicaragua v. Colombia*, *supra* note 53, at 655, para. 80. These elements were thoroughly analysed by the Court in *Nicaragua v. Honduras*, *supra* note 53, at 713–22, paras. 176–208 ('legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations.').

[111] See Kohen, *supra* note 54, at 160–3.

[112] See Aznar, *supra* note 70, at 308.

[113] See *Malaysia/Singapore*, *supra* note 59, at 37, para. 70.

[114] See Ibid, at 38–9, para. 74. However, it is important to note that the Court ultimately concluded that Pedra Branca/Pulau Batu Puteh belonged to Singapore. This is because Singapore had exercised *effectivités à titre de souverain* and Malaysia failed to react to this. It is an example of *effectivités* through acquisitive prescription.

[115] See *Malaysia/Singapore*, ibid., at 39, para. 75.

[116] Ibid. ('[T]he nature and degree of the Sultan of Johor's authority exercised over the Orang Laut who inhabited the islands in the Straits of Singapore, and who made this maritime area their habitat, confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh.'). See also paras. 71–74.

[117] See *Indonesia/Malaysia*, *supra* note 57, at 683, paras. 140–141.

[118] Ibid.

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Sedudu Island (Botswana/Namibia) case, where Namibia justified its sovereignty over Kasikili Island on the grounds of, *inter alia*, its *effectivités* over a village community in the Namibian region of Caprivi named the Masubia between at least 1890 and the late 1940s. This is because there was nothing showing that the presence of the Masubia people was linked to territorial claims by the Caprivi authorities.[119] Moreover, it noted that it was 'not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border'.[120]

Therefore, the key criterion according to the Court is the state's authority over the people, proven by an act and its intention to govern them. But a deeper examination reveals that the peoples' consent and acceptance to be ruled by the claiming state litigant is in fact an implicit element in this assessment as well. They, for instance, use the hospitals that the state litigants claim to have built, or pay the taxes that the state litigants impose. Such responsiveness exhibits their allegiance to the state litigant in question and their acceptance of the state's sovereignty. However, the peoples' consent is not explicitly acknowledged or examined in territorial disputes.

In the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* example mentioned above, the Orang Laut had to have consented to the Sultan of Johor's authority even if no mention was made of this. If there was any evidence that the Orang Laut were inhabitants of the maritime area, but rejected the authority of the Sultan, then Malaysia's *effectivités* could not have been upheld by the Court. It is not only the state's intention to govern a people, but also the latter's desire to be governed by the state, that has value in the claim of *effectivités*. However, no mention is made of this in the analysis of *effectivités* by the Court.

Even in the *Western Sahara* advisory opinion, a unique instance where the Court was tasked with assessing the allegiance of a people to a contending state litigant, the analysis privileged the latter's actions and intentions with little to no analysis of peoples' own desires. Indeed, in examining the ties between the territory of Western Sahara and the Kingdom of Morocco and the Mauritanian entity at the time of colonization by Spain, the Court had to assess whether Morocco had exercised *effectivités* over Western Sahara.[121] When observing the particular historical circumstances of *Western Sahara*, the Court noted that:

> Political ties of allegiance to a ruler ... have frequently formed a major element in the composition of a state. Such an allegiance, however, if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of state authority.[122]

Circumstances therefore called upon the Court to adopt the foreign practice of assessing the peoples' allegiance to determine Morocco's *effectivités*.

Morocco, therefore, presented evidence to show the allegiance of Saharan caids to the Sultan[123] in order to demonstrate the 'internal' display of authority invoked by Morocco.[124] The evidence included 'dahirs and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and what were referred to as "military decisions" said to constitute acts of resistance to foreign penetration of the territory'.[125] The evidence of the peoples' allegiance presented by Morocco and referred to by the Court did not demonstrate their explicit willingness or loyalty – rather, it was evidence of the state's willingness to rule over them. The exception was Spain's

[119]See *Kasikili/Sedudu Island*, *supra* note 56, at 1105–6, para. 98.
[120]Ibid., at 1094–5, para. 74.
[121]*Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 43, para. 92.
[122]Ibid., at 44, para. 95.
[123]Ibid., at 45, para. 99.
[124]Ibid.
[125]Ibid.

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counterargument that the tribes of Western Sahara did not pay taxes[126] – an explicit indication of the peoples' allegiance to the state as opposed to the state's intention to rule over them. Therefore, even when the Court was explicitly tasked with assessing the allegiance of a people, the evidence focused on the state's actions, with peoples' desires implied possibly by a lack of proven protest.

To include self-determination into the assessment of a state's *effectivités*, the Court would first identify the acts of private persons allegedly indicative of the state's *effectivités* and assess whether such actions have taken place on the basis of the state's authority. In this assessment, however, the Court would not satisfy itself by assuming the peoples' allegiance due to their passive acceptance of the state's actions, but verify that they exhibit allegiance and a desire to be governed by that state and explicitly affirm this. In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, the Court would have therefore not only analysed the Sultan of Johor's authority over the Orang Laut, but briefly considered if the Orang Laut accepted such authority and explicitly stated that this were the case.

Such a subtle shift does not compromise the principle of stability of boundaries as, when the Court examines a state litigant's *effectivités* in the absence of a suitable preferred legal title, it is already forfeiting the stability of boundaries that a treaty may offer. Territorial integrity also remains intact as the state litigant's acts and intentions to reign over a disputed territory are still an important part of the analysis. If, in the assessment of the peoples' desires when examining *effectivités*, such desires are not in alignment with the state's *actes de souverain*, then *effectivités* would not be upheld as a valid title in the given context. In such a scenario, the Court would still have other more subsidiary means to resolve the territorial dispute pursuant to its practice, such as the principle of equity.[127]

In sum, peoples' desires may be identified and specified when assessing *effectivités* – whether it is being assessed through general authoritative acts of the state litigant, or *actes de souverain* carried out by human beings. In both instances, this subtle shift would indicate that the peoples' desires do, in fact, matter in this assessment. The question remains of how to assess peoples' desires in such contexts, which is treated in the following section.

4.2 Evidence of peoples' desires in practice

How would peoples' desires be proven in such instances? Oftentimes, peoples' self-determination is expressed through plebiscites or referenda.[128] Three types of plebiscites have been distinguished in doctrine: (i) territorial plebiscites deciding between the territorial claims of two countries, (ii) plebiscites by a people exercising the right to internal self-determination (access to democratic rights within their country),[129] and (iii) secession plebiscites by a people exercising the right to external self-determination (in other words, deciding to separate from a nation).[130] However, such evidence is not expected to form part of the pleadings in the context of territorial disputes before the Court, which are decided between states on the grounds of title, and not peoples' desires. Three factors may serve as indicators in assessing peoples' desires when considering an argument of *effectivités*, each grounded in the Court's jurisprudence.

The first indicator is any action in response to governmental displays of authority that signify acceptance. An example is when people pay the taxes imposed by the state – many state litigants have

[126]Ibid., at 46, para. 101.

[127]Y. Suedi, 'Man, Land and Sea: Local Populations in Territorial and Maritime Disputes Before the International Court of Justice', (2021) 20 *Law and Practice of International Courts and Tribunals* 30, at 44–52.

[128]See Aznar, *supra* note 70, at 312.

[129]Only one type of plebiscite, falling under the second category, has been subject to a dispute in a territorial context before the Court, in Northern Cameroons examined above. See *Northern Cameroons*, *supra* note 82.

[130]See M. Kohen, 'El Individuo y Los Conflictos Territoriales', (2001) XXVIII *Curso de Derecho Internacional* 425. See also Aznar, *supra* note 70, at 316.

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referred to this in their arguments of *effectivités*.[131] Other examples may typically include making use of the infrastructure built by the state litigant – such as hospitals or schools.[132] *A contrario*, non-compliance displayed by people may be a sign that they do not accept the sovereignty of the authority claiming to exercise *effectivités*. As discussed above, peoples' actions reflecting their acceptance are merely implied in the Court's reasoning, as focus is placed on the state litigant's actions.

The second indicator is disloyalty, by serving any other sovereign. Servitude towards another sovereign would indicate a lack of exclusive obedience and respect for the state litigant claiming *effectivités*, and therefore compromise this argument. This was seen in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, where Qatar and Bahrain had both claimed sovereignty over the Islands of Hawar and Zubarah. Bahrain advocated its *effectivités* over Zubarah, through the Naim tribesmen, who were 'loyal to Bahrain'[133] and exercised sovereign authority within Zubarah on behalf of Bahrain.[134] The Court refuted Bahrain's claim of *effectivités* as there was no evidence that the Naim tribe exercised sovereign authority on behalf of Bahrain within Zubarah. However, even if Bahrain's *effectivités* had been proven, the Court observed that the Naim people appeared to have allegiance elsewhere as well: 'there [was] also evidence that some members of the Naim served both the Al-Khalifah and the Al-Thani [of Qatar]'.[135] Therefore, in this case, the lack of exclusive allegiance of the tribal inhabitants of the territory to Bahrain served against it. This is an example of how peoples' lack of allegiance can also invalidate claims of *effectivités*.[136]

A third possible indicator is the nationality of the people on the disputed territory. An example of this was seen in *Land and Maritime Boundary between Cameroon and Nigeria*, where Nigeria referred to the Nigerian nationality of the Bakassi population in arguing that it had *effectivités* over the Peninsula.[137] Nationality in and of itself cannot form the basis for *effectivités*; the Court has made clear that the mere presence of people – whether nationals or not – on a disputed territory is not indicative of any state's territorial sovereignty,[138] and has given no indication in its case law of nationality playing a significant role in such contexts.[139] However, as argued by Sir Gerald Fitzmaurice, the presence of settlers in a territory of a certain nationality may be *an element* in showing the existence of *effectivités* of the parent state.[140]

5. Conclusion

This article sought to address the underexplored paradox of the absence of self-determination in territorial disputes before the ICJ, despite the occasional repercussions of territorial disputes on local

[131]Examples include Nigeria in *Cameroon v. Nigeria*, *supra* note 36, at 413, para. 218; Morocco in *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, para. 101; Honduras in *El Salvador/Honduras*, *supra* note 41, at 516, para. 265.

[132]An example is Nigeria in *Cameroon v. Nigeria*, *supra* note 36, at 414–15, para. 222.

[133]See *Qatar v. Bahrain*, *supra* note 105, at 65, 66–7, paras. 75, 82, 85.

[134]Ibid., at 64, para. 70.

[135]Ibid., at 67, para. 86.

[136]Ibid.

[137]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Counter-Memorial of the Federal Republic of Nigeria, 1 May 1999, paras. 10.50–10.55; *Cameroon v. Nigeria*, *supra* note 36, at 352–3, para. 67.

[138]See *El Salvador/Honduras*, *supra* note 41, at 419, para. 97; *Cameroon v. Nigeria*, *supra* note 36, at 352–3, para. 67; Kohen, *supra* note 54, at 160.

[139]Although in *El Salvador/Honduras*, ibid., at 523–4, para. 275, the Court did mention it but no clear conclusion was drawn from it.

[140]G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', (1957/II) 92 *Recueil de Cours*, at 149. Russia also referred to ethno-linguistic nationality as justification of its annexation of Crimea – see A. Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence Was Not Contrary to International Law Set an Unfortunate Precedent?', in M. Milanović and M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion* (2015); C. Marxsen, 'The Crimea Crisis: An International Law Perspective', (2014) 74 *Heidelberg Journal of International Law* 367.

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populations and the prominence of self-determination in international law. This leaves self-determination as no more than a rhetorical tool scarcely used to reinforce other arguments. This is because the Court prioritizes the principle of the stability of boundaries and states prioritize their territorial integrity. While the latter is a cornerstone principle of international law, and the former an acceptable concern in the pursuit of safeguarding enduring peace between states, peace also encompasses human security and respect for human rights. Judge Bennouna has opined that '[t]he exercise of sovereignty has ... become inseparable from responsibility towards the population. This new approach to sovereignty should certainly be present when the Court rules on the course of boundaries between States'.[141] A possible means to achieve greater balance between these delicate factors may be through *effectivités* which, as described by one state litigant 'is the only satisfactory way of dealing with the emotively real and ethically unavoidable question of the link between man and the land'.[142]

It has been proposed in this article that, in the examination of *effectivités*, peoples' desires should be separately examined and acknowledged as opposed to assumed in determining a state's *actes de souverain*. Such an approach may moderately help create more equilibrium, involve peoples' desires into territorial disputes, and make room for the consideration of self-determination. If the peoples' desires are not in alignment with the state litigant's intentions to rule, then forcing a state's control over a people against their will stands in direct violation of the principle of self-determination.[143]

This author is nonetheless aware that a judgment alone cannot bring self-determination to life; it is a complex political process stemming far beyond the Peace Palace and involving multiple actors and intricacies. Rather, this study offered reflection on how self-determination could be given more relevance in the context of international dispute settlement, thereby extending beyond the lip-service it is paid in various declarations and treaties. The reflections herein aspired to take a closer step to 'balanc[ing] caution with idealism, and sovereignty with human rights'[144] in disputes impacting people before the Court.

[141]See *Burkina Faso/Niger*, *supra* note 55, at 95 (Judge Bennouna, Declaration).

[142]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Memorial of the Republic of El Salvador, 1 June 1988, para. 7.17.

[143]The term 'self-determination', which does carry rhetorical weight, would not have to be used – the Court did not utter it in the *Qatar* case. See *Qatar v. Bahrain*, *supra* note 105.

[144]See Aznar, *supra* note 70, at 341.

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