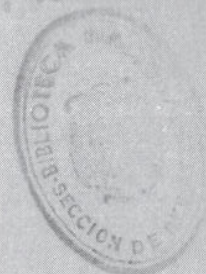


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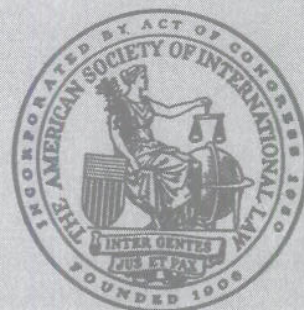
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# THE STEALING OF THE SAHARA

By Thomas M. Franck \*

## INTRODUCTION

The Western—or, until now, Spanish—Sahara is a small place. Its decolonization and the fortunes of its mere 75,000 inhabitants do not attract instant or prolonged public attention. Nevertheless, or, perhaps, in part for that very reason, the disposition of the Sahara case by the United Nations has been monumentally mishandled, creating a precedent with a potential for future mischief out of all proportion to the importance of the territory.

The “settlement” of the Saharan issue in favor of Morocco’s claim of historic title and the denial of self-determination to the Sahrawi people radically departs from the norms of decolonization established and consistently applied by the United Nations since 1960. This is bound to have an important significance for numerous other irredentist territorial claims such as those of Guatemala on Belize,<sup>1</sup> Somalia on Djibouti,<sup>2</sup> and Argentina on the Falkland Islands.<sup>3</sup> Even as Morocco and Mauritania solidified their hold on the Sahara in February 1976, Marshal Idi Amin of Uganda laid claim to large parts of Kenya and the Sudan on the basis of tribal affinity and history.<sup>4</sup> In due course, an Arab Palestine will almost certainly advance territorial claims against Israel. Indeed it may not be long before Morocco renews its quiescent designs on its partner, Mauritania.<sup>5</sup> The

\* Of the Board of Editors. Part of this study was undertaken by the author in his capacity as Director of the International Law Program of the Carnegie Endowment for International Peace, although the views expressed are his own. The author wishes to thank Mr. Paul Hoffman, his research assistant at Carnegie, for invaluable assistance.

<sup>1</sup> For a recent summary of UN consideration of the Belize case, see The Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/10023/Add.8 (Part III), at 15–29 (1975).

<sup>2</sup> The *London Times* has noted that “if the French withdraw completely, it seems certain that Somalia, on the model of Morocco in Spanish Sahara, will seize it during the ensuing troubles between the Issa and Afar factions.” The *Times* (London), Feb. 6, 1976, at 15 (editorial). For a recent summary of UN consideration of this issue, see The Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/10023/Add.6 (Part II) (1975).

<sup>3</sup> *Supra* note 1, at 3–14.

<sup>4</sup> The *Times* (London), Feb. 17, 1976, at 7; *id.* Feb. 20, 1976, at 6; *id.* Feb. 25, 1976, at 7.

<sup>5</sup> Morocco long opposed the independence of Mauritania. In the historic debate on Resolution 1514(XV) Morocco accused the French of attempting “to partition Morocco and disrupt its national territorial unity, by setting up an artificial State in the area of Southern Morocco which the colonialists call Mauritania. The population of that area does not even know the word ‘Mauritania.’ If you tell a Bedouin of so-called Mauritania that you are in Mauritania, he will not understand what you are



readjustment. This paramountcy of contemporary self-determination over historic claims and the alleviation of ancient wrongs is based on two considerations. First, there is the assumption that any other approach would lead to endless conflicts, as modern states found themselves under pressure to join a general reversionary march backward to a *status quo ante* of uncertain age and validity. Second, it is widely observed that states or even colonies with established boundaries and fixed populations, however unjustly or serendipitously arrived at, soon develop a cohesive logic of their own that should not be lightly overridden.

It is for these reasons that African states have insisted that each colony, in the final stage of decolonization, must exercise its "right" of self-determination within the confines of established boundaries. Even though, in some cases, this tends to perpetuate certain historic injustices or cultural hardships, it has been recognized that other alternatives are worse. To attempt a wholesale redrawing of the map of Africa on the basis of ancient claims or of tribal links could only lead to chaos, war, and the unraveling of a continent's state system. Africa's post-independence leaders understood that, while there were injustices, they could better be dealt with through functional arrangements between sovereign states such as regional common services and markets, rights of unhindered movement across frontiers, and, perhaps, federations.

So it was at the insistence of the Third World that the landmark UN Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>19</sup> while proclaiming that "[a]ll peoples have the right to self-determination"<sup>20</sup> also warned that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."<sup>21</sup> The Organization of African Unity has reenforced the rule that territories must exercise their right to self-determination within established colonial boundaries.<sup>22</sup> If a territory wishes to join with one or several neighboring states, it should have the right to manifest that preference in the process of decolonization, but it must be the free choice of the majority in that particular colony, and a territory with recognized boundaries may neither be absorbed nor dismembered against the will of its inhabitants.

#### UN PRACTICE IN IMPLEMENTING THE RULE OF SELF-DETERMINATION WITHIN ESTABLISHED COLONIAL BOUNDARIES

The record of democracy in the new states (or, for that matter, in a majority of the old) would scarcely overjoy Montesquieu or J. S. Mill. In

<sup>19</sup> G.A. Res. 1514, 15 GAOR Supp. 16, at 66-67, UN Doc. A/4684 (1966).

<sup>20</sup> *Id.* Art. 2.

<sup>21</sup> *Id.* Art. 6.

<sup>22</sup> OAU Assembly AHG/Res. 17(I), Cairo Ordinary Session, 17-21 July 1964. See also The Charter of the Organization of African Unity, Article 3(3), which pledges "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."



"sleeping dogs of historic title" have tended to be constrained by the international community's insistence that established boundaries must be respected and can only be changed with the free consent of the people living in each territory. Morocco and Mauritania, by their takeover of the Sahara without the consent of its people, have succeeded in frustrating the application of this norm and have taken the international system a blatant step toward a new set of mutually shared expectations about state behavior—incipient new norms—which are much more likely than their predecessor-rules to be conflict-inducing, even if their outlines are as yet dimly perceived.

The precedent is destabilizing in another, broader, way. The successful Moroccan-Mauritanian use of force to take control of the Western Sahara has strengthened the tendency of Third World states to pursue their national interest with military self-assertion rather than law and diplomacy. Nothing in international relations succeeds like success and in both Angola and the Sahara the use of force has been shown to work without significant opposition from the rest of the international community. These African events have had their echo in Asia with the Indonesian occupation of East Timor, another place where historic, geographic, and ethnic claims were asserted out of the barrels of rifles.<sup>6</sup> To the extent that this lesson is taken to heart, it makes the world an increasingly dangerous place—a consideration compounded by the Third World's leap into sophisticated weaponry.

The disposition of the Sahara case has already had a dramatic effect on world order. Some 60,000 Sahrawis have become refugees,<sup>7</sup> creating great hardships as well as a severe strain on the facilities and budget of the UN High Commissioner for Refugees. There has been active fighting involving the Algerian-supported Sahrawi liberation movement POLISARIO (*Frente Popular para la Liberación de Saguia el Hamra y Río de Oro*), with the Mauritanian Government reporting a two-day battle with heavy casualties in April 1976,<sup>8</sup> two months after the Sahara had formally been "pacified" by the Moroccan and Mauritanian armies. Within the Organization of African Unity, the issue has been intensely divisive. Its political committee in February recommended support for the liberation forces, thereby provoking Morocco and Mauritania to threaten a walkout.<sup>9</sup> Although the split was temporarily averted,<sup>10</sup> Algeria and others have unilaterally recognized a Saharan government-in-exile and Rabat and Nouakchott thereupon severed diplomatic relations with Algiers.<sup>11</sup> It will not be long before other states are compelled to choose sides.<sup>12</sup>

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talking about." 15 GAOR 947, at 1271 (1960) (remarks of Mr. Ben Aboud, Representative of Morocco).

<sup>6</sup> It is estimated that nearly 60,000 Timorese have been killed in the course of the territory's decolonization. *N.Y. Times*, Feb. 15, 1976, at 11.

<sup>7</sup> *The Times* (London), April 2, 1976, at 7.

<sup>8</sup> *N.Y. Post*, April 28, 1976, at 17.

<sup>9</sup> *N.Y. Times*, Feb. 27, 1976, at 3.

<sup>10</sup> *Id.* March 1, 1976, at 3.

<sup>11</sup> *Id.* Feb. 28, 1976, at 6; *id.* March 8, 1976, at 7.

<sup>12</sup> At the African Foreign Ministers' meeting in Addis Ababa at the beginning of



The United States, too, has been drawn into the dispute. The announcement in February 1976, that the United States would sell a squadron of 24 F-5E jet fighters to King Hassan II<sup>13</sup> was no doubt dictated by realpolitik. Morocco, with Spain, is America's key to the Mediterranean. The government of the King is generally perceived as pro-American, while Algeria's rulers are not. By contrast, the leaders of POLISARIO are tarred by their close association with the Algerians. In Washington's eyes, the right of a mere 75,000 persons to self-determination is of far less consequence, the more so as they might in any event tend to be dominated by Algeria, than is the stability of King Hassan's shaky throne. Thus, in the name of practical politics, the United States has deserted its historic commitment to the principle of self-determination.<sup>14</sup> Instead of asserting the paramountcy of an important world-order norm, the United States has allowed politics to dictate its international posture. In so doing, we have been brought face to face, once again, with the question whether the United States, as a leading global power, has a greater interest in preserving and reenforcing the integrity of the rules by which the game is supposed to be played or in winning subgames regardless of how our actions affect the rules. Put another way, the Sahara case faces us with a classic conflict of legal and political values.

#### THE SAHRAWI POPULATION

The Western Sahara is situated along the Atlantic coast of northwest Africa. Its tiny population inhabits a land area of 266,000 square kilometers, almost exactly the size of Colorado.<sup>15</sup> Many of these are nomadic desert herdsmen tending flocks of camel, goats, and sheep, although, in recent years, a sizable urban settlement has developed in the capital, El Aaiun, which, before the Spanish evacuation, had a civilian population of almost 30,000, as well as in Semara and Villa Cisneros with approximately 7,000 and 5,500 inhabitants each.<sup>16</sup> These figures do not include Sahrawis who have been living in neighboring countries, especially Morocco and Algeria, for either political or economic reasons. The best estimates of the number of these exiles has ranged from the Spanish figure of 10,000, to a high of about 50,000 claimed by the liberation movements and neighboring states.<sup>17</sup> Since both Morocco and Mauritania have taken the position that the Sahrawis are their nationals, no border barriers existed even

March, 1976, it was reported that as many as twenty African states favored recognition of POLISARIO. *Id.* March 1, 1976, at 3.

<sup>13</sup> *Id.* Feb. 22, 1976, at 1.

<sup>14</sup> For a discussion of the historic U.S. relation to self-determination, see Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AJIL 1 (1976).

<sup>15</sup> Report of the United Nations Visiting Mission to Spanish Sahara, 1975, in The Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/10023/Add.5, Annex, at 26 (1975) [hereinafter cited as *Visiting Mission*].

<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.* at 28.



in colonial times to stem, or even to record, their movements. Social and ethnic ties between the people in the Western Sahara and those nearby in Morocco, Algeria, and Mauritania make it particularly difficult to state definitively who is and who is not a Sahrawi. (One of the exiled leaders of POLISARIO, for example, is Ahmed Baba Miske, the former Mauritanian Ambassador to the United Nations and to Washington.) This fact took on political importance when it came to discussion of a self-determination plebiscite. Under the "right" arrangements, the polling could easily be skewed by imported Moroccans and Mauritians posing as Sahrawis.<sup>18</sup>

This difficulty, while important to bear in mind in assessing the decolonization tactics employed in the case of the Spanish Sahara, is far from unprecedented in Africa. Indeed, it is the rule rather than the exception for the boundaries of those new nations to reflect the cavalier indifference of the colonial powers towards tribal groupings and nomadic routes of passage. In virtually every African state there are tribes with close historic and social links across political boundaries. In some areas, such as the Ogaden of the African Horn, the problem is every bit as acute as, and similar to that of, the Western Sahara. Moreover, history is a fount of injustices and, in many instances, the aggrieved have long memories. The question is whether, in the name of redressing ancient grievances, traumatic new wrongs should be inflicted on the current inhabitants of a territory.

#### THE PRIMACY OF SELF-DETERMINATION AND THE INTEGRITY OF BOUNDARIES

The precedents in such instances, prior to the Western Sahara and Timor cases, are relatively consistent and uncomplicated. Generally, neighboring states have not been allowed to help themselves to adjacent territories on the basis of historic claims; boundary readjustments must come as an expression of the democratically expressed will of those subject to the

<sup>18</sup> An excellent short summary of Saharan demography is provided by the 1975 report of a UN Visiting Mission to the country. It states that:

[the] indigenous population of the Territory is comprised for the most part of persons of Moorish, or bedouin, race who are united by a common language, *hassania* (a form of Arabic), and by strong cultural and traditional ties . . . [T]he basic social unit, the family, is not thought of as an independent group, but rather as forming a part of a social group (fraction), and family group (sub-fraction) of a tribe . . . in most cases extending far beyond the political frontiers of the Territory. Thus, the majority of Saharans identify closely with other members of their tribe, for instance the Erguibat, Ait Lahsen and Ulad Delim to name only three, who are to be found also in Mauritania, Morocco and Algeria. This is in conformity with age-old tradition by which the various tribal groups have nomadized over wide-ranging areas without any regard to the political boundaries imposed by colonial régimes; it was in fact an intrinsic feature of a traditional economic system based on a continuous search for pasture and water and in which ownership of land was unknown. Today, though nomadism is declining, there is still a marked sense of kindred among the members of tribes and their subdivisions which straddle the frontiers of the Territory and its neighbors, and many Saharans have left the Territory either to live permanently among their relatives and kindred in the neighboring countries, or to settle temporarily for economic reasons (including the drought) or because they are political exiles and refugees. For this reason, and because of the close affinity between the Saharans of the Territory and those, for example, in the Moroccan province of Tarfaya or the border regions of Mauritania, it is extremely difficult to determine who among them is a Saharan indigenous to the Territory. *Id.*



one respect, however, the democratic aspiration has fared relatively well. During the past three decades it became virtually standard practice to encourage colonial populations, at the moment just before independence, to participate in a genuine act of free choice. In most instances, that act determined which party and government would assume the reins of power. In other cases, the issues were more complex: Should the new nation enter its era of independence as a single entity? Should it, or part of it, join another state? Should it reconstitute itself into several independent, or federated nations? Most of the voters in these new states have never since had occasion to participate through secret ballot in the decisionmaking process of their countries. But at least in making that one crucial choice, the principle of popular participation has generally been respected.

As early as 1954, the UN General Assembly had voted that "a mission, if the General Assembly deems it desirable, should, in agreement with the Administering Member, visit the Non-Self-Governing Territory before or during the time when the population is called upon to decide on its future status. . ." <sup>23</sup> Accordingly, the United Nations supervised plebiscites or elections in the British Togoland Trust Territory in 1956, in French Togoland in 1958, in the British-administered Northern Cameroons Trust in 1959 and 1961, in Southern Cameroons in 1961, in Belgian-administered Ruanda-Urundi in 1961, in Western Samoa in 1962, and in Papua-New Guinea in 1972.<sup>24</sup> Representatives of the UN Trusteeship Council also observed the controversial plebiscite in the Northern Marianas in June 1975, in which a majority voted to separate from the U.S. Pacific Islands Trust Territory and to become a Commonwealth in political union with the United States.<sup>25</sup>

With the creation, in 1961, of the UN's watchdog Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>26</sup> adherence to standards for decolonizing Trust Territories—where the United Nation had a clear legal interest—began also to be demanded for ordinary colonies. Since its creation, the Special Committee, in the words of the UN Department of Political Affairs and Decolonization, "has emphasized the desirability of a United Nations presence in the final stages of the self-determination process in non-self-governing territories particularly in those situations where the people are being asked to decide on a constitutional formula falling short of independence or where concern has been voiced regarding the full respect for democratic processes during the electoral consultation."<sup>27</sup> Thus, the Special Committee arranged for UN supervision

<sup>23</sup> G.A. Res. 850, 9 GAOR Supp. 21, at 28, UN Doc. A/2890 (1954).

<sup>24</sup> *Fifteen Years of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*, 2 DECOLONIZATION, No. 6, at 19 (1975) [hereinafter cited as *Fifteen Years*].

<sup>25</sup> *Id.* at 22.

<sup>26</sup> G.A. Res. 1654, 16 GAOR Supp. 17, at 65, UN Doc A/5100 (1961).

<sup>27</sup> *Fifteen Years*, *supra* note 24, at 19. Enumerated here are the many instances of self-determination elections and plebiscites in which the UN General Assembly asked



of the elections for a legislature to write the new constitution for the Cook Islands in April 1965, which led to "free association" with New Zealand.<sup>28</sup> In 1967, the General Assembly recommended the holding of a general election in Equatorial Guinea with UN participation prior to independence and in 1968 Spain implemented that request.<sup>29</sup> The United Nations has also participated in votes on self-determination in the New Zealand territory of Niue in 1974<sup>30</sup> and, in the same year, observed the referendum in the Ellice Islands whereby the voters decided to become a separate colony under the name of Tuvalu.<sup>31</sup>

Not all the initiatives have come from the General Assembly. In 1963, the Secretary-General was asked by the Governments of the Federation of Malaya, Indonesia, and the Philippines to send a mission to the British territories of Sarawak and North Borneo to determine whether those populations wished to be integrated with Malaya into a new federation of Malaysia. The mission, composed of senior diplomats appointed by the Secretary-General, reported that the votes for federation in the legislatures of North Borneo and Sarawak correctly represented the freely expressed wishes of the people of those territories.<sup>32</sup>

There are, of course, exceptions to the rule. In one instance the United Nations has taken the position that a free self-determination vote or plebiscite should not be taken in a colony. The General Assembly actually opposed the holding of a referendum in Gibraltar in 1967<sup>33</sup> which was designed to solicit the voters' choice between union with Spain and retention of links with Britain. The United Nations refused to sanction the sending of a UN observer to that plebiscite. Indeed, the Special Committee deplored its being held, insisting instead that the future of Gibraltar should be resolved by negotiations between Spain and Britain.<sup>34</sup>

In the decolonization of West Irian, the United Nations, in a controversial, deeply divisive vote<sup>35</sup> foreshadowing the Sahara debates, voted to accept as valid the Indonesian-organized "act of free choice" which involved not a secret ballot but only "collective consultations" held while the Indonesian Administration "exercised at all times tight political control

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to be involved as observer and supervisor, an involvement sometimes welcomed and sometimes not by the colonial authority.

<sup>28</sup> G.A. Res. 2005, 19 GAOR Supp. 15, at 7, UN Doc. A/5815 (1965).

<sup>29</sup> G.A. Res. 2355, 22 GAOR Supp. 16, at 54-55, UN Doc. A/6716 (1967).

<sup>30</sup> G.A. Res. 3285, 29 GAOR Supp. 31, at 98, UN Doc. A/9631 (1974).

<sup>31</sup> *Fifteen Years*, *supra* note 24, at 21.

<sup>32</sup> 3 REPERTORY OF PRACTICE OF UN ORGANS, SUPP. No. 3 (period 1959-1966), at 98; see also 19 GAOR Supp. 1A, at 8-9, UN Doc. A/5801/Add.1 (1964).

<sup>33</sup> G.A. Res. 2353, 22 GAOR Supp. 16, at 53, UN Doc. A/6716 (1967).

<sup>34</sup> 22 GAOR, Annexes, Addendum to Agenda Item No. 23 (Part II), at 238, UN Doc. A/6700/Rev.1 (1967).

<sup>35</sup> G.A. Res. 2504, 24 GAOR Supp. 30, at 3, UN Doc. A/7630 (1969). Before ratifying the "act of free choice" the General Assembly rejected an amendment submitted by Ghana which would have given the people of West Irian a further opportunity to express their will. 24 GAOR, Annexes, Agenda Item No. 98, at 40, UN Doc. A/L.576 (1969). The Ghanaian amendment was defeated by a vote of 60 to 15 with 39 abstentions.



over the population.”<sup>36</sup> The delegate from Sierra Leone to the UN General Assembly expressed the fear of his and other delegations that the same arguments being used by Indonesia against applying international standards of free elections to West Irian left room for other countries like South Africa, Portugal, and Southern Rhodesia to deny self-determination to their black African majorities in favor of rigged “consultations.”<sup>37</sup>

There have been a few other instances since the creation of the UN Special Committee in 1961 where a colonial power has rejected a request by the United Nations to supervise a self-determination election or referendum,<sup>38</sup> as well as a few cases (such as the Portuguese colonies) in which decolonization occurred primarily as a result of a domestic war of liberation rather than by political evolution. But there has also grown up through the vast majority of cases a clear pattern of orderly decolonization through freely conducted elections or plebiscites, often under UN supervision, in which the local population has had the opportunity to choose its own national destiny. It is this pattern which is so dramatically broken in the case of the Spanish Sahara.

#### THE UNSUCCESSFUL UN EFFORT TO SECURE THE RIGHT OF SELF-DETERMINATION FOR THE SAHRAWIS

The failure of the United Nations to ensure a self-determination election or plebiscite in the Sahara before its final decolonization is a break not only with a well-established and salutary general pattern of norms for colonies in general but also with the policy consistently advocated specifically for the Sahara in UN debates and resolutions during more than a decade. During the past two years, the disposition of the Sahara issue in the United Nations revealed that Organization at its most political and least principled.

The question of the Spanish Sahara has been exhaustively discussed in the Special Committee of the General Assembly since September, 1963 and in General Assembly plenary sessions since December of that year. The first of a stream of resolutions calling on Spain to implement the Sahara's right to self-determination was passed in Committee on October 16, 1964;<sup>39</sup> the General Assembly followed suit one year later.<sup>40</sup> Madrid's position, during this period, was that its African territories as provinces of metropolitan Spain, were not subject to self-determination.<sup>41</sup>

<sup>36</sup> Report of Secretary-General regarding act of self-determination in West Irian, 24 GAOR, Annexes, Agenda Item No. 98, at 2, UN Doc. A/7723 (1969).

<sup>37</sup> Report of the Secretary-General on the Work of the Organization. 25 GAOR, Supp. 1, at 64, UN Doc. A/8001 (1970).

<sup>38</sup> France refused to accept a UN presence during its 1967 referendum on the future of French Somaliland.

<sup>39</sup> 19 GAOR, Annexes, Annex No. 8 (Part I), at 290-91, UN Doc. A/5800/Rev.1 (1964).

<sup>40</sup> G.A. Res. 2072, 20 GAOR Supp. 14, at 59-60, UN Doc. A/6014 (1965).

<sup>41</sup> Note by the Secretary-General, 13 GAOR, Annexes, Agenda Item No. 36, at 37, UN Doc. A/C.4/L385/Rev. 1 (1958). See also Law of 21 April 1961 and Decree No. 3349 of 29 November 1962.



From the very beginning, Morocco's delegates were ambiguous about whether to support self-determination. On the one hand, they asserted that their country ultimately would regain the Moroccan territories which remained under colonial domination and had been separated from the country under an arbitrary and annexionist (sic) policy carried out at its expense by the powers which had placed them under the jurisdiction of their respective protectorates.<sup>42</sup> However, conceding that Spanish and world opinion would not then tolerate forcible "reunification," the Rabat regime at a meeting of the UN Special Committee in Addis Ababa in August, 1966 actually took the initiative in proposing that the Sahara and other Spanish colonies "*should as soon as possible be granted their independence*"<sup>43</sup> (emphasis added). That independence, it was added, must be genuine, "enabling the people of those Territories to exercise all the responsibilities of power themselves, without any colonialist presence" and, in choosing "the path most appropriate to their interests . . . within the framework of African unity,"<sup>44</sup> it was expected in Rabat that they would freely choose to join Morocco.

A similar position was taken at the same 1966 meeting by the Mauritanian Government, the representative of which also pressed his country's historic title to the Western Sahara while noting that Morocco's President had characterized Morocco's claims "as ridiculous as those which England might now make against France on the pretext that, at the time of Joan of Arc, Paris and a large part of France had been occupied by the English."<sup>45</sup> Yet Mauritania, too, averred that the Western Sahara, while historically a part of its domain, "should be completely independent" which meant "of Spain, but also, of course, of Morocco."<sup>46</sup>

The twenty-first session of the General Assembly, in 1966, reaffirmed the right of the peoples of the Spanish Sahara to self-determination but went further in describing how this was to be implemented. It invited Spain

. . . to determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination, and, to this end:

(a) To create a favorable climate for the referendum to be conducted on an entirely free, democratic and impartial basis by permitting, *inter alia*, the return of exiles to the Territory; . . .

<sup>42</sup> Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 21 GAOR, Annexes, Addendum to Agenda Item No. 23, 603. UN Doc. A/6300/Rev.1 (1966).

<sup>43</sup> *Id.* at 604.

<sup>44</sup> *Id.* at 605.

<sup>45</sup> *Id.* at 607.

<sup>46</sup> *Ibid.*



(d) To provide all the necessary facilities to a United Nations mission so that it may be able to participate actively in the organization and holding of the referendum. . . .<sup>47</sup>

The Assembly also asked the Secretary-General to appoint and send to the Sahara a special mission "for the purpose of recommending practical steps for the full implementation of the relevant resolutions of the General Assembly, and in particular for determining the extent of United Nations participation in the preparation and supervision of the referendum. . . ." <sup>48</sup>

On May 11, 1967, the Madrid government promulgated a decree establishing a General Assembly of Spanish Sahara—or Yema'a—the membership of which was to be partly elected.<sup>49</sup> The twenty-second session of the General Assembly was not impressed, seeing a transparent effort by Spain to create a local government manned by the senior tribal establishment and other conservative elements owing their role to Spain and the *status quo*, and reiterated the resolution of the previous year.<sup>50</sup> Indeed, all six resolutions adopted by the General Assembly between 1967 and 1973 echo the prescriptions of the 1966 resolution and, in particular, those paragraphs which relate to the organization of a referendum and the sending of a special UN mission to supervise self-determination in the territory.<sup>51</sup>

Despite such a rare and repeated display of public unanimity among all the key states, the clear and normative prescriptions of the resolutions were not followed. Instead, what occurred during the next six critical years was the acceleration of efforts by all parties to arrange their preferred outcome behind a facade of support for self-determination. Spain continued to argue that due to the nomadic nature of the population and the physical features of the country, preparations for self-determination could not be hurried.<sup>52</sup> Morocco and Mauritania interpreted this as a way of buying time to entrench the pro-Spanish traditionalists installed in the Yema'a and to ensure their victory in an eventual plebiscite. At the same time both countries used the right to be consulted by Spain on the political development of the Sahara (a right extended by the General Assembly resolutions) as a way of preventing, rather than accelerating, the evolution of self-government. In public, Spain, Morocco, and Mauritania shared an

<sup>47</sup> G.A. Res. 2229, 21 GAOR Supp. 16, at 72-73, UN Doc. A/6316 (1966).

<sup>48</sup> *Ibid.*

<sup>49</sup> 22 GAOR, Annexes, Addendum to Agenda Item No. 23, at 209, UN Doc. A/6700/Rev.1 (1967).

<sup>50</sup> G.A. Res. 2354, 22 GAOR Supp. 16, at 53-54, UN Doc. A/6716 (1967).

<sup>51</sup> The 1968 resolution is G.A. Res. 2428, 23 GAOR Supp. 18, at 63-64, UN Doc. A/7218 (1968). The 1969 resolution, which also "regrets that it has not yet been possible for the consultations to take place which the administering Power was to conduct in connexion with the holding of a referendum," is G.A. Res. 2591, 24 GAOR Supp. 30, at 73-74, UN Doc. A/7630 (1969). The resolutions passed between 1970 and 1973 are: G.A. Res. 2711, 25 GAOR Supp. 28, at 100-01, UN Doc. A/8028 (1970); G.A. Res. 2983, 27 GAOR Supp. 30, at 84-85, UN Doc. A/8730 (1972); G.A. Res. 3162, 28 GAOR Supp. 30, at 110-11, UN Doc. A/9030 (1973).

<sup>52</sup> Letter dated 8 September 1966 from the Permanent Representative of Spain to the United Nations addressed to the Chairman of the Special Committee, 21 GAOR, Annexes, Addendum to Agenda Item No. 23, Annex, at 621 (1966).



adherence to self-determination. In private, all three shared an abiding mistrust of genuinely free popular decisionmaking.

During this period, too, Algeria began to emerge more clearly as a protagonist. While continuing to deny that it had any territorial claims, it demanded to be consulted in any settlement, insisting that "its interests, based on obvious geo-political considerations and on the need for regional unity . . . should not be disregarded in the search for a solution to the problem. . . ." <sup>53</sup>

Undoubtedly a principal factor in this hardening of positions was the increasing evidence that the Spanish Sahara, far from being a useless wasteland, contained great mineral riches. The bountiful and readily extractable phosphate deposits of Bou Craa are located only 97 kilometers from the coast. When fully operative, the mines will yield up to 10 million tons of phosphate for export.<sup>54</sup> Iron ore deposits have been found in several regions and there are expectations of finding petroleum in the Western Sahara's considerable off-shore continental shelf.<sup>55</sup> In the view of the Spanish authorities, the phosphate industry could furnish the present population of the territory a per capita revenue "equal to that of some developed countries in Europe."<sup>56</sup> Moroccan authorities, on the other hand, profess to see injustice in restricting such disparately vast resources to a tiny population and privately say that "one Kuwait in the Arab world is enough."

On September 21, 1973, in reply to a request by the Yema'a, General Franco on behalf of the Spanish Council of Ministers in effect transferred to that Assembly a degree of internal legislative powers while retaining the external affairs, defense, and certain additional powers of veto and initiative. Franco also promised that the territory could vote on its future "when the population freely so requests. . . ." <sup>57</sup> The UN General Assembly resolution passed shortly thereafter again reaffirmed the principle of self-determination and, in the by now familiar terms, called for "free and authentic expression" of the Sahrawis' wishes.<sup>58</sup> These sentiments were strongly endorsed by the Third World in meetings of nonaligned and African states.<sup>59</sup>

<sup>53</sup> *Visiting Mission*, *supra* note 15, at 24.

<sup>54</sup> *Id.* at 40.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Id.* at 40-41.

<sup>57</sup> Reply to the Communication of the General Assembly of the Sahara by the Head of the Spanish State. UN Doc. A/9176, Annex IV, at 1 (1973).

<sup>58</sup> G.A. Res. 3162, 28 GAOR Supp. 30, at 110-11, UN Doc. A/9030 (1973).

<sup>59</sup> NAC/FM/CONF.1/Res.5, August 12, 1972, THE GEORGETOWN DECLARATION, THE ACTION PROGRAMME FOR ECONOMIC CO-OPERATION AND RELATED DOCUMENTS, CONFERENCE OF FOREIGN MINISTERS OF NON-ALIGNED COUNTRIES, Georgetown, Guyana, August 8-12, 1972; OAU Council Res. CM/Res.301(XXI), OAU COUNCIL OF MINISTERS, Addis Ababa, May, 1973; Res. No. 6, IVth CONFERENCE OF HEADS OF STATE OR GOVERNMENT OF NON-ALIGNED COUNTRIES, Algiers, 5-9 September, 1973; FUNDAMENTAL TEXTS, DECLARATIONS, RESOLUTIONS, ACTION PROGRAMME FOR ECONOMIC CO-OPERATION.



In July 1974, Spain, after informing Morocco, Mauritania, and Algeria, unveiled a new constitutional law for the Sahara which substantially increased the powers of the Yema'a.<sup>60</sup> Six weeks later Madrid announced it would at last hold a referendum under UN auspices during the first half of 1975.<sup>61</sup>

These seminal events had been preceded by a series of meetings in which Spain unsuccessfully attempted to win the cooperation of Morocco and Mauritania in conducting a plebiscite. The Foreign Minister of Spain met with his Moroccan counterpart in Rabat in March and in Madrid in April. The latter indicated privately that his country would permit a plebiscite only if the Sahrawis were limited to a choice between union with Morocco or remaining a Spanish colony, thus excluding the option of independence. The Spanish Minister also met with his Mauritanian counterpart in Nouakchott in April without securing any commitment of cooperation. On the other hand, when the Algerian, Moroccan, and Mauritanian Foreign Ministers met in Nouakchott on May 10 and again in Agadir on July 24, they again publicly "reaffirmed their adherence to the principle of self-determination for Spanish Sahara" and issued a joint communiqué stating that "self-determination should be implemented without foreign interference and in conformity with relevant United Nations resolutions."<sup>62</sup>

This, however, was the last Moroccan obeisance to the norm of self-determination. With Spain now committed to a UN supervised referendum, the hitherto private Moroccan opposition to a free vote began to emerge as a public policy. On July 8, King Hassan II in a Youth Day speech reasserted Morocco's historic claim to the Sahara and threatened general mobilization if necessary "to recover the usurped territories."<sup>63</sup> Up to this time, despite all the UN resolutions and the decisions of the conferences of the nonaligned and of the Maghrebian states, Rabat had nevertheless persuaded itself that Spain would eventually agree to negotiate a union between Morocco and the Western Sahara. When, instead, Spain unexpectedly acceded to the General Assembly's calls for a self-determination plebiscite, Morocco suddenly had to improvise an entirely new strategy. It decided to propose that the issue be referred to the International Court of Justice, thereby at least securing a postponement of the referendum during the Court's deliberations. It was also decided that the reference to the Court should be limited to an examination of the validity of Morocco's claim to historic title in such a way as to make that issue dispositive. "You, the Spanish Government, claim that the Sahara was '*res nullius*,'" King Hassan declared. "You claim that it was a territory or property left un-

<sup>60</sup> Letter dated 10 July 1974 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, UN Doc. A/9655 (1974).

<sup>61</sup> Letter dated 20 August 1974 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, UN Doc. A/9714 (1974).

<sup>62</sup> Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples Covering Its Work During 1974. UN Doc. A/9623/Add.4 (Part II), at 23 (1974).

<sup>63</sup> *Supra* note 60, at 2.



inherited, you claim that no power and no administration had been established over the Sahara; Morocco claims the contrary. Let us then request the arbitration of the International Court. . . ."<sup>64</sup>

Initially, Mauritania did not join in the call for submitting the case to the ICJ, reiterating, instead, "its sincere intent faithfully to respect the freely expressed will of the populations concerned. . . ."<sup>65</sup> However, at a summit meeting in Rabat, in October, King Hassan and President Ould Daddah of Mauritania agreed on the strategy of going to the Court and, it appears, on a division of the Sahara regardless of the outcome of the ICJ's deliberations.<sup>66</sup>

Algeria reluctantly endorsed the Moroccan-Mauritanian initiative, having been persuaded to do so in the name of Third World solidarity. After all, it was argued, the delay would involve no more than a year and in no way derogated from the right of the population to make the final decision.<sup>67</sup> The Algerian miscalculation is understandable. In the UN discussions, state after state, while agreeing to send the matter to the Court, stipulated that this was not to be construed as a departure from the principle of self-determination.<sup>68</sup> Spain was more suspicious of Moroccan motives. In an attempt at compromise, Madrid offered to support the request for an advisory opinion, but only if it were framed so as to ask the Court to look not only at historic legal title but also to "consider the legal effects of the provisions of the Charter of the United Nations and the resolutions of the General Assembly on the administering Power, the countries bordering the Territory and, above all, the indigenous population."<sup>69</sup> Morocco, however, rejected the proposed rewording.<sup>70</sup>

The vote in the General Assembly's Fourth Committee was held on December 11 and the resolution requesting and framing the issues for an advisory opinion of the ICJ was adopted by 81 to 0 with 43 abstentions.<sup>71</sup> Spain, in abstaining, said the "questions formulated . . . were, from a legal standpoint, ambiguous, incomplete and irrelevant, since they failed to take into account the development of contemporary international law in relation to Non-Self-Governing Territories, as embodied in the Charter and in General Assembly declarations and resolutions on decolonization."<sup>72</sup> The Representative of Kenya, Mr. Francis Njenga, condemned the delay in the plebiscite, adding: "The people of Spanish Sahara should be the court. . . .

<sup>64</sup> Letter dated 23 September 1974 from the Minister for Foreign Affairs of Morocco addressed to the Minister for Foreign Affairs of Spain, UN Doc. A/9771, Annex, (1974).

<sup>65</sup> Letter dated 20 August 1974 from the Acting Chargé d'affaires of the Permanent Mission of Mauritania to the United Nations addressed to the Secretary-General, UN Doc. A/9715, Annex, at 1, 2 (1974). See also UN Doc. A/PV.2251, at 82 (1974) (Mr. Ould Mouknass, Representative of Mauritania addressing the General Assembly).

<sup>66</sup> *Le Monde* Nov. 27, 1975, at 1, 5. *THE ECONOMIST*, Sept. 13, 1975, at 58.

<sup>67</sup> UN Doc. A/PV.2265, at 57-60 (1974).

<sup>68</sup> U.S. Representative Barbara White took the position that her country in principle supported the use of the Court, whenever possible, in resolving legal disputes. UN Doc. A/C.4/SR.2125, at 11 (1974).

<sup>69</sup> UN Doc. A/C.4/SR.2126, at 7 (1974).

<sup>70</sup> UN Doc. A/C.4/SR.2130, at 27 (1974).

<sup>71</sup> UN Doc. A/C.4/SR.2131, at 19 (1974). <sup>72</sup> *Id.* at 8.



The United Nations was indeed being asked to treat them as chattels and not as people."<sup>73</sup> Guatemala, on the other hand, candidly admitted that it had supported the resolution as a way to halt the plebiscite, thereby creating a precedent for preventing the application of self-determination to British Honduras (Belize).<sup>74</sup>

#### THE REPORT OF THE UN VISITING MISSION

On December 13 the General Assembly approved the action of the Fourth Committee by passing Resolution 3292(XXIX).<sup>75</sup> This resolution contained three important mandates: (1) the postponement of the referendum, (2) the despatch of a UN visiting mission to the Sahara, and (3) the request to the ICJ for an advisory opinion. Although Spain had resisted (1) and (3) it had welcomed (2). On the basis of consultations with its members, the Chairman of the Special Committee appointed representatives from Cuba, Iran, and the Ivory Coast to constitute the Mission, under the leadership of Siméon Ake, the UN Permanent Representative of the Ivory Coast.<sup>76</sup> The Mission was charged with responsibility for "securing first-hand information on the situation prevailing in the Territory, including information on political, economic, social, cultural and educational conditions, *as well as on the wishes and aspirations of the people*"<sup>77</sup> (emphasis added). To fulfill its mandate it was to examine the measures Spain proposed to take to ensure the decolonization of the Territory, and to undertake "direct contacts with the largest possible number of indigenous inhabitants of the Territory, including those currently living outside" it in order "to ascertain the wishes and aspirations of the indigenous people. . . ."<sup>78</sup>

The Mission toured from May 8 to June 9, beginning in Madrid and ending in Mauritania. In between, they traveled extensively in the Sahara, as well as to Morocco and Algeria. Discussions were held with government leaders and officials of the political parties that had recently begun to take shape inside the Sahara and among refugees and exiles in the neighboring countries. There appears to have been a thorough attempt at rigorous fact-finding, and the Mission reported an absence of any effort in the countries visited to interfere with the Mission's freedom of movement.<sup>79</sup>

What emerges from these extensive month-long investigations is not ambiguous. The opening page of the Mission's unanimous report on the political situation states unequivocally that:

Owing to the large measure of co-operation which it received from the Spanish authorities, the Mission was able, despite the shortness of its stay in the Territory, to visit virtually all the main population centres and to ascertain the views of the overwhelming majority of their inhabitants. At every place visited, the Mission was met by mass

<sup>73</sup> *Id.* at 12.

<sup>74</sup> *Id.* at 25.

<sup>75</sup> G.A. Res. 3292, 29 GAOR Supp. 31, at 103-04, UN Doc. A/9631 (1974).

<sup>76</sup> The other members of the Mission were Marta Jimenez Martinez (Cuba) and Manouchehr Pishva (Iran).

<sup>77</sup> *Visiting Mission*, *supra* note 15, at 4. <sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.* at 7-14.



political demonstrations and had numerous private meetings with representatives of every section of the Saharan community. *From all of these, it became evident to the Mission that there was an overwhelming consensus among Saharans within the Territory in favour of independence and opposing integration with any neighbouring country*<sup>80</sup> (emphasis added).

Independence was found to be the objective of the traditionalist-minded PUNS (Partido de la Unión Nacional Saharani), the only legally recognized movement in the territory and the one with which most members of the Yema'a said they identified.<sup>81</sup> Independence was also sought by POLISARIO, which opposed PUNS as a tool of the Spanish.<sup>82</sup> POLISARIO proved that it could organize mass demonstrations wherever the team went and during the Mission's stay secured the defection of two patrols of *Tropas Nomadas* and the capture of their Spanish officers.<sup>83</sup> It also crippled the conveyor belt linking the phosphate mines with the coast. If nothing else, these activities dispelled all doubt in the mind of the UN team that the larger of the independence movements was not the vehicle of the Spanish authorities. Far from being staged, the reception accorded to the Mission "came as a surprise to the Spanish authorities who, until then had only been partly aware of the profound political awakening of the population."<sup>84</sup>

No other political movements were deemed to be remotely as significant an expression of Sahrawi opinion as POLISARIO.<sup>85</sup> Thus "the Mission was able to conclude after visiting the Territory that the majority of the population within the Spanish Sahara was manifestly in favour of independence."<sup>86</sup> That impression was based "both on the public manifestation which it witnessed and on an extremely large number of interviews with groups and individuals representing different shades of opinion. All these interviews were held in private in the absence of any representatives of the Spanish authorities. Random discussions were also held with members of the general public."<sup>87</sup> In El Aaiun, alone, several thousand persons turned out to demonstrate for POLISARIO.<sup>88</sup> The Mission was satisfied that within the territory "the population, or at least almost all those persons encountered by the Mission, was categorically for independence and against the territorial claims of Morocco and Mauritania," although outside the territory, among the small, fragmented refugee movements, opinions were more mixed, reflecting the respective policies of the Moroccan, Mauritanian, and Algerian hosts.<sup>89</sup>

The Mission concluded with the recommendation that "the General Assembly should take steps to enable those population groups to decide their

<sup>80</sup> *Id.* at 48.

<sup>82</sup> *Id.* at 52.

<sup>84</sup> *Id.* at 48.

<sup>86</sup> *Ibid.*

<sup>88</sup> *Id.* at 56.

<sup>81</sup> *Id.* at 50.

<sup>83</sup> *Id.* at 52, 63.

<sup>85</sup> *Id.* at 55.

<sup>87</sup> *Ibid.*

<sup>89</sup> Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/10023/Add.5, at 11 (1975).



own future in complete freedom and in an atmosphere of peace and security. . . ." <sup>90</sup> To this end, the General Assembly should authorize the Secretary-General to appoint a new visiting mission to define the conditions under which the consultation should take place, a consultation "which should take place under United Nations auspices." <sup>91</sup>

The unanimity of the Visiting Mission in calling for a UN plebiscite on the question of independence is all the more remarkable because the Iranian member and the Ivory Coast chairman were both under considerable pressure from their home governments to report findings more favorable to the Moroccan cause. Yet they were so convinced by the evidence that they could bring themselves to accommodate their home governments with little more than a toning down of a few of the draft report's most critical references to Morocco's aspirations.

#### THE INTERNATIONAL COURT'S ADVISORY OPINION

A few days after the publication of the Visiting Mission's report, the International Court rendered its opinion. <sup>92</sup> Spain had argued that the questions posed in the General Assembly's request for an advisory opinion should not be answered at all, since, in focusing only on the issue of *res nullius* and historical title the answers would be "devoid of purpose . . . irrelevant." <sup>93</sup> In Algeria's view, they "cannot have any practical effect" <sup>94</sup> because they do not deal with the "fundamental principle governing decolonization"—self-determination. <sup>95</sup> The Court met these objections by stating, in effect, that, whatever the questions it had been asked, its *answers*, to be comprehensive, would certainly have to take into account "the applicable principles of decolonization" because "they are an essential part of the framework of the questions contained in the request. The reference in those questions to a historical period cannot be understood to fetter or hamper the Court in the discharge of its judicial functions." <sup>96</sup>

By refusing to be narrowly bound to the questions asked, the Court was able to reframe the question essentially in the manner earlier proposed by Spain, *i.e.*, how important in the final act of decolonization is historic title

<sup>90</sup> *Ibid.*

<sup>91</sup> A popular consultation with the inhabitants, the Mission noted:

. . . must be based on the participation of all Saharans belonging to the Territory. It is therefore important to establish who is and who is not a Saharan belonging to the Territory. The concerned and interested parties have agreed that this task should be entrusted to a commission of experts designated by the United Nations, which would work in close co-operation with the administering Power and with the other concerned and interested parties. *Id.*, at 9.

<sup>92</sup> Advisory Opinion on Western Sahara, [1975] ICJ REP. 12 [hereinafter cited as *Advisory Opinion*].

<sup>93</sup> *Id.*, at 29. The questions put to the Court by Resolution 3292(XXIX), *supra* note 75, were the following:

I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"

<sup>94</sup> *Ibid.*

<sup>95</sup> *Id.* at 30.

<sup>96</sup> *Ibid.*



as compared to the right of self-determinations? Addressing itself to this question of its own design, the Court found that, at least during the past fifty years, self-determination has become the rule, that independence, free association with another state, or integration into another state, while all legitimate forms of decolonization, must come about only as a "result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."<sup>97</sup>

The Court cited with approval the various General Assembly resolutions setting out these prerequisites of popular consultation as well as ones specifically applying the rules to the Sahara itself.<sup>98</sup> "All these resolutions from 1966 to 1973," the Court observed, "were adopted in the face of reminders by Morocco and Mauritania of their respective claims that Western Sahara constituted an integral part of their territory."<sup>99</sup> The Court concluded that the rules applicable to decolonization require respect for "the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right is not affected by the present request for an advisory opinion. . . ." <sup>100</sup> In no way should the Court's advisory opinion on historic title be seen as derogating from the right of the people to decide their contemporary destiny.<sup>101</sup> By a rather generous reading of the request for the advisory opinion, the Court was able to conclude that no such derogation was intended, that the concern with historic title was probably only to enable the General Assembly to arrange "consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people."<sup>102</sup>

With that, the Court went on to consider the issue of historic title. After a minute examination of evidence of political, military, religious, and fiscal practices in the region before Spain's arrival, the judges found that "the information before the Court does not support Morocco's claim to have exercised territorial sovereignty over Western Sahara."<sup>103</sup> While "the information before it shows the display of some authority by the [Moroccan] Sultan" over some, but only some, of the nomadic tribes of the region, the evidence "does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in the Western Sahara."<sup>104</sup> The "inferences to be drawn from the information before the Court concerning internal acts of Moroccan sovereignty and from that concerning international acts are, therefore, in accord in not providing indications of the existence, at the relevant period, of any legal tie of territorial sovereignty between Western Sahara and the Moroccan state."<sup>105</sup>

<sup>97</sup> G.A. Res. 1541(XV), 15 GAOR Supp. 16, at 29-30, UN Doc. A/4684 (1960), cited by the ICJ with approval in its *Advisory Opinion*, at 32-33.

<sup>98</sup> *Id.* at 34-35.

<sup>99</sup> *Id.* at 35.

<sup>100</sup> *Id.* at 36.

<sup>101</sup> *Id.* at 36-37.

<sup>102</sup> *Id.* at 37.

<sup>103</sup> *Id.* at 48.

<sup>104</sup> *Id.* at 49.

<sup>105</sup> *Id.* at 56-57.



In respect of Mauritania's claim, the Court's answer was essentially the same. Although there is evidence of "the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara . . . the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and . . . the Mauritanian entity."<sup>106</sup>

The decision as to Morocco's claim was 14 to 2, that as to Mauritania 15-1.<sup>107</sup> One of the dissenting votes in respect of Morocco and Mauritania was cast by an *ad hoc* judge, M. Boni, appointed under the Court's rules by Morocco. The second dissent in the case of the Moroccan claim was cast by Judge Ruda who, far from supporting the Shariffian claim, felt that the Court should more unqualifiedly have rebuffed the assertion of historic legal ties. "Sporadic manifestations of allegiance and authority," he declared, "even if established, are not sufficient to declare the existence of legal ties, whether of a territorial or personal character."<sup>108</sup> Judge Ammoun of Lebanon, the Court's Vice President, voted with the majority but, in a separate opinion, could be perceived to tilt in favor of the Moroccan and Mauritanian case. All in all, however, the results were a sharp and essentially unanimous rejection both of Morocco's and Mauritania's historic claims. More important, the Court emphatically rejected the assertion that "automatic retrocession"<sup>109</sup> can take precedence over the inhabitants' rights to self-determination.

#### THE USE OF FORCE TO PREVENT SELF-DETERMINATION

The Visiting Mission had found strong evidence of a preference for independence among the people of the Sahara and recommended holding a plebiscite under UN auspices. The ICJ had ruled that Morocco and Mauritania have no valid claim to the Sahara based on historic title, but that, even if they did, contemporary international law accords priority to the Sahrawis' right of self-determination. When these results were in, the Moroccan Government came to the remarkable conclusion, worthy of the perverse Red Queen in Lewis Carroll's *Through the Looking Glass*, that "the opinion of the Court can only mean one thing: the so-called Western Sahara was part of Moroccan territory over which the sovereignty was exercised by the Kings of Morocco and that the population of this territory considered themselves and were considered to be Moroccans. . . . To-day Moroccan demands have been recognized by the legal advisory organ of the United Nations."<sup>110</sup>

The day after the ICJ published its advisory opinion, the Moroccan Government announced that there would be a massive march of 350,000

<sup>106</sup> *Id.* at 68.

<sup>107</sup> *Id.* at 69.

<sup>108</sup> *Id.* at 176 (Dissenting Opinion of Judge Ruda).

<sup>109</sup> The expression appears in Judge Dillard's Separate Opinion, where he takes the view that the concept was inapplicable to the Western Sahara and that it was therefore unnecessary for the Court to deal with the principle of territorial integrity. *Id.* at 120.

<sup>110</sup> Press release of the Permanent Mission of Morocco to the United Nations on 16 October 1975, quoted in UN Doc. S/PV.1849, at 11 (1975).



"unarmed civilians" from Morocco into the Sahara "to gain recognition of [Morocco's] right to national unity and territorial integrity."<sup>111</sup> Spain's Representative to the United Nations replied that this "threatens international peace and security" and invoked Article 35 of the UN Charter to bring the situation to the attention of the Security Council.<sup>112</sup> Two days later, the Security Council was handed a terse draft resolution by Costa Rica demanding "that the Government of Morocco desist immediately from the proposed march on Western Sahara."<sup>113</sup>

The members of the Security Council were not ready to take the unqualified step proposed by Costa Rica. Instead, they voted to ask the Secretary-General "to enter into immediate consultations with the parties concerned and interested"—code words for Spain, Morocco, and Mauritania (countries "concerned") and Algeria (country "interested")—and "to report to the Security Council as soon as possible on the results of his consultations in order to enable the Council to adopt the appropriate measures to deal with the present situation. . . ."<sup>114</sup> The resolution backed away from any specific mention of the right of self-determination, although it "reaffirmed" Resolution 1514(XV) "and all other relevant General Assembly resolutions on the territory."<sup>115</sup> Neither did it order Morocco not to carry out its march. Instead it lamely appealed "to the parties concerned and interested to exercise restraint and moderation, and to enable the mission of the Secretary-General to be undertaken in satisfactory conditions."<sup>116</sup> This represented a victory of sorts for Morocco in that it envisaged further delay in the preparations for the referendum and substituted a UN negotiating role for that of preparing and supervising the act of self-determination.

Secretary-General Waldheim, acting on his vague Security Council mandate, proceeded on a three-day trip, holding discussions with the Moroccan King and the Heads of Government of Mauritania, Algeria, and Spain, as well as with relevant ministers. This was followed by a further brief field trip by his personal representative, Mr. André Lewin. Out of these negotiations emerged what Waldheim took to be a consensus that "all the parties . . . would be prepared to recognize the United Nations as an essential element in the search for an acceptable solution."<sup>117</sup> Spain, notably, "was ready to co-operate fully with the United Nations which could be called upon to play an appropriate role that might include temporary ad-

<sup>111</sup> Letter dated 18 October 1975 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council. UN Doc. S/11852 (1975).

<sup>112</sup> Letter dated 18 October 1975 from the Permanent Representative of Spain to the United Nations addressed to the President of the Security Council. UN Doc. S/11851 (1975).

<sup>113</sup> Costa Rica, Draft Resolution. UN Doc. S/11853 (1975).

<sup>114</sup> S.C. Res. 377 (1975) adopted by the Security Council at its 1850th Mtg. on Oct. 22, 1975.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Report by the Secretary-General in pursuance of Security Council Resolution 377 (1975) relating to the situation concerning Western Sahara. UN Doc. S/11863, at 5 (1975).



ministration of the Territory by the United Nations until such time as the wishes of the population could be ascertained.”<sup>118</sup>

By November 1, 1975, the day after publication of the Secretary-General's report, Spain again urgently requested a meeting of the Security Council.<sup>119</sup> The “Green March,” as the Moroccan invasion came to be known, had been announced by Rabat for November 4, and Madrid now declared that it would defend Saharan territory with military force, if necessary.<sup>120</sup> The resolution adopted by the Council, however, was little stronger than its predecessor. It merely reiterated the call to “all parties concerned and interested to avoid any unilateral or other action which might further escalate the tension in the area. . . .” and invited the Secretary-General to “continue and intensify his consultations.”<sup>121</sup> Several members of the Council, Costa Rica and Sweden in particular, indicated their displeasure that the need for a consensus had prevented the drafting of a more specific decision addressed to Morocco. “Once again,” Representative Salazar of Costa Rica said, “the Security Council . . . has avoided calling things by their proper names” and “its failure to do so may be taken to mean that it was unable to agree on the real cause of the crisis.”<sup>122</sup> The United States and France, however, successfully resisted all efforts to order Morocco to “cease and desist.”

Algeria's Representative said tersely that his country “considers that this march, if it crosses the borders of the Saharan Territory, would constitute a violation of the sovereignty of that Territory; an act contrary to international law; an initiative of a nature which would alter the balance of this region; and, finally, a decision, the incalculable consequences of which would directly affect the peace of this region and the future relations of all countries bordering on the Territory of Western Sahara.”<sup>123</sup> He charged that other African countries were being won over to the Moroccan side on secret “terms” and warned that the forcible takeover of the Sahara “would unquestionably constitute one of the most serious precedents that we have ever had the opportunity of seeing. If we place this initiative in an African context . . . I am convinced,” Representative Rahal added, “that not a single African country will fail to see the consequences, both immediate and long-term, of the success of such a solution if applied to the various boundaries and territorial problems which arise on the African continent.”<sup>124</sup> Then he stated:

I have been authorized by my Government to declare here, with all the solemnity this statement merits, that if the Security Council and

<sup>118</sup> *Ibid.*

<sup>119</sup> Letter dated 1 November 1975 from the Charge d'Affaires, A.I. of the Permanent Mission of Spain to the United Nations addressed to the President of the Security Council. UN Doc. S/11864 (1975).

<sup>120</sup> UN Doc. S/PV.1852, at 13-15 (1975). (Mr. Arias-Salgado, Representative of Spain, addressing the Security Council).

<sup>121</sup> S.C. Res. 379 (1975), adopted by the Security Council at its 1852nd Mtg. on Nov. 2, 1975.

<sup>122</sup> UN Doc. S/PV.1852, at 22 (1975).

<sup>123</sup> *Id.* at 72-75.

<sup>124</sup> *Id.* at 76.



the international community are not in a position to assume their responsibility, Algeria will assume its own responsibilities. . . .<sup>125</sup>

After the Moroccan march had crossed the frontier, the Security Council met once again, on the night of November 5. At an unusual closed session, France and the United States again effectively prevented the Council from ordering the King to call off the march. Instead, the Council President was merely authorized to address an "urgent request" to King Hassan "to put an end forthwith to the declared march into Western Sahara."<sup>126</sup> Each of the members of the Council realized, however, that this gesture would not suffice to reverse the momentum, and a negative reply from King Hassan was received by the Council the next morning.<sup>127</sup> Nevertheless, the Council, later the same day, passed a further toothless resolution that "deplored" the march and called on Morocco to withdraw from the territory and resume negotiations under the aegis of the Secretary-General.<sup>128</sup>

The march, of course, continued. The peaceful aggression proceeded in accordance with an immutable script written in other instances of "anschluss." Just before it commenced, there was the obligatory act of defection: Mr. Khatri Ould Joumaini, the elected President of the Yema'a, fled to Agadir and paid ritual homage to King Hassan.<sup>129</sup>

#### SPAIN SELLS THE SAHARA

Between November 3 and 6, the Secretary-General's representative, Mr. André Lewin, again visited Morocco, Mauritania, Algeria, and Spain. On this occasion it became clear that since his prior trip important changes had taken place in the positions of the parties which made obsolete the Secretary-General's plan for an interim UN administration. Although the march had not yet begun, it soon appeared to Lewin that something had been going on which had stiffened the position of the Moroccans and softened that of Spain. The Moroccans now rejected outright any UN interim administration, stating that the idea had been "overtaken by events."<sup>130</sup> Lewin also found that, while Spain still paid lip-service to the Secretary-General's proposal, "the President of the Spanish Government expressed the view that a trilateral agreement also could provide an appropriate formula if the United Nations were prepared to agree to it."<sup>131</sup> The stage had been set for the abandonment of the principle of self-determination, with the leaders of Morocco, Mauritania, and Spain cosily settling

<sup>125</sup> *Id.* at 82-85.

<sup>126</sup> Official communiqué of the 1853rd Meeting of the Security Council, UN Doc. S/11869 (1975).

<sup>127</sup> UN Doc. S/PV.1854, at 16 (1975) (Representative Slaoui, addressing the Security Council).

<sup>128</sup> S.C. Res. 380 (1975), adopted by the Security Council at its 1854th Mtg. on Nov. 6, 1975.

<sup>129</sup> Mr. Joumaini's statement is quoted in UN Doc. S/PV.1854, at 26-27 (1975).

<sup>130</sup> Report by the Secretary-General in pursuance of Security Council Resolution 379 (1975) relating to the situation concerning Western Sahara. UN Doc. S/11874, at 4 (1975).

<sup>131</sup> *Id.* at 6.



into Madrid to divide the spoils. With evident distaste, the Secretary-General reported that he would continue his consultations.<sup>132</sup>

On November 9, King Hassan requested the "Green Marchers" to return to their starting point. On November 11, tripartite negotiations at the Ministerial level began in Madrid culminating on November 14 in a joint Moroccan, Mauritanian, and Spanish communiqué which noted that the negotiations had been carried on in "a spirit of the utmost friendship, understanding and respect for the principles of the Charter of the United Nations" and "have led to satisfactory results in keeping with the firm desire for understanding among the parties and their aim of contributing to the maintenance of international peace and security."<sup>133</sup>

These results were, indeed, "satisfactory" to those who participated. Although the terms understandably remain secret,<sup>134</sup> their substance has become largely surmisable. Spain agreed to a decolonization formula that allowed the Sahara to be partitioned in the way previously agreed between Morocco and Mauritania.<sup>135</sup> The referendum would be quietly buried. Spain, in return, would retain a 35 percent interest in Fosbucraa, the 700-million dollar Saharan phosphate industry.<sup>136</sup> In addition, there were concessions by Morocco concerning fishing rights off the Saharan and Moroccan coasts, concessions of particular importance to the fishing industry of Spain's nearby Canary Islands, which are almost wholly populated by ethnic Spaniards.

Spain agreed that it would immediately establish an interim regime in the Sahara with Moroccan and Mauritanian Deputy Governors, that it would turn over its responsibility for the administration of the territory on February 28, 1976, and that the Yema'a, "which will express the view of the Saharan population, will collaborate in this administration."<sup>137</sup>

In the last respect, however, the three godfathers of the settlement were mistaken. In a final ironic twist, the hitherto servile Yema'a—first thought to be essentially an apolitical, pliable friend of Spain, later claimed to have been "won" over by Morocco—refused any further role in the proceedings.

<sup>132</sup> *Id.* at 7.

<sup>133</sup> Third report by the Secretary-General in pursuance of Security Council Resolution 379 (1975) relating to the situation concerning Western Sahara. UN Doc. S/11880, Nov. 19, 1975, Annex I, at 1.

<sup>134</sup> In April, Morocco published the terms of the agreement by which Morocco and Mauritania will share the proceeds of the lucrative Bou Craa mines. *The Times* (London), April 17, 1976, at 5.

<sup>135</sup> For further evidence of such an agreement, *see, e.g.*, the oral pleadings, Mr. Slaoui (Morocco) CR 75/6 (uncorrected translation) (mimeographed), Wednesday, 25 June 1975, at 6-9. In the written pleadings, Mauritania and Morocco each claimed the whole Sahara and Mr. Slaoui had the task of bringing this into conformity with the partition agreement. In effect, he told the Court not to worry about it, that:

... there is a north and there is a south which juxtapose in space the legal ties of Western Sahara with Morocco and with Mauritania. Having regard to the question put to the Court, and considering that, by definition, the mandate of the Court does not relate to any political problem and does not imply any territorial delimitation, the fact that there is overlapping between the north and the south that it would serve no purpose to define more accurately cannot modify the sense of the answers given by the Court. *Id.* at 8.

<sup>136</sup> *N.Y. Times*, Feb. 11, 1976, at 28.

<sup>137</sup> *Supra* note 133, Annex II, at 1.



It dissolved itself in order to avoid having to ratify a course of events in which it had not been consulted.<sup>138</sup> To the annexing powers, the gesture mattered little.

How had Morocco achieved this bloodless victory? One key appears to have been the terminal illness and death of General Franco which was the counterpoint to these events. While the Caudillo's incapacity paralyzed much of the Spanish Government, the initiative passed to a small group of army-backed conservatives in Madrid headed by Sr. Carlos Arias Navarro, the President of the Government. These "ultras," some of whom had reluctantly been converted to Saharan independence only on the assumption that it would occur under the auspices of the pro-Spanish Yema'a and PUNS, now favored a Moroccan solution over a POLISARIO-dominated independent Sahara. Towards the end of October, Sr. Jose Ruiz Solis, Minister and Secretary General of the Falangist Movement, was authorized to open negotiations with the Moroccan and Mauritanian Foreign Ministers. Hearing of this, Algeria dispatched its own representation to Madrid which attempted to participate in the negotiations and to enlist the support of the "non-ultras," in particular Prince Juan Carlos, who at that very moment was assuming power from the dying Franco, and Foreign Minister Cortina Mauri. In these efforts, Algeria had some leverage, since Spain is heavily dependent on the former for supplies of natural gas.

For an instant, this end run appeared to succeed. The tripartite negotiations were adjourned by the Prince, who, having become acting Head of State, flew off to El Aaiun and, on November 2, pledged to lead Spanish forces to defend the territory. Even as he did so, however, the Moroccan Prime Minister, Ahmed Osman, arrived in Madrid and, after a meeting with Juan Carlos, negotiations were resumed with the Spanish "ultras" led by Arias. The King had been overruled or made to back down. After two days of talks Osman returned to Morocco, carrying a draft proposal. It appears to have been agreed that the Moroccan Green March should go on as planned but that there would be only a token occupation and that the march would halt short of the Spanish Legion, thereby allowing both governments to save face. Behind what the Algerian Representative to the United Nations called "this masquerade,"<sup>139</sup> Moroccan regular armed forces were allowed to penetrate the Sahara to begin the task of liquidating the forces of POLISARIO.<sup>140</sup>

On November 8, the Spanish Minister attached to the Prime Minister's office, Antonio Carro Martinez, visited Morocco and the next day King Hassan announced the ending of the march. At the same moment, the Moroccan Prime Minister and Foreign Minister flew to Madrid accompanied by the director general of the Moroccan phosphate industry. The Moroccan-Spanish deal was all but complete. Within the Council of Ministers, Foreign Minister Cortina stood isolated in his opposition. A few days

<sup>138</sup> THE ECONOMIST, Dec. 20, 1975, at 50.

<sup>139</sup> UN Doc. S/PV.1854, at 36. (Representative Rahal, addressing the Security Council).

<sup>140</sup> AFRICAN RESEARCH BULL., Nov. 1-30, 1975, at 3837.



after the November 14 signing of the tripartite agreement, Mauritanian troops opened a bombardment of the southern Saharan town of La Guera which POLISARIO had occupied. A long bloody battle ensued which was won with Moroccan help and after heavy casualties.

#### EPILOGUE

By mid-November, heavy fighting was underway in the Sahara with both Moroccan and Mauritanian forces engaged by substantial and apparently well-trained forces of POLISARIO which, initially, claimed control over two-thirds of the country.<sup>141</sup> Throughout December, the Moroccan forces pushed POLISARIO out of the principal towns and villages, while Sahrawis fled into Algeria.

Even as the sides were preparing for battle, the UN General Assembly passed two conflicting resolutions. The first (Resolution 3458(A)) again called on Spain to arrange a free and genuine act of self-determination under UN supervision.<sup>142</sup> The latter (Resolution 3458(B)) took note of the Madrid three-power agreement and called on the Secretary-General to appoint a representative to "consult" with the three-power interim administration in order to "assist" it in holding a "free consultation" with the "Saharan populations."<sup>143</sup> In one breadth the General Assembly called for the Sahrawis to exercise "their inalienable right of self-determination" and in the next it recognized the fait accompli imposed on them by Morocco, Mauritania, and Spain. The two resolutions had in common only that, in their different ways, both created a scenario for further involvement by the Secretary-General in quite unrealistic circumstances to which that harried official took private and, eventually, public exception.<sup>144</sup> The opportunity to hold Spain accountable to the United Nations for arranging a regular self-determination plebiscite as envisaged by Part A was vitiated by Part B which, in effect, recognized the new tripartite status created in the Sahara by the Madrid accords. Since the three-power agreement already stipulated exactly how the Spanish Sahara would be apportioned between Morocco and Mauritania, expecting those countries to conduct a "free consultation" after having occupied their respective sectors was like inviting the cat to consult the canaries.

It is impossible to reconcile these two resolutions. Yet both resolutions were approved by the Assembly, the first by 88 votes to 0 with 41 abstentions; the second much more narrowly, by 56 to 42 with 34 abstentions.<sup>145</sup>

<sup>141</sup> *Id.*, Dec. 1-31, 1975, at 3872-74.

<sup>142</sup> G.A. Res. 3458(A), UN Doc. GA/5438, at 254-55 (1975). (Press Release)

<sup>143</sup> G.A. Res. 3458(B), UN Doc. GA/5438, at 256 (1975). (Press Release)

<sup>144</sup> *Waldheim Given Difficult Missions* [Interview with the Secretary-General], 6 THE DIPLOMATIC WORLD BULL., No. 5, March 8, 1976, at 1237, 1243. "I regret this development," Waldheim said of the role assigned him in the contradictory resolutions. "It is a negative development: you could not have a clearer answer from me. . . ." *Id.* at 1243.

<sup>145</sup> It should be noted that the second resolution could have been defeated if the Assembly, by a simple majority, had determined both resolutions to be "important" thus requiring adoption by a two-thirds vote of those present and voting in accordance with Article 18(3) of the UN Charter.



Among the 40 African states voting on the first resolution, 29 voted in favor, while 11 abstained. On the second resolution, only 12 Africans joined Morocco and Mauritania in favor, while 21 were opposed and 8 abstained. The United States abstained on the first resolution, calling for genuine self-determination, but voted in favor of the second, recognizing the imposed three-power partition. Thus, the United States firmly aligned itself against self-determination, against the majority of African states, and in favor of an arbitrarily instituted, antidemocratic solution at dramatic variance with the rules of the games as hitherto observed.

The U.S. vote can only be understood as an act of political expediency grounded in cold war, East/West political alliances. Among African states, however, a considerable number voted on principle rather than politics. Thus most of the pro-Western members of the O.A.U., including Zambia, Lesotho, Kenya, Botswana, Swaziland, Malawi, and Ghana, voted for self-determination and against any legitimization of the Madrid accords: this despite these nations' evident lack of political affinity for Algeria or POLISARIO.

Resolution 3458(B), calling for "consultations" between the three parties to the Madrid accords and the Sahrawi population, soon became blatantly inapplicable. After the Yema'a (the occupiers' chosen vehicle for consultations) dissolved itself, 57 of its 103 members, (including four members of the Spanish Cortes), joined POLISARIO and fled to Algiers.<sup>146</sup> The number of defectors eventually rose to 72, forcing King Hassan to declare the Yema'a dissolved.<sup>147</sup> Late in February, 1976, some of the defectors appear to have returned to El Aaiun, permitting the King to reconvene a rump Assembly to endorse partition and annexation.<sup>148</sup> However, that body's credibility had reached such a nadir that Spain preferred to terminate its role in the tripartite administration two days early rather than be implicated in such a bogus "consultation."<sup>149</sup> The Secretary-General's special representative, Olaf Rydbeck of Sweden, returned from the Sahara at the end of February to recommend that the United Nations should refuse to legitimate the actions of Morocco and Mauritania which, together with the fighting and lack of security in the territory, made any genuine "consultation" impossible.<sup>150</sup>

Although fighting became particularly fierce during January to March of 1976,<sup>151</sup> the tempo of battle in the Sahara may have subsided temporarily.

<sup>146</sup> UN Doc. A/PV.2435, at 92 (1975). (Representative Rahal of Algeria addressing the General Assembly); *Le Monde*, Dec. 9, 1975, at 3.

<sup>147</sup> *NEWSWEEK*, JAN. 26, 1976, at 35.

<sup>148</sup> According to newspaper reports, 65 members took part in the vote, which coincided with POLISARIO's proclamation of the Sahara Arab Democratic Republic. *N.Y. Times*, Feb. 28, 1976, at 6.

<sup>149</sup> *Id.*, Feb. 27, 1976, at 5, and interviews.

<sup>150</sup> *Ibid.*; 6 *THE DIPLOMATIC WORLD BULL.*, No. 5, March 8, 1976, at 1237, 1242.

<sup>151</sup> The termination of the tripartite administration did not diminish the will of POLISARIO, or of Algeria, to resist. Fierce fighting between the guerrillas and Mauritians was reported by the Spanish press in January, even in the remote southern towns of Villa Cisneros and Aargub, far from where the Algerians were massing. *N.Y. Times*, Jan. 12, 1976, at 7. At Villa Cisneros (Dakhla), the Moroccan army commander



In the opinion of some expert UN and African observers, the Soviet Union, having benefited from U.S. reticence in the support of its "clients" in Angola, reciprocated by restricting the level of aid furnished to POLISARIO and the Algerian armed forces.<sup>152</sup> However, such a slowdown, even if it occurs, is unlikely to be of long duration. The Russians do not have a monopoly on the capacity to aid POLISARIO. The North Koreans, for example, who have recognized POLISARIO's government, could fill any void left by Soviet restraint. Libya, too, has indicated a willingness to support a long-term POLISARIO effort with money and arms.

More significant even than the prospects for continued bloodshed in Northwest Africa is the effect of the Saharan precedent on the stability of the international system which has come to depend on respect for existing boundaries and the rejection of revisionist territorial claims based on allegations of historic rights. The 1976 President of the UN General Assembly, Shirley Amerasinghe of Sri Lanka, has warned of the "depressing" global trend among Third World states "to replace the old imperialism by other forms of foreign control founded on territorial claims."<sup>153</sup> Tanzania's UN Representative Salim added that "cardinal principles were involved and . . . how the United Nations dealt with them would have consequences not only in the Territory itself but also beyond its borders and even beyond the African continent."<sup>154</sup> The Zambian Representative on the General Assembly's Fourth Committee pointed to a clear "parallel between the claims of Guatemala over Belize on the one hand, and those of Morocco and Mauritania over Spanish Sahara on the other. . . . Policies of annexation and expansion were being pursued in total disregard of the aspirations of the inhabitants of the Territories concerned and the United Nations was being asked to bless those unjust designs."<sup>155</sup> To do so "would create a most dangerous precedent and would have far-reaching implications for future United Nations work in the field of decolonization. The United Nations, if it entertained the claims of Morocco and Mauritania, could no

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commented that his men were there "to protect the Mauritanian army." WEST AFRICA, Jan. 26, 1976, at 124. During January and February "bloody battles" between Algerian armored columns and the Moroccan army see-sawed around the Amgala oasis and Mahbes. N.Y. Times, Jan. 28, 1976, at 3; *id.*, Jan. 29, 1976, at 8; *id.*, Feb. 12, 1976, at 2; *id.*, Feb. 16, 1976, at 10; *id.*, Feb. 17, 1976, at 9.

The sadder effects, however, were those on the civilian population. In retaliation for the flight of Sahrawi refugees into Algeria, President Boumediene had already summarily expelled 30,000 Moroccan civilians from his country. NEWSWEEK, Jan. 26, 1976, at 35. On February 6, Algeria formally alleged that Moroccan and Mauritanian actions were now "virtually assuming the proportions of genocide." Letter dated 6 February 1976 from the Permanent Representative of Algeria to the United Nations addressed to the Secretary-General, UN Doc. A/31/48 and S/11971, at 7 (1976). According to POLISARIO, on February 18 the Moroccans, using U.S. F-5 fighter planes, began to attack Sahrawi refugee camps inside Algeria at Oum Dreiga. In the first two days 45 civilians were reported killed and 378 wounded.

<sup>152</sup> This point of view has been put forward in interviews by several high Secretariat personnel. It is also expressed in *JEUNE AFRIQUE*, Feb. 13, 1976, at 20.

<sup>153</sup> UN Doc. A/C.4/SR.2175, at 15, Dec. 3, 1975.

<sup>154</sup> *Id.* at 22.

<sup>155</sup> *Id.* at 32.



longer be credible; indeed, its moral right to insist on self-determination in many other pending cases would be brought into question. . . ." <sup>156</sup> The Somalia spokesman warned that his country could pursue exactly the same sort of historic claim to French Somaliland (Djibouti or the Territory of Afars and Issas) as Morocco and Mauritania asserted to the Western Sahara. <sup>157</sup>

The easy success of Morocco and Mauritania in the Sahara (and, concurrently, of Indonesia in Timor) against wholly ineffectual UN opposition, cannot but change the odds and encourage more vigorous pursuit of other territorial claims. Nor is there any reason to believe that this renewed tendency to assert claims of historic title can be limited to issues of decolonization. The arguments successfully used yesterday to justify the deployment of Moroccan forces against the colony of Spanish Sahara can as well be used tomorrow to legitimate the use of force to reassert Morocco's historic title to the independent state of Mauritania. It seems odd that U.S. diplomacy should have been enlisted on the side of such system-transforming behavior. Much of the territory of the United States is, itself, susceptible to claims based on historic title. In the decolonization context, U.S. support for Morocco has made it easier for Somalia to pursue its designs on Djibouti, an area of considerable strategic importance, where U.S. interests would be better served by rigorous application of the very norms that have been undermined elsewhere with U.S. consent.

An important part of the international lawyer's role is to advise his government about the reciprocal normative implications of a proposed course of political conduct. Although political strategists in Washington may feel that they have saved the Spanish Sahara from the clutches of leftist pro-Algerian forces, the international lawyer must warn that, even if this political assessment were correct, the "victory" has been gained at the cost of reinforcing a tendency in international conduct that could redound against the national interest of the United States. In particular, it is predictable that Israel, a state carved out of the Arab-Ottoman Middle East by agreement between a colonial-mandatory power (Britain) and a UN General Assembly from which most of Africa and Asia were still excluded, will feel the adverse impact of the greater credibility now inevitably accorded claims of historic title. The survival of Israel, as of most countries, depends primarily on its ability to defend itself. However, to the extent that its future also depends upon its place in the international system, the handling of the Saharan issue by the United Nations has inevitably, by implication, undermined Israel's legitimacy. It has shown that many nations, including the United States, are willing to tolerate the use of force to effect a restoration of historic title even in disregard of the wishes of the inhabitants.

For the same reason, Israel, and by derivation the United States, ought also to be concerned about the norm-transforming effect of U.S. support for Indonesia's seizure of East Timor. In three other cases currently before the United Nations, claims of historic title are being augmented by a further assertion that the people resident in these territories—in each instance

<sup>156</sup> *Id.* at 33.

<sup>157</sup> *Id.* at 5.



for more than a century—are not entitled to the right of self-determination because they are “imported populations” not native to the territory they inhabit.<sup>158</sup> In the case of Gibraltar and the Falkland Islands this alarming proposition has been advanced by the side securing overwhelming majority support in the General Assembly. The Argentine Representative to the United Nations, enlisting votes for his country’s case against permitting the Falkland Islanders to determine their own future, reminded his fellow UN delegates that the displacement of the original population and its replacement by another, alien to the region, is a wrong which they may wish to redress in their own regions.<sup>159</sup> The message for Israel is surely writ large. Yet Israel has consistently supported Argentina’s position in exchange for Argentina’s support in votes of importance to Israel.

This should not be surprising, the realist will say. Politics—concern for winning—must inevitably take priority over law—concern for the rules. But so stated, the realist poses a false dichotomy. The crisis in the Spanish Sahara offered an excellent opportunity for the United States to emerge as a principled champion of the right of a people within existing boundaries to determine their own destiny, regardless of how the boundaries, or the people, happen to have got there. But it does not follow that concern for the rules negates concern for political gain. The United States might have tried to negotiate a common front in the United Nations with Third World states committed to these principles and sensitive to their continued importance to global stability as well as for the decolonization of Southern Africa.<sup>160</sup> Such a principled coalition might then have tried to link the crises in Angola and the Spanish Sahara, calling for solutions in both instances based on UN supervised self-determination.

As it was, U.S. support for the use of force by Morocco in the Sahara, and the history of U.S. military intervention in Vietnam, made it impossible to arouse much international (or congressional) concern over the use of force by Cuba in Angola. A realist must appreciate that a policy based on the application of force rather than principle has now “lost” us both Vietnam and Angola while “gaining” only the Spanish Sahara. If these are the results of a strategy based on winning, perhaps even political realists might yet be persuaded to try a strategy based on concern for normative reciprocal principles.

<sup>158</sup> For a Guatemalan claim based on this argument, see UN Doc. A/PV.2431, Dec. 8, 1975, at 37, 38–40, Mr. Maldonado Aguirre addressing the General Assembly. For the Spanish claim that self-determination is applicable only to “those who had their roots” in a territory and not to “settlers,” see 23 GAOR, Fourth Comm., 1799th meeting, at 14 (1968). For Argentina’s argument to the same effect in respect of the Falkland Islanders, see Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 19 GAOR, Annexes, Annex No. 8 (Part I), at 436–37, UN Doc. A/5800/Rev.1 (1964).

<sup>159</sup> 28 GAOR Fourth Comm., 2074th meeting, at 302 (1973).

<sup>160</sup> For example, it is a frequent assertion of white South Africans that most blacks arrived only after the white settlers had begun to develop the country. It is also the South African position that, with the creation of black “tribal homelands,” Africans in the white areas cannot expect to participate in the democratic process.