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CASE COMMENT: *Advisory Opinion on the Western Sahara*

Gary Jay Levy

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CASE COMMENTS

Advisory Opinion on the Western Sahara—The Western Sahara was not *terra nullius* when colonized by Spain in 1884, but neither Morocco nor Mauritania proved the existence of legal ties sufficient to establish sovereignty over the territory.

INTRODUCTION

The acquisition and maintenance of title by a sovereign over territory has frequently been the subject of international legal controversy. Numerous decisions of the Permanent Court of International Justice, the International Court of Justice, and various arbitral tribunals have attempted to delineate the modes of acquisition of sovereignty and the acts required to effectively establish possession.[1] The recent territorial dispute over the former Spanish protectorate known as the Western or Spanish Sahara[2] prompted the reexamination of these concepts by the International Court of Justice. At the request of the United Nations General Assembly,[3] the Court prepared the *Advisory Opinion on*

1. *See, e.g.*, Case concerning Right of Passage over Indian Territory (Portugal-India), [1960] I.C.J. 6 (merits); Case concerning Sovereignty over certain Frontier Land (Belgium-Netherlands), [1959] I.C.J. 209; Legal Status of Eastern Greenland Case (Norway-Denmark), [1933] P.C.I.J., ser. A/B, No. 53; Clipperton Island Arbitration (France-Mexico), 2 U.N.R.I.A.A. 1107 (1931); Palmas Island Arbitration (Netherlands-United States), 2 U.N.R.I.A.A. 829 (1928). United States courts have frequently utilized international legal principles when presented with boundary disputes. *See* note 87 *infra*.

2. This territory covers an area of 105,400 square miles in northwestern Africa. C. GALLAGHER, THE UNITED STATES AND NORTH AFRICA 208 (1963). It is bordered by the Atlantic Ocean to the northwest, by Morocco to the north, by Mauritania to the southwest, and, for eighteen miles, by Algeria to the west. It is sparsely populated by approximately 75,000 nomadic tribesmen known as the Sahaouis. N.Y. Times, Nov. 2, 1975, § 4, at 2, col. 2. These inhabitants hold "no particular national allegiance." *Id.*, Jan. 30, 1976, at 1, col. 4.

3. G.A. Res. 3292, 29 U.N. GAOR Supp. 31, at 103, 104, U.N. Doc. A/9631 (1974). The Court's power to give advisory opinions derives from the Statute of the International Court of Justice. Article 65 reads, *inter alia*:

> The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

I.C.J. STAT. art. 65, para. 2. The authority contemplated by the Statute is granted to the General Assembly in Article 96 of the Charter: "The General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question." U.N. CHARTER art. 96, para. 1. The General Assembly is required to present to the Court

> [q]uestions upon which the advisory opinion of the Court is asked . . . by means of a written request containing an exact statement of the question upon

the Western Sahara.[4] In denying the claims of both Morocco and Mauritania, the two States vying for control of the territory, the Court retrenched from its earlier opinions and decisions by increasing the evidentiary requirements for the effectiveness of occupation.[5]

I. BACKGROUND

Considerable phosphate deposits make the Western Sahara a valuable territory.[6] Until 1884, it was uncolonized and divided into two regions—Río de Oro in the south and Sakiet El Hamra in the north—which had been occupied by various nomadic tribes for many centuries. Pursuant to a royal order of December 26, 1884,[7] Spain proclaimed a protectorate over a portion of the coastal zone of Río de Oro.[8] By 1958, Spain had expanded its occupation so that it controlled the entire Western Sahara territory, and it became a province of Spain.[9]

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which an opinion is required, and accompanied by all documents likely to throw light upon the question.

I.C.J. STAT. art. 65, para. 2.

4. [1975] I.C.J. 12.

5. However, it should not be concluded that the opinion had no pragmatic effect upon the controversy. Immediately following its announcement on October 16, 1975, King Hassan II of Morocco declared that he would lead a march of 350,000 unarmed Moroccans into the Western Sahara to claim the territory for Morocco. N.Y. Times, Oct. 17, 1975, at 1, col. 4. The march occurred in early November, and the marchers met with no resistance from Spanish troops. *Id.*, Nov. 7, 1975, at 1, col. 2. A few days later, Morocco complied with a request of the United Nations Security Council to withdraw from the territory. *Id.*, Nov. 10, 1975, at 1, col. 4. On November 14, Spain agreed, in a pact with Morocco and Mauritania, to abandon the Western Sahara by the end of February. A referendum was to be held after Spain's departure, under Moroccan and Mauritanian control. *Id.*, Nov. 15, 1975, at 1, col. 2. The agreement seemed to bypass the United Nations, since it did not provide a role for the world body. *Id.*, Nov. 16, 1975, at 9, col. 1. On February 26, 1976, Spain formally withdrew from the territory. However, a referendum was not immediately held, and joint administration over the territory by Morocco and Mauritania was instituted. Memorandum of Feb. 25, 1976, from the Spanish Government to the Secretary-General of the United Nations, Press Release SG/SM/2306, Feb. 26, 1976, at 3.

6. Although a windswept desert, the Western Sahara is rich in phosphates which are primarily used in the production of fertilizer. In 1974 it ranked behind the United States, the Union of Soviet Socialist Republics, and Morocco as the world's fourth largest phosphate producer. N.Y. Times, Nov. 6, 1975, at 37, col. 1. *See also* N.Y. Times, Nov. 9, 1975, § 3, at 3, col. 1.

7. [1975] I.C.J. 38.

8. The Spanish government claimed the land between Cape Bojador and Cape Blanc, two coastal cities in Río de Oro, and actually occupied the coastal site of Villa Cisneros. 13 ENCYCLOPEDIA BRITTANNICA 173 (15th ed. 1974).

9. 25 ENCYCLOPEDIA AMERICANA 360y (int'l ed. 1971).

A. *General Assembly Resolutions*

United Nations General Assembly Resolution 1514,[10] passed in 1960, is the basic statement of that body on the issue of decolonization of "non-self-governing" territories.[11] Entitled the Declaration on the Granting of Independence to Colonial Countries and Peoples, it recognized the recent transformation of many former territories into independent nations and proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations . . . ."[12] The Resolution provided that "[a]ll peoples have the right to self-determination" and that "immediate steps" should be taken to grant independence to the peoples of "all . . . territories which have not yet attained independence . . . ."[13]

These principles have been restated in a number of resolutions passed in the last ten years. Resolution 2711[14] of December 14, 1970, pertains exclusively to the Western Sahara. Reaffirming past resolutions, particularly Resolution 1514, the General Assembly "calls upon" the Spanish government as administering power "to create the atmosphere of *détente*" required to implement a referendum which would allow the people of the Western Sahara to "exercise their right to self-determination and to freedom of choice . . . ."[15]

B. *Legal Claims*

In September, 1974, Morocco proposed that the issue of sovereignty over the Western Sahara be submitted to the Court.[16]

10. G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

11. *See* 29 U.N. GAOR 76, 87, U.N. Doc. A/PV.2249 (1974).

12. 15 U.N. GAOR Supp. at 67.

13. *Id.* General Assembly Resolution 1541, 15 U.N. GAOR Supp. 16, at 29, U.N. Doc. A/4684 (1960), passed the following day, reaffirmed the principles of Resolution 1514 and stated them more explicitly. Principle VI of the Annex states:

> A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
>
> (a) Emergence as a sovereign independent State;
>
> (b) Free association with an independent State; or
>
> (c) Integration with an independent State.

14. G.A. Res. 2711, 25 U.N. GAOR Supp. 28, at 100, U.N. Doc. A/8028 (1970).

15. *Id.* at 101. A referendum was never conducted. *See* note 5 *supra*.

16. Letter of Sept. 23, 1974, from the Minister for Foreign Affairs of Morocco to the Minister for Foreign Affairs of Spain, contained within note verbale of the same date from the Permanent Mission of Morocco to the Minister for Foreign Affairs of Spain, Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/9771, at 2 (1974).

Morocco and Mauritania both claimed rights to the territory. In the months following the Moroccan proposal, the General Assembly was used as a forum by the States involved in the controversy to pursue their respective legal claims.

Morocco contended that Spain had spoken of decolonization for ten years but nevertheless had continued to maintain "colonial dominion and exploitation" of the Western Sahara,[17] as evidenced by Spain's occupation force which numbered between 70,000 and 80,000.[18] Morocco emphasized that on the basis of historical, legal, ethnic, and cultural ties, it had always considered the area to be an integral part of its own national territory.[19] It indicated that it would be able to present evidence to the Court demonstrating territorial contiguity and continuity, as well as evidence relating favorably to the nature of the settlement of the area. In addition, Morocco alleged it could establish that prior to Spanish colonization it had exercised sovereignty over the territory "in accordance with the conditions laid down by public international law."[20] For example, Morocco hoped to prove that it had regarded the area as an integral part of its territory without interruption and had, in effect, unequivocally assumed the administration of the territory.[21]

Mauritania relied on similar criteria in asserting its rights to the territory. In statements made before the General Assembly, the Mauritanian representative argued that the Western Sahara

> is inhabited solely by Mauritanian tribes differing in no way from other tribes living in the north-western part of independent Mauritania. Indeed, they have everything in common: their language—Hassania, a Mauritanian Arab dialect; culture, race and customs.[22]

Furthermore, Mauritania maintained that the daily activities

17. 29 U.N. GAOR 76, *supra* note 11, at 91. The Moroccan respresentative stressed that it was Morocco which had taken the initiative to place the issue on the agenda in the fall of 1964. *Id.* at 87. Referring to General Assembly Resolution 2072, 20 U.N. GAOR Supp. 14, at 59, U.N. Doc. A/6014 (1965), unanimously approved (with the exception of Spain and Portugal), which "urgently requests" Spain to negotiate toward immediate liberation of the territory, Morocco asserted that it was Spain which refused to negotiate. 29 U.N. GAOR 76, *supra* note 11, at 87.

18. 29 U.N. GAOR 76, *supra* note 11, at 91.

19. *Id.* at 95.

20. 4th Comm. Summary Record, 29 U.N. GAOR 188, 190, U.N. Doc. A/C.4/SR.2117 (1974).

21. *Id.*

22. 29 U.N. GAOR 67, 81, U.N. Doc. A/PV.2251 (1974).

and "Nomadic nature" of the Saharan inhabitants were no different than those of tribes living in Mauritania.[23]

Spain repeatedly stated its intention to hold a referendum in the territory under United Nations supervision, in accordance with Resolution 3162[24] and previous resolutions on the Sahara issue.[25] It assured the General Assembly that it intended "to respect the will of the Saharan people."[26] Nevertheless, Morocco remained unsatisfied by the speed with which Spain was progressing toward decolonization.[27]

Although Algeria did not assert any legal claim to the territory, it also used the General Assembly as a forum to present its position with regard to the Western Sahara. Since it borders the territory, Algeria asserted that its interest was "based on obvious geopolitical considerations and on the need for regional unity, [and] did not go beyond its legitimate national concerns."[28]

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23. *Id.* Such tribes supposedly existed prior to Africa's colonization and in some cases had "reached a state of development resembling that of a modern State." 4th Comm. Summary Record, 29 U.N. GAOR 188, 199, U.N. Doc. A/C.4/SR.2117 (1974). The Bilad Shinguitti, the group of tribes which later became the Mauritanian entity, inhabited the Western Sahara during the nineteenth century. *See* text accompanying notes 71-75 *infra*. They resisted French and Spanish colonization, and, upon defeat, concluded treaties with them. Thus, in Mauritania's view, the Western Sahara,

> like all other African territories, was not without rulers at the time it was colonized. The term "free territory," as understood at the notorious Berlin conference on the partition of Africa, could hardly refer to a territory devoid of rulers. It meant rather a territory free from any colonization.

4th Comm. Summary Record, 29 U.N. GAOR 188, 199, U.N. Doc. A/C.4/SR.2117 (1974). Mauritania asserted that it would be able to present evidence to the Court demonstrating Mauritanian ties with the territory based upon "legal, human, geographical, ethnic and cultural levels," and a deep attachment of the inhabitants of the Western Sahara with Mauritania. *Id.*

24. G.A. Res. 3162, 28 GAOR Supp. 30, at 110, U.N. Doc. A/9030 (1973).

25. 29 U.N. GAOR 58, 59-60, U.N. Doc. A/PV.2253 (1974); 4th Comm. Summary Record, 29 U.N. GAOR 253, U.N. Doc. A/C.4/SR.2126 (1974).

26. 29 U.N. GAOR 58, 59-60, U.N. Doc. A/PV.2253 (1974). Its representative frequently referred to his letter of September 13, 1974, to the Chairman of the Fourth Committee, which embodied these principles. *Id.*; 4th Comm. Summary Record, 29 U.N. GAOR 253, U.N. Doc. A/C.4/SR.2126 (1974).

27. *See* text accompanying note 17 *supra*.

28. 4th Comm. Summary Record, 29 U.N. GAOR 247, 250, U.N. Doc. A/C.4/SR.2125 (1974). Algeria supported the call of a referendum for the Saharan inhabitants ostensibly because this would allow for their self-determination as mandated by the various General Assembly resolutions on decolonization. *Id.* Yet most observers felt that the only reason for Algeria's demand for a referendum was that it was generally believed Mauritania, the weaker of the two competing powers, would win such a referendum. N.Y. Times, Oct. 19, 1975, § 1, at 8, col. 1. Algeria apparently was motivated by a desire to maintain the balance of power in the region and adhered to the general view that were Morocco to gain control of the phosphate-rich territory, this balance would be shifted.

The Court announced its advisory opinion in October, 1975. Spain agreed, in a pact entered into with Morocco and Mauritania on November 14, to abandon the territory by the end of February.[29] In January, 1976, the General Assembly adopted Resolution 3458[30] which reaffirmed principles embodied in earlier resolutions[31] and "urged" that all parties involved "exercise restraint" and refrain from any unilateral action with respect to the territory. The resolution noted the pact of November 14, and requested that the parties to it "ensure respect for the freely expressed aspirations of the Saharan populations."[32] The referendum called for by the General Assembly was never implemented. At the end of February, 1976, Spain formally withdrew[33] and, pursuant to the pact, Morocco and Mauritania undertook joint administration of the territory.[34]

II. THE COURT'S OPINION

In requesting the advisory opinion on the legal status of the Western Sahara, the General Assembly presented two questions for the Court's consideration:

> I. Was Western Sahara (Río 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,

29. N.Y. Times, Nov. 15, 1975, at 1, col. 2.

30. G.A. Res. 3458, 30 U.N. GAOR Supp. —, U.N. Doc. A/RES/3458 (XXX), Jan. 16, 1976 (1976).

31. The resolution reaffirmed "the inalienable right of the people of Spanish Sahara to self-determination" in accordance with Resolution 1514, *supra* note 10. It also reaffirmed Resolution 1541, *supra* note 13, Resolution 2072, 20 U.N. GAOR Supp. 14, at 59, U.N. Doc. A/6014 (1965), and Resolution 3292, *supra* note 3, at 104.

32. U.N. Doc. A/RES/3458 (XXX), Jan. 16, 1976, at 4.

33. Memorandum of Feb. 25, 1976 from the Spanish Government to the Secretary-General of the United Nations, Press Release SG/SM/2306, Feb. 26, 1976, at 3.

34. Letter from Khatri Ould Said El Joumani, President of the Saharan Jemaa, to the Secretary-General, contained within communication of Feb. 27, 1976, from the Permanent Mission of the Kingdom of Morocco to the Secretary General, Press Release NV/493, Mar. 1, 1976, at 2-3. The letter stated, *inter alia*,

> [T]he Saharan Jemaa, meeting in special session today, Thursday 26 February 1976 . . . has unanimously approved the reintegration of the Territory of the Sahara with Morocco and Mauritania, in conformity with historical realities and with the links which have always united the Saharan population to these two countries, and has expressed its full satisfaction and complete approval for the decolonization of the Territory and its reintegration with Morocco and Mauritania.

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?[35]

In a lengthy opinion, the Court declared unanimously that the territory was not *terra nullius* when colonized by Spain. It also decided that although legal ties existed between the predecessors of the present inhabitants of the disputed territory and both Morocco and Mauritania, neither State was able to establish the existence of a relationship strong enough to be considered a "tie of territorial sovereignty."

A. *The Requirement of a* Terra Nullius

> Territory may be considered *terra nullius*
>
> either because no one has ever appropriated it—as in the case of newly found land—or because, though once appropriated, it has subsequently been abandoned.[36]

It is a prerequisite to the acquisition of territorial sovereignty by occupation that the land be *terra nullius*.[37] Occupation is a mode of acquiring sovereignty over territory, and is recognized in international law as an original or nonderivative mode.[38] It consists of "the intentional appropriation by a state of territory not under the sovereignty of any other state."[39] The test of effective occupation is not met by the mere existence of a physical settlement, but by the nature of that settlement. Whiteman has characterized the requisite presence as the "actual, continuous, and peaceful display of the functions of a state."[40] Consequently, the Court determined that it could find that the Western Sahara was *terra nullius* at the time of Spain's colonization "only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation.' "[41]

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35. G.A. Res. 3292, 29 U.N. GAOR Supp. 31, at 103, U.N. Doc. A/9631 (1974).

36. 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1030 (1971).

37. *Id.*

38. *Id.* Other original modes are discovery and prescription. *Id.* at 1028-85. Derivative modes include cession, conquest, and *uti possiditis* (the agreement of the parties to a treaty to retain the territories each has acquired through war). *Id.* at 1086-1161. With respect to the requirements for effective occupation, see text accompanying notes 91-95 *infra*.

39. 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 401 (1940). "It does not involve the transfer of sovereignty from one state to another." *Id.*

40. WHITEMAN, *supra* note 36, at 1031.

41. [1975] I.C.J. 39.

The Court stated that habitation of a territory by tribes or people "having a social and political organization" indicates that the area is not *terra nullius*.[42] It reasoned that the tribes inhabiting the Western Sahara immediately prior to the start of Spanish colonization were sufficiently organized, "socially and politically,"[43] to foreclose a *terra nullius* characterization. Based upon agreements signed between Spain and the representatives of these tribes,[44] the Court held that the acquisition of the territory by Spain more closely resembled cession, a derivative mode of acquisition, than occupution, an original mode.[45]

The Court noted, however, that the tribes were nomadic.[46] While the Court did not seem concerned by this fact at this point in its analysis, it did give it considerable weight toward the end of the opinion when discussing the "overlapping" of the territories "inhabited" by the tribes of the Mauritanian entity and those of the Kingdom of Morocco. By the use of the term "overlapping," the Court referred to the phenomenon of the crossing of the migration routes of these nomadic tribes.[47] The Court stated that such overlapping "indicates the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization by Spain."[48] The Court further stated that

> [t]his complexity was . . . increased by the independence of some of the nomads . . . . Nor is the complexity of the legal relations of Western Sahara with the neighbouring territories at that time fully described unless mention is made of the fact that the nomadic routes of certain tribes passed also within areas of what is present-day Algeria.[49]

The nomadic character of the tribes "inhabiting" the West-

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42. *Id.*
43. *Id.*
44. In its Royal Order of December 26, 1884, far from treating the case as one of occupation of *terra nullius*, Spain proclaimed that the King was taking the Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes; the Order referred expressly to "the documents which the independent tribes of this part of the coast" had "signed with the representatives of the Sociedad Española Africanistas," and announced that the King had confirmed "the deeds of adherence" to Spain. *Id.*
45. *Id.*
46. *Id.* at 41.
47. *Id.* at 67.
48. *Id.*
49. *Id.*

ern Sahara at the time of the Spanish colonization cannot be overlooked. It suggests the possibility that these tribes were not the cohesive and well-defined entities which the Court portrays in its discussion of whether the territory was *terra nullius*. This distinction is important since one type of territory which may be considered *terra nullius*, and therefore open to acquisition by occupation, is territory inhabited by "individuals who are not permanently united for political action."[50] Hence, perhaps the Western Sahara should have been considered *terra nullius*;[51] Spain's acquisition of sovereignty would then have been accomplished by the original mode of occupation, rather than by the derivative mode of cession. The General Assembly only sought a determination of whether Morocco or Mauritania had legal ties to the territory, provided the Court reached a negative finding on the *terra nullius* question.[52] Nevertheless, the Court indicated that it would consider each question separately and independently.[53] Therefore, although the Court would probably have reached nearly the same conclusion with respect to the existence of legal ties regardless of its determination of the first question, the Court's analysis of the issue of *terra nullius* contains a basic inconsistency.

B. *The Extent of Legal Ties*

Morocco asserted that ties of sovereignty existed between itself and the territory on the basis of an immemorial possession "based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and uncontested, for centuries."[54] With this argument, Morocco attempted to bring itself within the scope of the holding of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland Case*.[55]

In that case, the Court was called upon to decide between the conflicting claims of Norway and Denmark to the eastern coast

50. HACKWORTH, *supra* note 39, at 396.

51. This argument seems especially persuasive in light of the fact that the Court, although finding the existence of "legal ties," held that such ties were not strong enough to constitute ties of sovereignty between the contesting nations and the tribes of the Western Sahara. [1975] I.C.J. 68.

52. *Id.* at 37.

53. *Id.* at 37-38.

54. *Id.* at 42.

55. [1933] P.C.I.J., ser. A/B, No. 53.

of Greenland. The Danish claims were not based upon any particular act of occupation; rather, title was founded "on the peaceful and continuous display of State authority over the island."[56] According to the Court, since Norway had not established occupation until July 10, 1931, Denmark would merely need to establish occupation sufficient to constitute sovereignty during the period immediately prior to that date. After examining various Danish activities indicative of the exercise of sovereignty, the Court held that Denmark had successfully established valid title.[57] It stated that

> a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.[58]

In addition, it observed that in the absence of a superior claim, "very little in the way of actual exercise of sovereign rights" is necessary to establish sovereignty, especially in sparsely populated or uninhabited areas.[59]

In *Western Sahara*, however, the Court found these principles inapplicable due to the "paucity of evidence of actual display of authority unambiguously relating to Western Sahara . . . ."[60] It considered that the constant movement of nomadic tribes through the region raised the issue of display of sovereignty in a significantly different context from that of the *Eastern Greenland* case[61] and, in addition, found that the requirement of intent enunciated in that case was clearly lacking. Relying on the *Minquiers and Ecrehos Case*,[62] the Court stated that the period immediately preceding the colonization by Spain was to be considered the relevant period. In that case, both France and the United Kingdom asserted ancient or original title, which had never been lost, over two groups of islets situated in the English Channel. Various specific acts of sovereignty and indications of

56. *Id.* at 27.
57. *Id.* at 46.
58. *Id.* at 27-28.
59. *Id.* at 28. Most Danish acts of sovereignty were performed in the southern and western regions of Greenland; these were deemed sufficient to exclude Norway's claims to the northeastern coastal region.
60. [1975] I.C.J. 43.
61. *Id.*
62. [1953] I.C.J. 47.

jurisdiction exercised by each of the States were examined, such as the establishment of criminal proceedings, property tax assessments, customs taxes, and boat registries, and the Court held that sovereignty over both sets of islands belonged to Great Britain.[63]

Morocco offered specific evidence concerning the colonization of the Western Sahara and the period preceding it which the Court agreed to consider.[64] The type of evidence enumerated in the *Minquiers and Ecrehos Case,* however, was not available with regard to the Western Sahara. Neither permanent communities, as in the *Minquiers and Ecrehos Case,* nor frontier settlements, as in the *Eastern Greenland* case, existed in the desert terrain which comprises the Western Sahara. Instead, nomadic tribes traced routes through the territory. The situation did not lend itself to the display of such finite acts of sovereignty as, for example, property tax assessments.[65] Consequently, the Court was forced to rely upon an examination of ties of allegiance, ethnology, culture, and religion as the basis of "legal ties,"[66] apparently ties of a lesser degree than ties of sovereignty, between the territory of the Western Sahara and either or both of the States involved. The Court also attempted to use sections of various treaties to ascertain the existence and degree of spheres of influence.[67] It would thus seem clear, even before the Court began this analysis, that while both parties would be able to meet the less rigorous test of the existence of "legal ties," neither would withstand the stricter traditional test which requires a display of acts of sovereignty.

The Court considered similar factors in evaluating the claims of both Morocco and Mauritania. "Common religious links" are not sufficient to prove the existence of a legal tie of sovereignty or subordination to a ruler.[68] Political ties, to be sufficient, must be "manifested in acts evidencing acceptance of [a ruler's] political authority."[69] The Court was not swayed by evidence of two visits by the Sultan of Morocco to the territory in question be-

63. *Id.* at 72.

64. [1975] I.C.J. 43.

65. "Spain invokes the absence of any evidence of taxes by tribes of Western Sahara and denies all possibility of such evidence being adduced . . . ." *Id.* at 46.

66. *Id.* at 44-46.

67. *Id.* at 49.

68. *Id.* at 44.

69. *Id.*

cause they appeared to have been made in order to prevent commerce between the area tribes and the European powers, rather than to display authority over the tribes.[70]

Mauritania contended that the Bilad Shinguitti, the predecessor to the modern Mauritanian entity,[71] was a community having its own distinguishing characteristics and laws.[72] It emphasized the existence of clearly defined migration routes of each tribe that spanned the Western Sahara as well as Mauritania.[73] Yet the Court found that these tribes could not meet the test it had enunciated in an earlier case, that is, the tribes did not form "an entity capable of availing itself of obligations incumbent upon its Members,"[74] and did not have the "character of a personality or corporate entity distinct from the several emirates and tribes which composed it."[75]

The Court also examined treaties, agreements, and diplomatic correspondence pertaining to the Western Sahara, seeking indications of Moroccan sovereignty over the territory. The treaties, some dating from 1767, were commercial in nature, and each contained a short reference to territory belonging to Morocco. For example, an 1895 British-Moroccan agreement[76] concerning the sale of buildings in Terfaya, a Moroccan port city near the Western Sahara border, contained two clauses which are representative of the various treaty clauses which the Court discussed.

> I. If this Government buy the buildings, &c., in the place above named from the above-named Company, no one will have any claim to the lands that are between Wad Draa and Cape Bojador, and which are called Terfaya above named, and all the lands behind it, *because all this belongs to the territory of Morocco.*
>
> II. It is agreed that this Government shall give its word to the English Government that they will not give any part of the above-named lands to any one whatsoever without the concurrence of the English government.[77]

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70. *Id.* at 46.

71. *Id.* at 57-58.

72. *Id.* at 59.

73. *Id.* at 59-60.

74. *Id.* at 63, *quoting* Advisory Opinion on Reparations for injuries suffered in the service of the United Nations, [1949] I.C.J. 174, 178.

75. [1975] I.C.J. 63.

76. Agreement between Great Britain and Morocco concerning the sale of property in Terfaya, *signed* Mar. 13, 1895, 87 BRIT. AND FOR. STATE PAPERS, 1894-1895, at 972.

77. *Id.* (emphasis added).

Wad Draa, Terfaya, and Cape Bojador form a line along the southwestern coast of Morocco, continuing along the northwestern coast of the Western Sahara. The phrase "all the lands behind it" must necessarily include the land which today comprises the Western Sahara. Thus it appears that Great Britain, in this treaty, recognized the exclusive dominion of Morocco over the territory. Nevertheless, the Court felt that treaties such as this one represented agreements by Great Britain not to question any *future* claims of the Sultan over these areas rather than a recognition of existing Moroccan sovereignty. "In short, what those provisions yielded to the Sultan was acceptance by Great Britain not of his existing sovereignty but of his interest in that area."[78]

Other treaties referred to by the Court contain clauses in which the Sultan of Morocco agreed to protect the captain and crew of vessels shipwrecked at or near Wad Noun, an area within the present Western Sahara territory.[79] The Court rejected Morocco's contention that such shipwreck clauses are sufficient to indicate that the other signatory recognized complete Moroccan sovereignty; the language merely indicated a more limited degree of control.[80]

An 1856 British-Moroccan treaty,[81] to which the Court did not refer, would seem at first glance to be particularly instructive since it explicitly states that certain areas lie within the dominion of the Sultan of Morocco.

> The Articles of this Convention shall be applicable to all the parts in the Empire of Morocco; and should His Majesty the Sultan of Morocco open the ports of Mehedea, Agadeer, or Wadnoon [Wad Noun], *or any other ports within the limits of His Majesty's dominions,* no difference shall be made in the levying

78. [1975] I.C.J. 54.

79. General Treaty between Great Britain and Morocco, *signed* Dec. 9, 1856, 46 BRIT. AND FOR. STATE PAPERS, 1855-1856, at 176; Treaty of Commerce and Navigation between Spain and Morocco, *signed* Nov. 20, 1861, 53 BRIT. AND FOR. STATE PAPERS, 1862-1863, at 1089; Treaty of Peace and Friendship between the United States and Morocco, *signed* Sept. 16, 1836. 24 BRIT. AND FOR. STATE PAPERS, 1835-1836, at 702.

80. Clearly, Morocco is correct in saying that these provisions would have been pointless if the other State concerned had not considered the Sultan to be in a position to exercise some authority or influence over the people holding the sailors captive. But it is quite a different thing to maintain that those provisions implied international recognition by the other State concerned of the Sultan as territorial sovereign in Western Sahara.
[1975] I.C.J. 53.

81. Convention of Commerce and Navigation between Great Britain and Morocco, *signed* Dec. 9, 1856, 46 BRIT. AND FOR. STATE PAPERS, 1855-1856, at 188.

> of duties, or anchorage, *between the said ports and other ports in the Sultan's dominions.*[82]

The language employed in this agreement demonstrates, at least as well as that found in any of the treaties the Court discussed, a recognition of Moroccan sovereignty over some portion of the Western Sahara. Mehedea and Agadeer refer to port cities on the Moroccan coast. However, the ambiguity inherent in the use of geographic terms such as Wad Noun makes it somewhat difficult to determine the *extent* of the Moroccan dominion delineated. The name Wad Noun appears in a number of treaties advanced by Morocco in support of its claim that the signatories had acceded to Moroccan dominion over the *entire* area which constitutes the present-day Western Sahara.

The Court noted that during the period in which the various bilateral treaties were executed there were two possible interpretations of "Wad Noun." The first, a more restrictive meaning, apparently indicated an area immediately surrounding the port; the second, more expansive in nature, signified an area including the Sakiet El Hamra, the entire northern region of the Western Sahara.[83] The Court found that Morocco failed to establish that the more expansive meaning was intended by the use of the term in the various treaties.[84] This ambiguity was not the determining factor in the Court's rejection of the various treaties offered in support of Morocco's proposition,[85] and illustrates the limited value of presenting treaties drafted more than seventy-five years ago as proof in territorial sovereignty disputes.

The Court was unimpressed by claims of common religious links, political ties, and treaty clauses allegedly indicative of recognition of sovereignty over the Western Sahara. It concluded that the relationship between both Morocco and Mauritania and the territory merely amounted to legal ties and not those of sovereignty.

C. *Theories of Territorial Acquisition*

The principles enunciated by the Court in its *Western Sahara* opinion develop existing theories of territorial acquisi-

82. *Id.* at 194 (emphasis added).
83. [1975] I.C.J. 52.
84. *Id.* at 53.
85. *Id.* at 49-55.

tion. In addition to occupation,[86] discovery and prescription[87] are two other modes traditionally classified as original modes of acquisition.[88] However,

> according to the view that has prevailed . . . since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.
>
> . . . .
>
> An inchoate title . . . cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.[89]

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86. *See* text accompanying note 38 *supra*.

87. Oppenheim describes prescription as

> the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create under the influence of historical development the general conviction that the present condition of this is in conformity with international order.

1 L. OPPENHEIM, INTERNATIONAL LAW 576 (8th ed. Lauterpacht 1955). Prescription may take one of two forms. Extinctive prescription refers to "the loss of a claim by failure to prosecute it within a reasonable time," and acquisitive prescription refers to "a title acquired through a lapse of time." WHITEMAN, *supra* note 36, at 1062.

The requirements for acquisitive prescription are similar to those necessary for effective occupation in that both require the continuous and uninterrupted exercise of the authority of a sovereign over the area. However, "whereas occupation is a means of acquiring territory which is *res nullius,* prescription is a means of acquiring territory which is subject to the sovereignty of another state." *Id.* at 1066. Thus the title of the party is established at the expense of the title and rights of the previous possessor. "Display of authority by the one party, acquiescence in that display by the other party—those are the *sina qua non* of acquisitive prescription." *Id.* at 1064. The possession must be public since acquiescence is essential. Although acquiescence can be implied, "without knowledge there can be no acquiescence at all." *Id.* at 1065.

This concept of international law is applicable to interstate boundary disputes within the United States. Each state is viewed as an independent sovereign asserting claims to the contested territory. Principles of international law, and especially acquisitive prescription, are relevant. As the Supreme Court stated in a boundary case, *Arkansas v. Tennessee*,

> "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority" [*quoting* Indiana v. Kentucky, 136 U.S. 479, 510 (1890)] . . . . "[L]ong acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive" [*quoting* Louisiana v. Mississippi, 202 U.S. 1, 53 (1906)] . . . .

310 U.S. 563, 569 (1940). *See generally* Vermont v. New Hampshire, 289 U.S. 593, 613 (1933); Michigan v. Wisconsin, 270 U.S. 295, 307-08 (1926); New Mexico v. Colorado, 267 U.S. 30, 41 (1925); Maryland v. West Virginia, 217 U.S. 1, 41-44 (1910); Indiana v. Kentucky, 136 U.S. 479, 518 (1890); Missouri v. Iowa, 48 U.S. (7 How.) 660, 677 (1849).

88. WHITEMAN, *supra* note 36, at 1028-85.

89. Palmas Island Arbitration (Netherlands-United States), 2 U.N.R.I.A.A. 829, 846, 869 (1928).

Modern usage recognizes the principle that mere physical discovery or visual apprehension is sufficient *per se* "to establish a right of sovereignty over, or a valid title to, *terra nullius*."[90]

The exact degree of occupation necessary to establish sovereignty over an area would appear to depend upon the circumstances of the case. The *Clipperton Island Arbitration Award*,[91] one of the landmark decisions in the area of occupation, has been referred to as an example of the "elasticity of the notion of occupation."[92] The King of Italy acted as the arbitrator of a dispute between France and Mexico concerning sovereignty over the island. The only actual displays of State activity by France were a proclamation of sovereignty over the island, an unsuccessful attempt by a French naval vessel to reach the shore, and a protest to the United States following the discovery of a group of Americans collecting guano on the island. Mexico claimed the island had already belonged to it prior to France's proclamation of sovereignty.

The dispute was decided in France's favor on the basis of the proclamation coupled with what the arbitrator considered to be effective occupation. Yet in Lauterpacht's view, there was no "initial taking of possession in the ordinary sense of the word."[93] There was merely a symbolic act—the proclamation—and one unsuccessful attempt to reach shore. Lauterpacht surmised that as a result of this decision

> the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title. Such areas are not only those which are uninhabited, but also those which are normally uninhabitable.
>
> . . . .
>
> [E]ffectiveness [of occupation] is not a magic formula which can be applied with mathematical precision. It is effectiveness relative to the situation and to the circumstances. It may range from the requirement of intensive administration in every 'nook and corner' in a densely populated and developed area to *mere 'state activity' manifesting itself in the conclusion of treaties and conferment of concessions by an authority situated in a*

90. A. KELLER, O. LISSITZYN, & F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS, 1400-1800, at 148 (1938).

91. Clipperton Island Arbitration (France-Mexico), 2 U.N.R.I.A.A. 1107 (1931).

92. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 417 (1950).

93. *Id.*

> *narrowly circumscribed part of the territory or even outside it;* and it may even assume the form of a mere proclamation.[94]

Other commentators have expressed similar views. One writer stated that the *Clipperton Island* award in effect held that "the occupation which is required is such an occupation as is appropriate and possible under the circumstances. It is a question of fact. This is a realistic and altogether satisfactory solution from the legal point of view."[95] In light of the principles embodied in the *Clipperton Island* decision, the Court seemed inclined to conclude in *Western Sahara* that neither the clearly defined and periodic migration routes of the tribes of the region,[96] nor the numerous treaties referring to areas of the Western Sahara,[97] constituted sufficient manifestations of ownership to confer sovereignty upon either Morocco or Mauritania. It therefore appears that the *Western Sahara* opinion retrenches from the above-mentioned standards of effective occupation, or at the very least, unnecessarily limits their application.

III. The Value of the Advisory Opinion

An advisory opinion of the Court is not formally binding on the parties.[98] Its purpose is to clarify "the legal issues involved in disputes between States," and in this manner to assist the General Assembly in mediating the controversy.[99] Advisory opinions do, however, have "persuasive character and substantive authority."[100] They represent "judicial pronouncements of the highest international tribunal";[101] both the Court itself[102] and the General Assembly[103] have regarded advisory opinions as authoritative expressions of law constituting authority equal to that of judgment. According to Rosenne,

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94. *Id.* at 417-18, 429 (emphasis added, footnote omitted).

95. Dickinson, *The Clipperton Island Case,* 27 Am. J. Int'l L. 130, 133 (1933).

96. *See* text accompanying note 73 *supra.*

97. *See* text accompanying notes 76-80 *supra.*

98. M. Hudson, The Permanent Court of International Justice, 1920-42, at 511 (1943); Hambro, *The Authority of the Advisory Opinions of the I.C.J.,* 3 Int'l & Comp. L.Q. 1, 5 (1959).

99. D. Pratap, The Advisory Jurisdiction of the International Court 229-34 (1972).

100. Fitzmaurice, *The Law and Procedure of the International Court of Justice: International Organizations and Tribunals,* 29 Brit. Y.B. Int'l L. 1, 55 (1952).

101. Pratap, *supra* note 99, at 231.

102. Advisory Opinion on the Status of Eastern Carelia, [1923] P.C.I.J., ser. B, No. 5 at 29.

103. G.A. Res. 294, U.N. Doc. A/1043, at 16 (4th Sess. 1949); G.A. Res. 1731, 16 U.N. GAOR Supp. 17, at 54, U.N. Doc. A/5100 (1962).

> the practical difference between the binding force of a judgment, which derives from specific provisions of the Charter and Statute apart from the *auctoritas* of the Court, and the authoritative nature of an advisory opinion possessed of that same *auctoritas,* are not significant.[104]

The General Assembly, in requesting an advisory opinion from the International Court of Justice, sought a statement that would decisively answer the questions posed concerning the ties of sovereignty with the area, and perhaps provide a basis for a negotiated settlement supervised by the United Nations. In the Court's own words,

> the materials and information presented to [the Court] do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory . . . .[105]

Since the Court was unable to find any relationship constituting ties of sovereignty between either of the contesting States and the Western Sahara, it in effect returned the controversy to the General Assembly, thereby rendering the non-binding nature of the advisory opinion of no real import.

IV. CONCLUSION

The Court was inconsistent in devoting a lengthy discussion to the clearly nomadic nature of tribes inhabiting the Western Sahara and, at the same time, holding that the Western Sahara could not be considered *terra nullius* since it was inhabited by socially and politically well-defined tribes. Tenuous reasoning was also used to find that principles enunciated in the *Legal Status of Eastern Greenland Case* was inapplicable due to both the present factual setting and to principles stated in the *Minquiers and Ecrehos Case.* Finally, although the degree of occupation demonstrated by the parties would appear at least equivalent to that manifested by France in the *Clipperton Island*

104. S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 747 (1965). *See also* S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 113 (1957).

105. [1975] I.C.J. 68.

dispute, the Court held that neither Morocco nor Mauritania had established effective occupation over the territory of the Western Sahara. Consequently, by deeming well-established principles of international law concerning the acquisition of sovereignty to be inapplicable to the Western Sahara, the Court has unnecessarily modified these principles and limited their scope.

Gary Jay Levy