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Sovereignty Over Unoccupied Territories--The Western Sahara Decision

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Introduction

IN RESPONSE TO DEMANDS for the decolonization of Spanish Sahara, the United Nations General Assembly voted on December 13, 1974, to request the International Court of Justice to render an advisory opinion on the key issues involved in the decolonization dispute. The Resolution asked the Court to decide:

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?[1]

The issues presented to the Court by this Resolution involve the acquisition and maintenance of legal title by a sovereign over remote and sparsely inhabited territory. This problem had been adjudicated by various international tribunals,[2] and consequently, the Court had a body of relevant case law on which to base its decision. Even so, the Court apparently retreated from the guidelines established in these earlier decisions by finding that Western Sahara was not *terra nullius* and that neither Morocco nor Mauritania had sufficient ties to the territory to establish sovereign title.

Background

Western Sahara is a vast, phosphate-rich desert, with a predominately nomadic population of 76,000 people.[3] Spain's claim to Spanish Sahara originated in 1509, but from 1524 to 1860, the area was under Moroccan control. In 1884, Spain proclaimed a protectorate over portions of Western Sahara. By 1958, Spain

[1] G.A. Res. 3292, 29 U.N. GAOR Supp. 31, at 103, 104, U.N. Doc. A/9631 (1974). *See also* Advisory Opinion on Western Sahara, [1975] I.C.J. 12.

[2] *See* Palmas Island Arbitration, (Netherlands-United States), 2 R. Int'l Arb. Awards 829 (1928); Clipperton Island Arbitration (France-Mexico), 2 R. Int'l Arb. Awards 1107 (1931); Legal Status of Eastern Greenland Case, (Norway-Denmark), [1933] P.C.I.J., ser. A/B, No. 53, 1; Minquiers and Ecrehos Case, (United Kingdom-France), [1953] I.C.J. 47.

[3] TIME, Jan. 26, 1976, at 34.

had extended its occupation to the rest of the territory, and it became a province of Spain.[4]

The end of the Spanish rule began in 1970 with the adoption by the United Nations General Assembly of Resolution 2711,[5] a decree guaranteeing the right of the peoples of Western Sahara to self-determination. In that Resolution, the General Assembly called upon Spain to create a conciliatory atmosphere conducive to a referendum which would allow the population of Western Sahara to "exercise their right to self-determination and to freedom of choice. . . ."[6] This declaration led to a December 1974 request for an advisory opinion from the International Court of Justice on certain problems relating to the decolonization of Western Sahara.[7] The Court rendered a decision[8] on October 16, 1975, and almost immediately King Hassan of Morocco, citing ancient claims to the territory, declared that he would send 350,000 unarmed Moroccans into Western Sahara to claim the territory for Morocco.[9] His march began on November 6, 1975, and proceeded some six miles into Western Sahara territory to a point just opposite a Spanish minefield.[10] On November 9th, King Hassan bowed to international pressure and ordered a withdrawal from the territory.[11] An agreement was negotiated between Spain and Morocco in which Spain agreed to abandon Western Sahara on February 2, 1976.[12] An interim arrangement calling for joint administration of the territory and a referendum to be organized by the two provisional powers was announced.[13] The Spanish government received significant concessions in the form of oil, gas, and fishing rights in the territory, in return for the agreement establishing Morocco and Mauritania as joint administrators.[14] Presently, the territory is under control of this provisional government, and the prospects for a referendum are small.

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[4] 25 ENCYCLOPEDIA AMERICANA 360y (int'l ed. 1971).

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

[6] *Id.* at 101.

[7] G.A. Res. 3292, 29 U.N. GAOR Supp. 31, at 103, 104, U.N. Doc. A/9631 (1974).

[8] The Western Sahara Advisory Opinion, [1975] I.C.J. 14.

[9] N.Y. Times, Oct. 17, 1975, at 1, col. 4.

[10] N.Y. Times, Nov. 8, 1975, at 13, col. 5.

[11] N.Y. Times, Nov. 10, 1975, at 1, col. 4.

[12] N.Y. Times, Nov. 15, 1975, at 1, col. 2.

[13] N.Y. Times, Nov. 16, 1975, at 9, col. 1.

[14] N.Y. Times, Nov. 17, 1975, at 4, col. 4.

Algeria, the only country actively pressing for a referendum, is currently supporting a revolutionary army in Western Sahara.[15] In response to this threat, Morocco attempted to support its annexation efforts by holding its own referendum among the tribal chiefs of the area.[16] The chiefs were reported to have overwhelmingly supported continued Moroccan control.[17]

I. THE *Terra Nullius* ISSUE IN THE WESTERN SAHARA OPINION

A. *Application of Intertemporal Law.*

Before finding that Western Sahara was not *terra nullius*, the Court had to determine a critical date from which to measure the claims of the parties. In many cases, the rights of the parties derive from legally significant acts, or a treaty concluded very long ago. To ensure fairness to the parties, these rights must be evaluated in light of the law contemporary with them, not with reference to the law in force at the time that the dispute arose.[18] Thus, the designation of Western Sahara as *terra nullius* must be determined by the rules of international law in force at the time Spain colonized the territory. The critical date established by the Court for this purpose was 1884 — this corresponding to a Spanish proclamation establishing a protectorate over the southern portion of Western Sahara (Rio de Oro).[19]

According to the law in force at the time of the Spanish colonization, land which was *terra nullius* could consist of:

(1) Uninhabited lands, unless they are suitable for permanent habitation and are being used for the purposes for which they are suitable;
(2) lands inhabited by individuals who are not permanently united for political action;
(3) lands which have been abandoned by their former occupants; or,
(4) lands which have been forfeited because they have not been occupied effectively.[20]

Occupation was the means of peaceably acquiring sovereignty over *terra nullius* territory. Consequently, the Court reasoned that

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[15] N.Y. Times, May 6, 1976, at 5, col. 1.

[16] N.Y. Times, Feb. 28, 1976, at 6, col. 2.

[17] *Id.*

[18] Palmas Island Arbitration, *supra* note 2, at 829.

[19] [1975] I.C.J. 38.

[20] 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 396 (1940).

a determination that Western Sahara was a *terra nullius* at the time of Spanish colonization would be possible only if it were established that, at that time, the territory belonged to no one in the sense that it was open to acquisition through the legal process of "occupation."[21] The Court concluded that because Western Sahara was not *terra nullius*, there was no issue as to whether Spain had effectively occupied the territory. This conclusion rested on state practice at the time of the colonization — that territories inhabited by peoples having a social and political organization were not regarded as *terra nullius*.[22] Sovereignty, in these cases, was said to derive from agreements with local rulers and not through a unilateral occupation of the *terra nullius*.[22a]

There are two issues presented by the Court's *terra nullius* opinion. First, was the test of effective occupation employed by the Court one that was generally recognized at the time of Spanish colonization of Western Sahara? Second, had the tribes of the area reached the level of political sophistication attributed to them by the Court?

The Court's conclusion that territory occupied by tribes having a social and political organization is not *terra nullius* has support. A notable commentator in the area indicates that there had been a preponderance of juristic opinion in favor of the proposition that lands in the possession of any backward peoples who were politically organized ought not to be regarded as *terra nullius*.[23] This view, while supported by a majority of 19th century legal scholars, is not conclusive however. Another doctrine which denied that international law recognized any rights in primitive peoples to the territory they inhabit also had a respectable following.[24] In its most advanced form, this latter approach demands that such peoples shall have progressed so far in civilization as to be recognized as members of the "Family of Nations" before they can be granted such rights.[25] Other writers maintain that a territory is *terra nullius* as long as the occupying peoples lack an "international personality."[26] While there would appear to be some

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[21] [1975] I.C.J. 39.

[22] *Id.*

[22a] 10 INT'L LAWYER 201 (1976).

[23] M. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 20 (1926).

[24] *Id.*

[25] *Id.*

[26] 1 G. SCHWARZENBÉRGER, INTERNATIONAL LAW 136 (1949).

disagreement as to the validity of the standard used by the Court, the Court's test seems to reflect the opinion of a majority of the writers on the subject. One is forced to rely solely on these opinions because there are no judicial decisions dealing with the occupation of lands inhabited by natives organized on a tribal level. All of the cases in the area[27] deal with the conflicting claims of two countries to an area which has been effectively occupied by at least one of them. Under these circumstances, a strict *terra nullius* issue would not arise except insofar as one of the parties' title was based on occupation. The courts have preferred to decide these *terra nullius* cases on alternate grounds and have favored placing title in one claimant even though there are grounds for a finding that the territory is *terra nullius*.[28] Thus, in the *Eastern Greenland* case,[29] Danish activity in the disputed area had been minimal, but the court refused to declare the area *terra nullius*.

Assuming that the Court employed the proper test of occupation, it remains to be seen whether it correctly applied it to the facts of the Western Sahara case. In holding that Western Sahara was not *terra nullius*, the Court relied on two assumptions:

(1) That at the time of colonization, Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; and,

(2) That Spain did not proceed upon the basis that it was establishing sovereignty over *terra nullius*, but rather was taking the Rio de Oro under its protection on the basis of agreements entered into with the chiefs of local tribes.[30]

While the Court concludes that the tribes of Western Sahara were politically and socially organized, it offers little in the way of legal reasoning to support its conclusion. Had the question been moot, this would have been understandable; but there appears to be considerable ambiguity as to when a tribe has reached a sufficient level of political sophistication to be declared sovereign over the territory it inhabits. The distinction between civilized and uncivilized, or between political and non-political, is not one that can be drawn with the apparent ease assumed by the Court.

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[27] *See* note 2 *supra*.

[28] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 167 (2nd ed. 1973).

[29] [1933] P.C.I.J., ser. A/B, No. 53, 1.

[30] [1975] I.C.J. 39.

The traditional test employed in this situation poses three requirements for a society to be termed "political." They are: (1) that the bulk of its members must be in the habit of obedience to a certain and common superior; (2) that the society must possess some degree of permanence; and (3) that the society must be "considerable," that is to say, it must be composed of a number of families.[31] It would follow that, if a tract of land were inhabited by isolated individuals, or even groups of individuals, who were not united for political action, such a tract would be *terra nullius*. This seems to, at least, raise a question as to the level of organization among the inhabitants of Western Sahara.

The lifestyle of the inhabitants at the time of colonization was almost exclusively nomadic, the environment being inhospitable to any other form of existence.[31a] It appears that these tribes recognized no common superior, nor did they engage in any but the most rudimentary forms of concerted political activity. They clearly did not believe that they exercised any right of control over the land they traversed, nor did they, as a group, possess the power to exclude other people from their land. While these peoples were organized at the tribal level, it is not entirely clear that this standing alone is enough to render the land occupied (that is, non-*terra nullius*).[32] Were not some degree of intertribal organization required, it would be difficult to imagine any populated area which could be classified *terra nullius*. The lack of a supporting rationale in this part of the opinion may be regarded as a serious defect, especially given the fact that the area of law on which the Court relies is not clearly articulated.

A second problem with this part of the decision lies in the Court's failure to carry its reasoning through to a logical conclusion. Had the Court done so it would have realized that by characterizing Western Sahara as non-*terra nullius*, it was by definition declaring that the area was effectively controlled by a sovereign.[33] This follows from the definition of *terra nullius* adopted by the Court, that is, a territory belonging to no one.[34] If a territory is not *terra nullius*, the result is that some politically organized group must be exercising traditional acts of sovereignty in relation to it. If those traditional acts include, as the court in the

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[31] LINDLEY, *supra* note 23, at 20.

[31a] [1975] I.C.J. 41.

[32] LINDLEY, *supra* note 23, at 20.

[33] BROWNLIE, *supra* note 28, at 130.

[34] [1975] I.C.J. 39.

Island of Palmas case indicates,[35] the right to exclude the activities of other States, as well as the ability to protect the rights of other nationals in the territory, then the Western Sahara Court would be hard-pressed to name the party displaying these acts of sovereignty in Western Sahara. In addition to the two qualifications previously mentioned, the Court in the *Island of Palmas* case defines sovereignty in such a way as to disqualify all of the parties with an interest in Western Sahara. It says that:

> Sovereignty, which in relation to territory may be called territorial sovereignty, in relation between states signifies independence. Independence in relation to territory is the right to exercise therein, to the exclusion of any other state, the functions of the state . . . territorial sovereignty belongs always to one state, or in exceptional circumstances to several states, to the exclusion of all others.[36]

Indeed, Morocco and Mauritania are disqualified because of the Court's determination later in the opinion that they lacked sufficient ties of territorial soverignty to Western Sahara.[37] The burden similarly cannot be placed on the tribes of Western Sahara simply because they were incapable of exercising the acts of sovereignty required by the *Palmas* decision over the vast majority of the territory. Thus, the Court's conclusion that Western Sahara was not *terra nullius* in 1884 is not consistent with the fact that there was no country or group of individuals in a position to occupy the territory at that time.

In support of its finding, the Court also seems to rely heavily on the notion that the tribes inhabiting Western Sahara were led by chiefs capable of representing them.[38] While this may in part relate to the Court's finding that these tribes entered into valid treaties of cession with the Spanish government, it is in the last analysis inconclusive. To state that these tribes had chiefs competent to represent them is to state a tautology. All tribes have leaders; a distinction exists only, using the Court's analysis, if the leaders are not competent to represent their tribe. But it is a fact that these chiefs were, with few exceptions, incapable of representing their tribes in dealings with European powers seeking to negotiate treaties of cession. In most cases, the native chief did not even realize what he was transferring under the

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[35] Palmas Island Arbitration, *supra* note 2, at 839.

[36] *Id.* at 838.

[37] [1975] I.C.J. 68.

[38] *Id.* at 39.

treaty.[39] This lack of capable leadership, coupled with the essentially nomadic character of their constituents, makes one doubt that the tribes were the cohesive and politically organized entities that the Court said they were. This damages the Court's determination that the territory was not *terra nullius*, a determination based in part on the assumption that the tribes were viable political entities.

Finally, it should be noted that the Court does not go far in explaining what definition it attached to the word "inhabited." It uses the word in its holding that Western Sahara was not *terra nullius* because it was "inhabited" by people who were politically and socially organized. The Court does not recognize that there might be an issue as to whether the majority of the tribes actually "inhabit" Western Sahara. This issue is raised by the fact that the migration routes of the tribes were not limited to Western Sahara but tended also to cross into Mauritania and Morocco. The sparsity of resources and the spasmodic nature of the rainfall compelled all of the tribes to traverse very wide areas of desert. Consequently, none of the nomadic routes were confined to Western Sahara; some passed through Southern Morocco, a part of present-day Mauritania or Algeria, and some through more distant countries.[40] Thus, a majority of the tribes were only temporary inhabitants of Western Sahara.

The Court, in its holding on this first issue, also notes that in colonizing Western Sahara, Spain did not proceed on the basis that it was establishing sovereignty over *terra nullius*.[41] Rather, the King of Spain took Rio de Oro under his protection on the basis of agreements he had entered into with chiefs of the local tribes. While this act alone is not conclusive, it does correspond to the general practice of the time.[42] Prior to the middle of the 19th century, the European powers preferred to use the concept of *terra nullius* when they acquired sovereignty over large areas of Asia and Africa which were often in fact the seat of organized communities.[43] Since then, they have tended to employ treaties of cession rather than occupation as a means of establishing dominion over backward peoples.[44] While it has been noted that

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[39] LINDLEY, *supra* note 23, at 44.

[40] [1975] I.C.J. 41.

[41] *Id.*

[42] LINDLEY, *supra* note 23, at 34.

[43] BROWNLIE, *supra* note 28, at 131.

[44] LINDLEY, *supra* note 23, at 43.

the tribes generally did not realize what was being transferred under these treaties, the fact that the form employed was cession indicates that the power concerned did not consider the territory to be *terra nullius*. This is fairly conclusive, especially when one considers that the colonial power was free to choose among a number of acquisitive methods when dealing with these undeveloped societies.[45] The fact that Spain chose not to treat the territory as *terra nullius* is the Court's strongest argument on this issue.

II. The "Legal Ties" Issue in the Western Sahara Opinion

A. *The Western Sahara Opinion*

Once it was established that Western Sahara was not *terra nullius* at the time of the Spanish colonization, the Court had to determine whether Morocco or Mauritania had sufficient "legal ties" to establish a valid claim of sovereignty over the area.

Generally, sovereignty over territory is expressed in terms of a "continuous and peaceful display,"[46] or an "effective display" of state authority,[47] rather than in terms of "legal ties." Consequently, unlike the term *terra nullius*, "legal ties" did not have a previously determined meaning in international law. Consequently, to ascertain that meaning, the Court had to look to the context in which the General Assembly's questions were presented.[48] The Court characterized legal ties as:

> . . . referring to such "legal ties" as may affect the policy to be followed in the decolonization of Western Sahara. In this connection, the Court cannot accept the view that the legal ties the General Assembly had in mind in framing Question II were limited to ties established directly with the territory and without reference to the people who may be found in it. Such an interpretation would unduly restrict the scope of the question, since legal ties are normally established in relation to people.[49]

Although the Court incorporated the General Assembly's "legal ties" language into its holding,[50] it did not discuss the

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[45] Generally, the other colonial powers would not challenge an acquisition by another power of territory to which they had no claim. *Id.* at 45.

[46] Palmas Island Arbitration, *supra* note 2, at 857.

[47] [1975] I.C.J. 43.

[48] 11 Tex. Int'l L.J. 363 (1976).

[49] [1975] I.C.J. 40.

[50] In its holding, the Court recognized rights, including some rights relating to the land, which constituted legal ties between the two countries and Western

relationship between "legal ties" and decolonization in the rest of the opinion. In fact, the Court employed a traditional definition of sovereignty in evaluating Moroccan and Mauritanian claims to Western Sahara.[51]

Morocco's claim to sovereignty over Western Sahara was based on an "alleged immemorial possession of the territory," which possession, it maintained, was based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and uncontested, for centuries.[52] Morocco emphasized that on the basis of unique religious and cultural ties, it had historically considered the area to be an integral part of its own national territory. Evidence demonstrating the existence of territorial continuity and contiguity between the two regions was also relied upon to some degree.[53] Morocco also invoked alleged acts of internal display of Moroccan authority,[54] as well as certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of the territory.[55] Morocco's claims of sovereignty, in a word, were based not on traditional notions of territory but on bonds of religion and loyalty

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Sahara. They also concluded that the information presented did 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 did not find "legal ties of such a nature as might affect the application of General Assembly Resolution 1514 (XIX) 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 people of the territory." *Id.* at 68.

[51] *Id.* at 42.

[52] *Id.*

[53] *Id.*

[54] The principle evidence of this "internal display of authority" consisted of acts alleged to show the allegiance of the Western Saharan sheikhs to the Moroccan Sultan. These included documents concerning the appointment of these sheikhs, the alleged imposition of Koranic and other taxes, and what were referred to as military decisions, said to constitute acts of resistance to foreign penetration of the territory. Morocco also placed emphasis on the two visits of Sultan Hassan I to the northern portion of Western Sahara in 1882 and 1886 undertaken to strengthen his authority there, and on the dispatch of arms by the Sultan to tribes inhabiting the territory to reinforce their resistance to foreign penetration. *Id.* at 45.

[55] The international acts relied on by Morocco included:

(1) certain treaties concluded with Spain, the United States, and Great Britain between 1767 and 1861 which dealt with the safety of persons shipwrecked on the coast of Wad Noun or its vicinity; and,

(2) certain bilateral treaties whereby Great Britain, Spain, France and Germany were said to have recognized that Moroccan sovereignty extended as far south as Cape Bojador or the boundary of the Rio de Oro. *Id.* at 49.

existing between the Sultan and certain tribes in Western Sahara.[56]

The Mauritanian "legal ties" argument differed necessarily from that of Morocco because, at the time of colonization, there was no Mauritanian state in existence.[57] Consequently, Mauritania had to base its claims on ties between an amorphous Mauritanian "entity" and Western Sahara.[58] In statements before the United Nations General Assembly, the Mauritanian representative argued that Western Sahara was inhabited solely by Mauritanian tribes differing in no way from other tribes inhabiting the northwestern part of Mauritania. To support this contention he noted that these tribes had everything in common, including; Hassania, a Mauritanian-Arabic dialect, culture, race, and customs. Furthermore, he noted that the daily activities and nomadic nature of the Saharan inhabitants were no different from those of tribes living in Mauritania.[59] He also emphasized that the migration routes of these tribes were contained wholly within the Shinguitti country, and that these routes commonly bisected or even trisected the artificial borders imposed by the colonial powers.[60] The existence of this community, according to Mauritania, became especially apparent when its independence was threatened, as evidenced by the concerted effort made by the tribes throughout the Shinguitti country to resist French penetration.[61]

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[56] *Id.* at 44.

[57] *Id.* at 57.

[58] Geographically, the entity covered a vast region lying between the meridian of Timbuktu on the east and the Atlantic on the west. The entity is bounded on the south by the Senegal River and on the north by the Wad Sakiet el Hamra. Ethnographically, it denoted the cultural and social entity within which the Islamic Republic of Mauritania was to be created. According to Mauritania, that entity, at the relevant period, was the Bilad Shinguitti, which human unit was characterized by a common language, way of life, religion and system of laws. The Bilad featured two types of political authority; emirates and tribal groups. While recognizing that these emirates and tribes did not constitute a State, Mauritania suggested that the concepts of "nation" and of "people" would be more appropriate to describe the position of the Shinguitti people at the time of colonization. According to Mauritania, the territory presently under Spanish administration and the territory controlled by the Islamic Republic of Mauritania, together constituted indivisible parts of a single entity which shared valid legal ties with one another. [1975] I.C.J. 57.

[59] 29 U.N. GAOR 188, 199, U.N. Doc. A/C.4/SR. 2117 (1974). *See also* 2 BROOKLYN J. INT'L L. 293 (1976).

[60] [1975] I.C.J. 59.

[61] *Id.*

B. *The Court's Analysis of These Claims*

By basing its claim to Western Sahara on "immemorial possession" and an "uninterrupted display of authority," Morocco was asserting that it had gained title through the process of prescription. Mauritania's claim, while not strictly classifiable according to traditional modes of territorial acquisition,[62] would seem to be based on some immemorial ties to the area.

Like occupation, prescription is based on effective control over territory. The difference lies in the fact that prescription is the acquisition of territory which belonged to another state, whereas occupation is acquisition of *terra nullius*.[63] The requirements for acquisitive prescription are similar to those necessary for effective occupation in that both require the peaceful, continuous, and uninterrupted exercise of the authority of a sovereign over the area.[64] The exercise of the authority, apparently, must also be public, because the acquiescence of the former titleholder is necessary.[65] The effective control necessary to establish title by prescription must last for a longer period of time than the effective control which is necessary in cases of occupation. This period may be a "very long time,"[66] or for "so long a period that the position has become part of the established international order."[67] The length

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[62] These modes are occupation, prescription, cession, conquest, and accretion. Occupation is the acquisition of *terra nullius*, i.e. territory which, immediately before acquisition belonged to no state. Prescription, like occupation, is based on effective control over territory. The difference is that prescription is the acquisition of territory which belonged to another State. Cession is the transfer of title, usually by treaty, from one State to another. Conquest involves one State forcefully taking land from another State. Accretion is the means by which a state gains title to lands through the operation of nature. The most common examples of this form of acquisition are the formation of silt deposits in rivers or the emergence of volcanic islands. *See* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 183-87 (1971), and 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1030-1224 (1963).

[63] WHITEMAN, *supra* note 62, at 1066.

[64] *Id.* at 1062.

[65] Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or international tribunal, or — especially in cases where no such action was possible — have failed to manifest their opposition in a sufficiently positive manner through the instrument of diplomatic protests. *Id.* At least one author feels that this acquiescence of the former sovereign is the operative factor in the acquisition of title by prescription. R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 30 (1963).

[66] L. OREFIELD, INTERNATIONAL LAW 353 (1965).

[67] Lauterpacht notes that the length of time ". . . is such a period as is necessary to create under the influence of historical development the general

of time of continued occupation will vary in every case, and is invariably a matter of fact to be decided by the international tribunal before which the matter is eventually brought for adjudication.[68]

Immemorial possession, the claim of title relied on by Mauritania, is one form of acquisitive prescription. "Uninterrupted possession" is singled out by some writers as another form.[69] "In the case of immemorial possession, the origin of an existing state of affairs is uncertain, and since it is impossible to prove whether the origin of this state of affairs is legal or illegal, it is presumed to be legal."[70] Like any form of prescription, it derives its justification from the difficulties which grew with the passing of time, with the necessity of furnishing evidence of matters far in the past, and from the tendency not to change a state of affairs which actually exists and has existed for a long time.[71] Thus, when the origin of a State's possession of territory is unclear or unknown, but it appears to have been continuous and uninterrupted, the territory will likely be awarded to the State on the basis of immemorial possession.

The Court's rejection of Mauritania's claims of sovereignty was based on its conclusion that the Bilad Shinguitti did not constitute a recognizable "entity" capable of gaining sovereignty over Western Sahara.[72] The Court relied on *The Reparation for Injuries Suffered in the Service of the United Nations*[73] case in determining that the Mauritanian entity did not possess a personality distinct from its composite emirates. That case dealt with the issue of whether the United Nations had the capacity to bring an international claim against the responsible *de jure* or *de facto* government, with a view to obtaining reparations for injuries suffered by United Nations personnel.[74] The Court concluded

conviction that the present condition of things is in conformity with international order." 1 L. OPPENHEIM, INTERNATIONAL LAW 576 (8th ed. H. Lauterpacht 1955).

[68] WHITEMAN, *supra* note 62, at 1062.

[69] *Id.*

[70] *Id.*

[71] Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT'L L. 322 (1957). Whiteman (*supra* note 62, at 1080) describes the concept more pragmatically as "possession which has lasted so long a time that it is impossible to furnish proof of a different situation and which no person can remember having heard spoke of."

[72] [1975] I.C.J. 63.

[73] [1949] I.C.J. 8.

[74] *Id.* at 184.

that the organization could bring these claims because it possessed an "international personality." The United Nations was said to possess such a personality because it was in "such a position, as to possess, in regard to its members, rights which it was entitled to ask them to respect."[75] This "international personality" is indispensable if an emirate or tribal group is to be granted an "entity" status.[76] The Court in the Western Sahara case concluded that while the criterion was applied in a somewhat special context in the *Reparation* case, nevertheless, it expressed the essential test that must be satisfied where a group, whether composed of States, of tribes, or of individuals, claims to be a legal entity distinct from its members.[77] The Bilad Shinguitti did not satisfy this test because its constituent tribes were completely independent of one another and shared no common institutions or organs even remotely similar in character.[78]

By basing its rejection of Mauritania's claims on this test of entity status, the Court was able to dismiss any Mauritanian argument based on cultural ties between the Bilad Shinguitti and the tribes of Western Sahara. Of initial benefit was the Court's being able to avoid having to decide the merits of the actual ties of sovereignty between Bilad Shinguitti and the tribes of Western Sahara. This question would have proved difficult because most of the tribes inhabiting the southern portion of Western Sahara were members of the Bilad Shinguitti. This allegiance to the Bilad would have constituted a legal tie had not the Shinguitti entity itself been found not to exist. At the same time, however, the Court relied exclusively on a test which was vague and difficult to apply. Why the Bilad Shinguitti was unable to assert the rights, with regard to its member tribes, "which it was entitled to ask them to respect" is not at all clear. The Court did, however, reach the correct conclusion and based it on the fact that the constituent tribes shared no common institutions.

The Court, it would appear, had other grounds at its disposal to deal with the Mauritanian claims. Mauritania's proof of ties of allegiance between the Western Saharan tribes and those composing the Mauritanian "entity" was weak and unsubstantiated. The evidence tended to show that far from merging into or disap-

[75] *Id.* at 178.

[76] *Id.*

[77] [1975] I.C.J. 63.

[78] *Id.*

pearing within the framework of the so-called Mauritanian entity, the tribes of Western Sahara led lives independent of the other Saharan tribes.[79] Especially prominent among this evidence were treaties of cession concluded between the tribes of Western Sahara and several European states.[80] The Court noted that this evidence illustrated the lack of allegiance shown by these independent tribes to the Mauritanian entity.

While the territorial ties invoked by Mauritania were weak, those displayed by Morocco were comparatively stronger. Consequently, the Court's discussion of the latter's ties was more involved, and for the most part, not as well supported by the precedents relied on by the Court.

With respect to Morocco's claims, the issue before the Court was whether, at the relevant time (1884), Moroccan sovereignty was effectively exercised or displayed in Western Sahara. For purposes of this discussion the critical words in the Court's eyes were "effective control." If Morocco could prove sufficient legal ties to establish a claim of effective occupation, the Court would have no choice but to recognize it. In an effort to establish a claim of effective occupation Morocco pointed to certain acts of internal display of Moroccan authority and to various international acts said to constitute recognition by other States of its sovereignty over the whole or part of Western Sahara.[81] Morocco invoked, *inter alia*, the decision of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case[82] to support its claim of effective occupation. Morocco stressed that during a long period it was the only independent state in northwestern Africa.[83] It also pointed to geographical contiguity and the character of the land as factors to be considered in evaluating Morocco's claim to Western Sahara.[84] In this way, the Moroccan government hoped to bring its case within the holding of the Court in the *Eastern Greenland* case.[85]

The term "effective occupation" has been developed in major part through the International Court of Justice's decisions in the

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[79] *Id.* at 61.

[80] *Id.* at 62.

[81] *Id.* at 45.

[82] *Supra* note 2.

[83] [1975] I.C.J. 42.

[84] *Id.*

[85] *Supra* note 2.

Palmas Island[86] and *Eastern Greenland*[87] cases. In the *Palmas* arbitration, the dispute centered on conflicting claims of sovereignty over the Island of Palmas, an isolated island halfway between the Philippines and the most northerly island in the Dutch East Indies. The United States title was derived from Spain by way of cession under the Treaty of Paris. The Spanish claim, in turn, had been based on the titles of discovery, recognition by treaty, and geographical contiguity. The Netherlands, on the other hand, founded their claim to sovereignty on the title of peaceful and continuous display of authority over the island. The arbitrator held that the Netherlands title was proved by evidence of a continuous and peaceful display of sovereignty for a long period of time and was superior to the title asserted by the United States.[88]

In the *Eastern Greenland* case,[89] the Court was called upon to decide between the conflicting claims of Norway and Denmark to the eastern coast of Greenland. Denmark claimed that the sovereignty it exercised over Greenland had existed for a long time and had been continuously and peacefully displayed, and, until the present dispute, had not been contested by any other State. It also contended that Norway was estopped from denying Danish sovereignty over the island because Norway had recognized various treaties establishing Danish sovereignty.[90] Norway contended that Denmark exercised no sovereignty over the area which Norway occupied on July 10, 1931, and that at the time of the occupation, the area was *terra nullius*. It claimed that the area lay outside the limits of the Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of these colonies.[91] Norway also claimed that attempts made by Denmark to obtain recognition of her position in Greenland were inconsistent with a claim to be already in possession of the disputed area, and that she was therefore estopped from alleging a long-established sovereignty over the whole island.[92]

The Court, in holding for Denmark, did not use the test developed in the *Palmas* case but referred to a title derived from a

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[86] *Id.*

[87] *Id.*

[88] Palmas Island Arbitration, *supra* note 2, at 869.

[89] *Supra* note 2.

[90] [1933] P.C.I.J. ser. A/B, No. 53, 44.

[91] *Id.*

[92] *Id.*

"continued display of authority."[93] This title 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.[94] The first element seems to require no more than positive evidence that the particular State intends to establish sovereignty over the disputed area. This evidence may consist either of published assertions of title or of specific acts of sovereignty.[95] It is the requirement imposed by the second element, that sovereignty must be sufficiently manifested, which requires analysis.

The *Island of Palmas*, *Eastern Greenland*, and *Clipperton Island*[96] cases are the leading authorities on effective occupation. These cases developed four requisites of effective occupation. These are that the display of sovereignty must be; (a) peaceful, (b) continuous, (c) actual, and (d) sufficient to confer valid title. The validity of Morocco's claims under each of these requirements will be considered.

In order for the exercise of sovereignty to be peaceful, it seems that no more is required than that the assertion of sovereignty is not contested by another State.[97] In addition, the Court in the *Eastern Greenland* case held specifically that mere protests from Norway did not alter the peaceful character of Denmark's display of sovereignty.[98] Morocco's claims would appear to satisfy the requirements of this broad test. There is no evidence that the control exercised by the Moroccan government over the Western Saharan tribes was contested in any way by any other States.

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[93] *Id.* at 45.

[94] *Id.*

[95] WHITEMAN, *supra* note 62, at 1031.

[96] In the Clipperton Island case, the dispute centered on a small atoll located several hundred miles off the coast of Mexico. French claims of sovereignty over the island were based on conspicuously minimal acts of effective occupation. These included a proclamation of sovereignty over the island, and an unsuccessful attempt by a French vessel to land there, and a protest to the United States following the discovery of a group of Americans collecting guano on the island. The Mexican case rested on an allegation of Spanish title through discovery which title was later inherited by Mexico. The arbitrator decided that even if a historic right existed, it was not maintained by any act of Mexican sovereignty. He concluded that the island was *terra nullius* and that the French acts were sufficient to gain sovereignty over the island, even in the absence of any efforts to occupy it. 2 R. Int'l Arb. Awards 1107 (1931).

[97] WHITEMAN, *supra* note 62, at 1032.

[98] [1933] P.C.I.J., ser. A/B, No. 53, 62.

The requirement that the display of sovereignty be continuous is also fairly broad in its application. Displays of sovereignty at irregular and comparatively long intervals were held sufficient for effective occupation both in the *Island of Palmas* and *Eastern Greenland* cases. The *Clipperton Island* case may perhaps also be regarded as a correct though extreme example of the principle. Thus, in the *Island of Palmas* case, the arbitrator noted that the degree of continuity varies widely according to circumstances. Therefore,

> Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ accordingly, as inhabited or uninhabited regions are involved . . .[99]

Consequently, the fact that Western Sahara is essentially uninhabited and susceptible only to very limited forms of human activity inevitably diminishes the level of continuity required. Under this liberal test of continuity, Morocco would appear to have exercised some form of more or less continuous activity in relation to Western Sahara. Whether or not this activity was sufficient to establish sufficient ties of sovereignty is the critical question.

The requirement that the display of sovereignty be actual means only that the claim be exercised in some way and not exist as a mere paper claim dressed up as an act of sovereignty.[100] There is generally no dispute as to whether the occupying State's acts are actual, as this requirement is satisfied by very little in the way of activity. The difficulty comes in determining whether these acts are sufficient to confer valid title. The essential consideration becomes whether the occupying State's activity was continuous and peaceful, to use the language of the *Palmas* Court, or was based on a continued display of authority, using the language of the Court in the *Greenland* case. The level of effective possession may be such as to show that the claimant really acted as an international sovereign would have acted under the circumstances.[101] Understandably, a great deal of latitude is given when determining what acts are considered crucial to this analysis. Basically, any act of authority will suffice, although a premium is placed on acts going to the control of the area in

[99] Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 867, 877 (1928).

[100] WHITEMAN, *supra* note 62, at 1032.

[101] *Id.* at 1033.

dispute. Thus, the religious and cultural ties relied on by both claimants would be treated as ties of international sovereignty, as would the political ties of allegiance to the Sultan which Morocco claimed existed. While these represent factors to be considered, the courts, including the one reviewing the Western Sahara dispute, have tended to require more concrete evidence of effective occupation. The courts have tended to look for evidence of effective occupation as manifested by the establishment of a proper state machinery for purposes of defense and administration of the occupied territory.[102] Some writers have maintained that effective occupation takes place, in ordinary cases, only when the State establishes an organization in the territory capable of making its laws respected.[103] They do, however, allow a considerable exception in the case of remote or uninhabitable lands.[104] The Court in the *Minquiers and Ecrehos* case[105] placed emphasis on the claimant's capability to defend the occupied territory. It noted that the exercise of effective military control did not necessarily require the garrisoning of practically uninhabitable places, but rather consisted of the power to hold such areas at will and to prevent other States from occupying them.[106] The evidence supplied the Court by Morocco gives no indication that Morocco had either the intention or the ability, prior to 1884,

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[102] *Id.* at 1036.

[103] A. MCNAIR AND H. LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW 104 (1927-28).

[104] In those exceptional cases the occupation is considered effective from the first moment that the occupying state makes its appearance in the area. A. MCNAIR AND H. LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW 107 (1931-32). Brownlie (*supra* note 28, at 151), a writer with similar views on the subject, notes that in these cases "little is required in the nature of state activity, so that a first and decisive act of sovereignty will suffice to create a valid title."

[105] This case involved a dispute between France and England over the disposition of certain islands in the Channel Island group. Both sides relied on a title as ancient as their title to their mainland territories so the issue centered on which of the two countries had more effectively occupied the islands. The United Kingdom stressed the reality and the effectiveness of their possession over a long period, a possession which they said should be compared with that of Denmark in the Eastern Greenland case and that of the Netherlands in the Island of Palmas case. The principal French claim was that title to the islands was originally vested in France and that it had done nothing to abandon its claim. The court held that by virtue of England's defense and administration of the islands, it was deemed to have effectively occupied them. Acts of occupation such as the imposition of property and customs taxes, the establishment of criminal proceedings and boat registries were examined by the Court. [1953] I.C.J. 47.

[106] *Id.* at 78.

to defend Western Sahara. There is some evidence that the Sultan supplied arms to a few tribes in Rio de Oro to reinforce their resistance to foreign penetration,[107] but this would be insufficient to establish Moroccan defense of the territory. It is also illustrative to note that Morocco's claims of sovereignty over the territory did not rest on the historical defense of Western Sahara. While this did not considerably weaken Morocco's case, the fact that Morocco also excluded all but the most basic references to any administration of the territory may have been crucial. By attempting to bring itself within the holding of the *Eastern Greenland* case, Morocco committed itself to providing evidence of its assuming some role in the administration of the territory. The Court in the *Eastern Greenland* case placed great weight on the fact that a systematic "extension of sovereignty by means of the extension of colonization and administration was consistently followed by Denmark."[108] These instances of Danish administration and legislation in reference to Greenland were varied, and also controlling in the Court's mind.[109] This process of administrative extension culminated in the Decree of May 10, 1921, which declared that the whole country was henceforward attached to the Danish colonies and to Danish administration of Greenland.[110] The Court in the *Island of Palmas* case placed similar weight on this requirement of administration. In describing the nature of the parties' ties to the island, the Court noted that:

> . . . [I]t is an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods . . . . The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if sovereignty be regarded as confined

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[107] [1975] I.C.J. 33.

[108] [1933] P.C.I.J., ser. A/B, No. 53, 110.

[109] Evidence of Danish administration of Greenland exists from as early as the eighteenth century. The founding of the Danish colonies in Greenland was accompanied by the grant of a trade monopoly by the Danish legislature. These ordinances regulated trade with the Danish colonies on Greenland and prohibited the maltreatment of native Greenlanders. Furthermore, the trading regulations applied not only in the existing colonies but also in any future colonies which might be established. Subsequent acts of administration, including the activities of government-supported hunting expeditions, increases in the number of government authorized scientific expeditions, the granting of trading and mining concessions and the issuing of permits by Danish authorities to persons visiting the eastern coast of Greenland were also established. *Id.*

[110] *Id.*

> within such narrow limits as would be supposed for a small island inhabited exclusively by natives.[111]

Morocco, for its part, was able to invoke few examples of direct administration of even part of Western Sahara (*supra, note 49*). The imposition of Koranic taxes, the so-called "military decisions" said to constitute acts of Moroccan resistance to foreign penetration of the territory, and the acts of administration resulting from the allegiance of certain tribes to the Sultan are the only *bona fide* acts of administration presented by Morocco.[112] The Court found that it did not have to rule on the sufficiency of these acts because the evidence indicated that these administrative efforts were directed to areas situated within present-day Morocco.[113] Furthermore, the Court found that the information furnished by Morocco could not be said to provide convincing evidence of the levying of Moroccan taxes with respect to the territory.[114]

The Court's finding that these taxes were not imposed, and that claimed acts of Moroccan sovereignty did not even reach into Western Sahara can hardly be challenged. The Court was justified in dismissing these claims without determining whether they did in fact constitute valid ties of sovereignty. Still, the method used by the Court to dismiss the remaining Moroccan claims, that is, those that could not be summarily dismissed as not extending all the way into Western Sahara, was suspect. Included among the acts of Moroccan sovereignty that extended into the territory were agreements signed between the Sultan and tribes inhabiting Western Sahara relating to the recovery of shipwrecked seamen, documents of allegiance to the Sultan, and letters from the Sultan to several of the tribes requesting the performance of certain acts entirely within the borders of Western Sahara.[115] The Court makes its greatest leap of faith by noting that these acts showed that the Sultan exercised some administrative authority in Western Sahara, but that they did not establish any tie of territorial sovereignty. In reaching this conclusion, the Court dismissed out of hand the primary Moroccan contentions.

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[111] *Supra* note 2, at 855.

[112] [1975] I.C.J. 45.

[113] *Id.* at 48.

[114] The Court seemed to rely on the fact that there was no evidence of the Western Saharan tribes paying taxes, and that there was no possibility that such evidence could be adduced. *Id.* at 46.

[115] *Id.* at 48.

In doing this, the Court divided the Moroccan acts into two groups — those that did not extend into Western Sahara and those that did. The Court then devoted a lengthy discussion to the former, the easier group to deal with from a substantive viewpoint, and a mere paragraph to the latter.[116]

A second defect exists with respect to the Court's disposition of the Moroccan claims. It has already been noted that the arbitrator in the *Island of Palmas* and *Eastern Greenland* cases recognized that in thinly populated and uninhabited areas very little in the way of actual exercise of sovereign rights might be sufficient to establish sovereignty in the absence of any competitive claims.[117] The Court held in the *Eastern Greenland* case that, as there had been no claim of sovereignty by any other power, and in view of the inaccessible character of the country, mere acts of legislation were sufficient evidence of the effectiveness of occupation.[118] Even less exacting was the award of the arbitrator in the *Clipperton Island* case;[119] a case often referred to as an example of a situation in which international law dispenses altogether with the requirement of effectiveness of occupation.[120] In effect, the case held that the degree of effective occupation which is required is such occupation as is appropriate and possible under the circumstances.[121] Thus, the mere symbolic notice of occupation was held sufficient even though the French government made no effort to occupy the island.[122] One addition must be made to these principles in light of the modern cases, most notably, the *Minquiers and Ecrehos* case.[123] That is, when uninhabited or very sparsely inhabited territory is occupied, the occupying State may not necessarily be required to maintain even a single official permanently on the spot. It is enough if the State displays the functions of the State in a manner corresponding to the nature of the territory, assumes the responsibility to exercise some local administration, and does so in fact when occasion demands.[124]

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[116] *Id.*

[117] [1933] P.C.I.J., ser. A/B, No. 53, at 45, 46.

[118] WHITEMAN, *supra* note 62, at 1042.

[119] *Supra* note 96.

[120] *See* note 96 *supra* for a description of the acts held to be sufficient for effective occupation of the island. *See also* WHITEMAN, *supra* note 62, at 1042 (1963).

[121] 27 AM. J. INT'L L. 132 (1933).

[122] 26 AM. J. INT'L L. 390 (1932).

[123] [1953] I.C.J. 47. *See also* note 105 *supra.*

[124] WHITEMAN, *supra* note 62, at 1033.

In the Western Sahara opinion, the Court took judicial notice of the statements in the *Eastern Greenland* case that very little in the way of actual exercise of sovereign rights was necessary in the thinly populated areas to reduce them to effective occupation.[125] The Court, however, found this principle inapplicable due to the "paucity of evidence of actual display of authority unambiguously relating to Western Sahara."[126] The Court also noted that Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organized tribes were in constant movement and where violent incidents between these tribes were frequent.[127] But had the Court reasoned more carefully, it would have realized that it is not possible to distinguish between the political and social organization of Greenland's Eskimos and the Western Sahara's nomadic tribes. Thus, the Court's statement that the Moroccan claims "were not on all fours with those of Denmark in the *Eastern Greenland* case"[128] appears to be an oversimplification, at least with respect to the type of tribes inhabiting each region. In addition to misinterpreting the *Eastern Greenland* case, the Court severely limited the scope of the *Clipperton Island* case.[129] The test of effectiveness of occupation established in that case was very broad and was at least arguably satisfied by Morocco in this case.[130] It appears, then, that in denying the claims of Morocco, and possibly, Mauritania, the Court retrenched from its earlier opinions by increasing the evidentiary requirements for the effectiveness of occupation.

Despite the inconsistencies in the Court's use of precedent, there are several factors which justifiably militate against the Moroccan claims. In the first place, the French government's acts in the *Clipperton Island* case can be easily distinguished from those of Morocco. In that case, the arbitrator attached great importance to the "regularity of the act by which France made known in a clear and precise manner her intention to consider the Island her territory."[131] Morocco, on the other hand, did not

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[125] [1975] I.C.J. 43.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Supra* note 96.

[130] The case essentially held that the occupation required differs by the facts of each case, and in some cases, no real occupation was required. *See* notes 120, 122 *supra.*

[131] MCNAIR AND LAUTERPACHT, *supra* note 104, at 107.

notify any other party of its intention to exercise sovereignty over Western Sahara. While such notification is not necessary to establish territorial sovereignty over an area,[132] the intention to occupy is.[133] There is no evidence that Morocco ever communicated its intention to establish sovereignty over Western Sahara prior to 1884, nor were any direct references to this intention contained within the Moroccan government papers or other historical sources. The lack of evidence of Moroccan administration of Western Sahara[134] also appears to go a long way to negate this intention.

In attempting to bring itself within the decision of the Court in the *Eastern Greenland* case, Morocco also relied on arguments based on historical rights to, and geographical proximity with, Western Sahara. The Mauritanian government also relied heavily on historical claims to the territory. These historical claims of sovereignty have generally not been upheld by the courts.[135] The Court in the *Eastern Greenland* case noted that historic claims to dominion over whole regions — claims which had, formerly, played an important part in the allocation of territorial sovereignty — lost weight and were gradually abandoned even by the States which had relied upon them. International law began to require a close connection between the existence of sovereignty and the effective exercise thereof.[136] In the *Clipperton Island* case, Mexico's claim of sovereignty was based on historic rights unsupported by any other acts of effective occupation. Predictably, these rights were declared void by the arbitrator.[137] Following these principles, the Western Sahara Court was justified in rejecting both claims based on historical title.

The Court was also justified in rejecting Morocco's claim of sovereignty based on geographical contiguity. The Court, in discarding this claim, noted: "The geographical unity of Western Sahara with Morocco is somewhat debatable, which also militates

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[132] This principle was established in the Island of Palmas case where the Court said that "an obligation for the Netherlands to notify to other powers the establishment of suzerainty over the Sangi States or of sovereignty in these territories did not exist." 2 R. Int'l Arb. Awards 868 (1928).

[133] The intention or will to act as sovereign is one of the two elements of the Eastern Greenland test. [1975] I.C.J. 43.

[134] *Supra* note 104.

[135] 2 R. Int'l Arb. Awards 854, 869 (1928).

[136] 3 M. HUDSON, WORLD COURT REPORTS 202 (1938).

[137] 2 R. Int'l Arb. Awards 1109 (1931); *see also* 26 AM. J. INT'L L. 393 (1932).

against giving effect to the concept of contiguity."[138] Instead of relying solely on this argument, the Court should have noted that the arbitrator in the *Island of Palmas* case said quite flatly that "the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."[139] This statement does not stand alone. It is almost universally agreed that "geographical contiguity is no more than evidence raising some sort of presumption of effective occupation; a presumption that can be rebutted by better evidence of sovereignty by a rival claimant."[140]

MARK A. SMITH, JR.*

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[138] [1975] I.C.J. 43.

[139] *Supra* note 2, at 869.

[140] JENNINGS, *supra* note 65, at 75.

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