Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara

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From the perspective of the international *legal* principle of 'self-determination', the twentieth century has been phenomenal. While the spirit of the concept traces back to the American and French Revolutions,[1] in this century it underwent rapid and significant change.[2] Mooted as an idea by US President Woodrow Wilson,[3] it played a huge role at the Versailles negotiations and subsequently withstood Nazi expansionism to emerge after the Second World War a much altered concept.[4] Decolonisation became considered a matter of justice, much like the abolition of slavery, and self-determination found expression in the emancipation of colonial peoples who were given the right to form their own states.[5]

Amidst this euphoria, however, the *legal* norm of self-determination was framed with certain parameters in mind. Central to the concept were the intertwined ideas of territoriality and identity. The former was defined for the postcolonial state with regard to the existence of colonially (read: artificially) imposed boundaries, while

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1. Thomas Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86, no. 1 (1992): 46-91. See also W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen, 1977).

2. Nathaniel Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework', *Harvard International Law Journal* 33, no. 2 (1992): 353-79; and Martti Koskenniemi, 'National Self-determination Today: Problems of Legal Theory and Practice', *International and Comparative Law Quarterly* 43, no. 2 (1994): 241-69.

3. Ray Stannard Baker and William Edward Dodd, eds., *The Public Papers of Woodrow Wilson* (New York: Harper, 1925-27).

4. Rigo Sureda, *The Evolution of the Right to Self Determination: A Study of the United Nations Practice* (Leiden: Sijhoff, 1973).

5. United Nations, *The Right of Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments*, prepared by Aureliu Cristescu, E/CN.4/Sub.2/404/ Rev.1, 1981.

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the latter was considered a matter of development as ideas of 'nation-building' became vital to the 'national project' of statehood.[6]

This paper seeks to examine the complexities of identity within the western fringe of the Saharan desert, where populations migrate in search of survival, thereby preventing any fixed 'territorial' link from crystallising. Add to this the influence of a sea-faring colonial power seeking to control the coast, and a modern decolonised state with a historically powerful past, and the Western Sahara situation poses challenging questions about territoriality, identity, and statehood that must be addressed.

In examining the tenuous link between territory and identity within the Western Sahara, we shall scrutinise the manner in which international law views these two tenets and the manner in which they are expressed within the norm of 'national' self-determination. It needs to be stated at the outset that international law has evolved around the European states that won their freedom from the Roman Catholic Church after the Peace of Westphalia in 1648. Many of the norms and doctrines within international law are still influenced by the events that took place in Europe since that year. It is thus instrumental to view these against different situations, to draw conclusions about the treatment of territory and identity within the law and how they relate to modern scenarios.

This paper is divided into five sections and begins by examining the basis of the norm of self determination in international law today, briefly tracing its historical development from early Wilsonian concepts to its present shape within UN discourse. Particular attention is given to the territorial bias within international law expressed in the concept of *uti possidetis*, which has been used to foreclose the issue of re-examination of the boundaries of former colonies.[7] The second section traces the lineage that forms part of the identity of a typical person residing in this region. This part of the study includes brief historical sketches of the *Sherifian State* and the *Bilad Shinguitti* entity that existed in the region of the Maghreb prior to colonisation.[8] To analyse the merits of the case of the people inhabiting the Western Sahara territory, the third section presents the background as well as the developments leading up to the current impasse there.[9] The penultimate section looks at some of the issues of definition that were raised with respect to territory and identity in the *Western Sahara Case Advisory Opinion* adjudicated before the

6. Karl Deutsch and William Foltz, eds., *Nation Building* (New York: Atherton Press, 1963) and Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Ithaca, NY: Cornell University Press, 1993).

7. Malcolm Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', *British Yearbook of International Law* 67 (1996): 75–154.

8. 'Maghreb' in Arabic simply means 'the West'; see Ernest Gellner, introduction to *Arabs and Berbers: From Tribe to Nation*, eds. Ernest Gellner and Charles Micaud (London: Duckworth, 1972), 11.

9. This section will be based on data (in the form of official reports) accessed through the UN web-site at [http://www.un.org]; see also Jarat Chopra, *United Nations Determination of the Western Saharan Self* (Oslo: Norsk Utenrikspolitisk Institut, 1994) and John Damis, *Conflict in Northwest Africa: The Western Sahara Dispute* (Stanford, CA: Hoover Institution Press, 1983).

International Court of Justice (ICJ) in 1975.[10] The main purpose of this section is to highlight the fluidity of allegiances and the limitations of the politics of possession as widely understood within the modern society of states, and as interpreted within international legal discourse. The paper concludes by reiterating the magnitude of the territorial assumption present within the modern norm of self-determination, its expression within postcolonial 'national' identity, and its larger implications for a more coherent development of the principle of self-determination.

History of the Self-Determination Movement

When Wilson presented his idea of self-determination to the international community, claiming that 'peoples may now be dominated and governed only by their own consent', he warned statesmen that they would 'henceforth ignore [the principle of self determination] at their peril'.[11] His ideas, put in place to order the post-World War I world, received their best expression in the Versailles Settlement of 1919.[12] The idea behind the norm echoed the American and French experiences: only the consent of the governed could make the government legitimate.[13] Wilson used this concept to suggest that the only way that international peace and stability could be maintained was if minorities within states were given the freedom to constitute themselves into separate states reflecting their own interests. Groups too small for statehood, he suggested, could be governed under strict minority regimes monitored by the League of Nations. Even then however, this theory was met with scepticism. The problem with it was, as Robert Lansing, US Secretary of State at the time, put it, 'On the surface it seemed reasonable: let the people decide. [But] It was in fact ridiculous because people cannot decide until someone decides who the people are'.[14] The problem was simple:

> When the President talks of self-determination what has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability.[15]

Nearly 80 years later, the concept of self-determination remains relevant but is still as ambiguous. In the intervening period, it changed guise visibly, being the

10. See *Reports of the International Court of Justice* (The Hague, 1975), 12.

11. Woodrow Wilson, 'Fourteen Point Address', 8 January 1918, in Anthony Whelan, 'Wilsonian Self-Determination and the Versailles Settlement', *International and Comparative Law Quarterly* 43, no. 1 (1994): 100.

12. Ibid.

13. Franck, 'The Emerging Right to Democratic Governance'. See generally, Jack Hayward, *After the French Revolution: Six Critics of Democracy and Nationalism* (London: Harvester Wheatsheaf, 1991); see also Ruth Lapidoth, 'Sovereignty in Transition', *Journal of International Affairs* 45, no. 2 (1992): 325-46.

14. Ivor Jennings, *The Approach to Self Governance* (Cambridge: Cambridge University Press, 1956), 55-56.

15. Robert Lansing 'Self-determination', *Saturday Evening Post*, 9 April 1921, 7, as quoted in Whelan, 'Wilsonian Self-Determination', 101.

means by which colonies emancipated themselves.[16] This process was shaped under the United Nations system, backed by the 1960 and the 1970 declarations.[17] In 1966, self-determination was also made the primary international human right and given pride of place in the International Bill of Rights with the realisation that before any rights could begin to be enjoyed it was vital for the people to be the masters of their own political destiny.[18] Today, the discourse of self-determination is at a crossroads: it can be stated as a legal principle for people subjugated to colonial rule, but remains problematic in all other cases. The legal problem with the concept is that the idea of 'colonial rule' has come to be narrowly interpreted to refer to white Europeans exercising land rights over non-white peoples and their territories. Declared abhorrent to humanity, this has been outlawed. Thus, to rid a territory of a white colonial ruler is legal; peoples are encouraged to do so and Member States of the UN have a duty to ensure this does takes place.[19]

Broaden the definition of who a colonial ruler is, however, and a distinct bias becomes apparent: the international legal principle of self-determination today does not readily accept that a people could be subjected to colonialism by people of similar colour to them. The international legal right of self-determination is formulated to suggest that, in the words of Article 1 of the International Bill of Rights, 'all peoples have the right to self-determination'.[20] The dilemma, first enunciated by Robert Lansing in 1921 thus still remains the key issue to self-determination, i.e., who are the people? The argument made here suggests that 'people' have been territorially defined, but in so doing errors have been committed which over-estimate the territorial factor in the consideration of the identity of a people.

The main fear at the time of decolonisation in Africa was that if unrestricted self-determination was allowed, new states would be vulnerable to being unravelled by smaller groups within them. This dilemma was similar to that faced by the retreating Spanish in Latin America much earlier. In that particular situation,

16. For a detailed account of the evolution of the norm of self-determination through the decolonisation process, see Sureda, *The Evolution of the Right to Self Determination.*

17. United Nations General Assembly, Fifteenth Session, Resolution 1514, 'Declaration on the Granting of Independence to Colonial Territories and Peoples' and United Nations General Assembly, Twenty-fifth Session, Resolution 2625, 'Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations'.

18. See Joint Article 1 of the *International Convention on Civil and Political Rights, 1966*, and the *International Convention on Economic, Social and Cultural Rights, 1966*, in Malcolm Evans, *International Law Documents* (London: Blackstone Press, 1996), 142-66; and Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the ICCPR* (Oxford: Oxford University Press, 1991).

19. See United Nations General Assembly, Twenty-Fifth Session, Resolution 2625, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN'.

20. See Joint Article 1, *International Covenant for Civil and Political Rights* (1966), and *International Covenant for Economic, Social and Cultural Rights* (1966) in Evans, *International Law Documents*, 142-66.

widespread fear that Spanish withdrawal would lead to chaos led to the formation of the doctrine of *uti possidetis*, which is central to this paper since it forms the basis for colonial identity and is based on an extremely artificial form of territoriality.

The Doctrine of Uti Possidetis*: Legitimising Territorial Identities*

The doctrine of *uti possidetis* is perhaps the single greatest influence on the shaping of the map of the world today. It is, arguably, the most important factor in the creation and maintenance of modern postcolonial identities. The doctrine basically states 'that new states will come to independence with the same boundaries that they had when they were administrative units within the territory or territories of one colonial power'.[21] When applied to self-determination, this suggests that newly independent states will inherit the boundaries created for them by their colonial rulers. Thus, while underlining the principle of stability of boundaries, it also provides a territorial limitation to the exercise of sovereign power by a state in relation to its neighbours by means of a demarcated boundary line.

Interestingly, the norm itself originates in Roman law; *uti possidetis ita possidetis* forms the basis for the modern doctrine of *uti possidetis*. It was basically an interdict of the Praetor aimed at preventing the 'disturbance of the existing state of possession of immovables as between two individuals'. Translated, it states, 'as you possess, so you possess'. Accordingly, the status quo would be preserved irrespective of the means by which possession had been gained.

International law picked up on the doctrine of *uti possidetis* to allow consolidation of the de facto situation following hostilities. This was convenient in that it allowed the simple conclusion of peace without redressal. Thus, in the case of belligerent occupation, the doctrine required peace to be concluded by the simple decision to allow the aggressor to continue possession of the territory gained by conquest, and the status quo to be maintained from that point onwards. The doctrine thus 'bestowed an aura of historical legality to the expropriation of the lands of indigenous peoples'.[22]

The doctrine of *uti possidetis* respects the de facto situation existing prior to colonial departure.[23] To allow redefinition during transition was considered chaotic since new claimants to power would arise. This was perhaps inevitable due to the nature of colonialism, which often did not put importance on the grooming of successors upon colonial abdication. The doctrine therefore merely recognised that in the interests of order, the current 'photograph of the territory' at independence,

21. Shaw, 'The Heritage of States', 97.
22. Ibid., 98.
23. See Kaiyan Kaikobad, 'Some Observations on the Doctrine of Contiguity and Finality of Boundaries', *British Yearbook of International Law* 49 (1983): 119-41 and Stephen Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', *American Journal of International Law* 90, no. 4 (1996): 590-624.

would have to be taken as a given, so that the process of development could be pursued.[24]

By the time of the decolonisation of Africa in the middle of the twentieth century, this norm was rehabilitated. The African situation was particularly fragile due to the nature of boundaries drawn by colonial rulers in the land grab in the preceding century. This had created artificial entities in the continent, and the administrative units drawn and being left behind by the colonial powers had little or no bearing to the history or geography of the region, often placing antagonistic groups within the same boundary.[25] The dilemma faced was either to allow the renegotiation of boundaries along more acceptable lines, or simply to accept the de facto situation and pursue development without risking fragmentation. The logic behind this was clear to postindependence African leadership, and the Organisation of African Unity extended the scope of the doctrine to the African continent, expressing it in the language of the Cairo Declaration in 1964.[26] By freezing international boundaries for posterity, it prevented smaller postindependence movements from carving up sovereign states.

While it was perhaps necessary to prevent the immediate unravelling of the state at the time of transition from colonisation to independence, what the doctrine of *uti possidetis* has done is to legitimate these boundaries for all time. With the African application of the doctrine having been deemed a success by the international community, the doctrine was extended in the 1990s to the unravelling Soviet Empire, Yugoslavia, and Czechoslovakia. In all three cases, the parent states—artificial entities themselves—broke down under pressure from the different peoples within them. Faced the threat of destabilisation, the international community once more responded by calling on the doctrine of *uti possidetis*. Thus, new entities claiming statehood could only do so along fault-lines that already existed when they were administrative units within the parent state. The question today is how this norm can be applied in the face of what Thomas Franck calls the 'post-modern tribalism', a force that 'seeks to promote a political and legal environment conducive to the break-up of existing sovereign states. . .in a bid to constitute unicultural and uninational units' by asserting 'a political, moral, historically determinist and legal claim to support this agenda'.[27] This, he argues,

24. Terminology used in the *Burkina Faso Mali Case*. See *Reports of the International Court of Justice* (The Hague, 1986), 554.

25. See Robert Jackson, 'Juridical Statehood in Sub-Saharan Africa', *Journal of International Affairs* 46, no. 1 (1992): 1-16 and Grovogui Siba, *Sovereigns, Quasi-Sovereigns and Africans: Race and Self Determination in International Law* (Minneapolis: University of Minnesota Press, 1996); for an example of a similar process in north-east India, see Costas Constantinou, 'Before the Summit: Representations of Sovereignty on the Himalayas', *Millennium: Journal of International Studies* 27, no. 1 (1998): 34.

26. Subsequently re-enforced in the *Burkina Faso Mali* Case (1986) and *Libya Chad Arbitration Case* (1992) besides the *Western Sahara Case* (1975). See *Reports of the International Court of Justice* (The Hague: 1975, 1986, 1992).

27. See Thomas Franck, 'Post-Modern Tribalism and the Right to Secession', in *Peoples and Minorities in International Law*, eds. Catherine Brölmann, René Lefeber, and Marjoleine Zieck

has forced a growing need to rethink fundamental norms such as title to territory and its relation to human personality and group identity.

The Waldock Report on the Succession of States and Governments in Respect of Treaties, however, suggests that international law cannot accept such a 'clean slate' approach to boundary treaties.[28] Waldock recommends that 'boundaries established by treaties remain untouched by the mere fact of a succession'. While the Report itself has no binding force of law, it is indicative of the direction that international legal jurors foresee for the discourse. In addition, such reports are considered sources of law as expressed under Article 38 of the Statute of the International Court of Justice as appended to the United Nations Charter 1945. International law, though, goes a step further than the recommendations in the report when it comes to colonial territories: boundaries left behind by colonial rulers, whether sanctified by treaties or not, remain untouched by the succession of the state by independent non-colonial rulers.[29] The merits of the idea are clear: with the immediate withdrawal of the colonial sovereign, states needed protection from potential fragmentation which could defeat the fruits of independence. In addition, the doctrine suppresses frontier disputes between new states and is conducive to international order, thereby to international peace and security.

But what is the effect of this on the identity of peoples? And how has this affected the situation in Africa, where in the words of Lord Salisbury:

> We [the colonial powers] have engaged. . .in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.[30]

The logic of *uti possidetis* means that these ignorant people, typically sitting in foreign offices in London and Paris in the middle of the nineteenth and twentieth century, have shaped the national identities and destinies of African peoples. Lines drawn on a map are sufficient for modern international law to take its cue, even if these lines are drawn by colonial rulers. The colonial territory thus decides the identity of the people and the issue of self-determination. This principle is bolstered by the freezing of these lines for posterity; unchangeable even by force,

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(Dordecht: Martinus Nijhoff, 1993), 3; see also Jim Falk and Joseph Camilleri, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Aldershot: Elgar, 1992).

28. See *Yearbook of the International Law Commission* 2 (1968): 92-93.

29. See *Island of Palmas Case* (1928) in United Nations, *Reports of International Arbitral Awards*, vol. 2 (New York: United Nations, 1928); *Temple of Veah Prear Case*, *Reports of the Internaitonal Courts of Justice* (The Hague: 1962); *Rann of Kutch Case* (1968), University of London, *International Law Reports* 50 (London: Butterworth, 1968); *Dubai-Sharjah Arbitration Case* (1981), University of London, *International Law Reports* 91 (London: Butterworth, 1981); and *El Salvador Honduras Case*, *Reports of the Internaitonal Courts of Justice* (The Hague: 1992).

30. Lord Salisbury as cited by Judge Ajibola, *Reports of the International Court of Justice* (The Hague, 1994), 53.

which is outlawed in the modern international environment.[31] This process is legitimised by the domestic jurisdiction clause which prevents the UN from interfering in matters within the domestic realm of the state.[32]

Accordingly, newly emergent postcolonial people have to exist within the boundaries created for them adhering to principles of nation-building, bolstered by the idea that people are similar and that differences between them could be overcome at the altar of the sovereign state.[33] This omnipotent state then went about trying to constitute national identity myths for itself to appeal to the often different peoples within it.[34] Separatism was strongly discouraged in international and national law: separatists were held up as being guilty of treason for threatening to compromise the principles their forefathers had fought for in gaining independence from colonial rule.

The problem that the norm against separatism created was that the people who typically found themselves within newly independent states gradually realised that they had little in common with each other. Sustained through the freedom struggle by the need to oust the colonial power, their unity began to fragment with the common enemy gone. Peoples of different ethnicity, tribe, religion, and often with historic animosities (in short, with different idenities), suddenly found they had to coexist within the new structure of the state. Under colonialism, strong, unrepresentative government had prevented the structure from developing along these fault lines. However, with that power handed over to one set of people, these differences began to resurface.

The root of the problem is perhaps that the factors that were presumed to create a common identity were merely the experience of a common colonial ruler within a territory externally deemed to be a unit. United Nations Economic and Social Council (UNESCO) experts, in trying to describe the parameters of 'peoplehood' suggested that an inherent description of a people would be

> a group of individual human beings who enjoy some of the following features: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, a common economic life.[35]

What *uti possidetis* has done is to neglect all the other criteria of identity in favour of territoriality. That in itself is not as disastrous as the fact that the territorial demarcations were imposed in ignorance in the first place.

31. United Nations Charter, Article II, §4.
32. United Nations Charter, Article II, §7.
33. See Karl Deutsch and William Foltz, *Nation Building*.
34. As discussed by Anderson, *Imagined Communities*.
35. See Patrick Thornberry, 'The Principle of Self-determination', in *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst*, eds. Colin Warbrick and Vaughan Lowe (London: Routledge, 1994), 175-203.

Having examined the manner in which the norm of self-determination has changed in the process of decolonisation to favour territoriality over other forms of identity, we can now turn our attentions to the effects of such law on the nomadic population of the western fringe of the Sahara Desert. To understand the intricacies of identity with the Western Sahara, it is necessary to go back to before Spanish colonisation when the region was dominated by two powerful entities: the *Sherifian State* to the north, and the *Bilad Shinguitti* to the south. The next section will attempt to describe the nature of the ties between these two entities, and the shifting dynamic of colonial occupation on the identity of the people of the Western Sahara.

Historical Influences on Western Saharan Identity: The Sherifian State and the *Bilad Shinguitti*

The goal of this section is to examine some of the influences that have shaped the identities of the people/s of this region. Strands of history and shared visions inevitably contribute to the identity of peoples within any given territory and we shall look to three important historical factors that played a significant role in this part of north-western Africa.[36] This section is not offered as a comprehensive historical account of the region but as an overview of certain crucial historical features.[37]

North Africa presents us with a host of different forms of organisation that challenge the basis of the territorial expression of identity that is central to the discourse of sovereign statehood. At the heart of this challenge is the notion of two entities then prominent in ancient north-west Africa; the Sherifian State (precursor to modern Morocco), and the *Bilad Shinguitti* (precursor to the Islamic Republic of Mauritania).[38] This section concludes with an analysis of the effect of colonisation by France and Spain on the region.

Sherifian Society

Societies can be classified according to the extent and manner in which the central government can impose its will on their members.[39] The system that prevailed under the Sherifian Empire presented to European viewers a picture that appeared

36. Thomas Franck, 'Clan and Super Clan: Loyalty, Identity and Community in Law and Practice', *American Journal of International Law* 90, no. 3 (1996): 359–83.

37. The research for this section involves study of authors such as Ernest Gellner who has undertaken extensive research on the region, as well as the matter presented in the pleadings of the case before the International Court of Justice, by the Kingdom of Morocco, the Islamic Republic of Mauritania and Spain. See also [http://www.arso.org/biblio-2.htm] (8 November 1999). For a historical account, see Abun-Nasr, *History of the Maghrib*; Hodges, *Western Sahara*; and Aguirre, *Historia del Sahara Español*.

38. Spelled by some authors as 'Blad Shinqit', as in Charles Stewart, 'Political Authority and Social Stratification in Mauritania', in *Arabs and Berbers*, 375-93. We shall use the spelling used in the ICJ judgement, which refers to it as *Bilad Shinguitti*.

39. See Gellner, introduction to *Arabs and Berbers*, 16.

anarchic, but in fact involved a complex system of allegiances and vassalages in constant movement which led to a relatively stable equilibrium.[40] The Sherifian state came into being after a series of Berber and Arab kingdoms were formed and dissolved with great rapidity on the Tunis-Kairouan-Tlemcen-Fés axes.[41] These struggles are documented elsewhere but it will suffice for our purposes to conclude that the Sherifian Empire came to be built on the ashes of the dynasties of the Almoravids and Almohads.[42]

It differed from European states in existence at the time, since it was built on a system of allegiance to the Sultan; who was considered the spiritual head of the region. Under him, myriads of tribes functioned more or less autonomously, with Berber tribes in the hinterland and the Arabic tribes closer to the centres of power and the imperial cities of Fés and Marrakech.[43] As pointed out by Dunn,

> migratory movement of pastoral populations has been a continuous theme in the history of Morocco and the Western Sahara for almost a thousand years. . . the major thrust of these movements has been from the fringes of the Sahara northward into the Atlas and beyond to the fertile Atlantic coastal plains.[44]

However, this migration of the indigenous Berbers from south to north began to be tempered by a counter-movement from north to south in the face of Arab expansion. This constant movement of people made for a certain 'lack of unity' in the system which was counterbalanced by the spread of Islam.[45] The Islamic faith arrived with the Arabs but gradually spread to the Berber tribes as well. The brand of Islam practised was unique in that it encompassed a 'complex and ramified network of religious brotherhood and saint cults, with regular pilgrimages and loose but extensive hierarchies' which were primarily tribal.[46] The maintenance of order was left to local tribespeople themselves,

> generally (though not universally) self-defined in kin terms, in which virtually all adults males were warriors and which maintained order by a complex system of. . .balances, operating simultaneously at various levels of size.[47]

Not only did these balances and counter-balances work externally, i.e., between one tribe and another, but there were also internal balances that regulated life within the tribe. The system provided for a number of mediators and arbitrators,

40. See the Spanish argument in referring to the tribes of the Sahara *Reports of the International Court of Justice* (1975), 44-45; see also Edmund Burke III, 'The Image of the Moroccan State in French Ethnological Literature,' in *Arabs and Berbers*, 177.

41. See Rézette, *The Western Sahara*.

42. Notably Rézette, *The Western Sahara*, and Abun-Nasr, *History of the Maghrib*.

43. Ross Dunn, 'Berber Imperialism: The Ait Atta Expansion in Southeast Morocco', in *Arabs and Berbers*, 85-107.

44. Ibid., 85.

45. Gellner, introduction to *Arabs and Berbers*, 17.

46. Ibid., 17.

47. Ibid., 18.

usually under the umbrella of Islam. These consisted of holy lineages or personages exempt from the warring and feuding ethos of the tribes. According to Gellner, the lineages were the nearest the system had to an aristocracy.[48] Thus, there prevailed a certain weakness of the state as the Sherifian empire was 'perched precariously on top of a mass of tribal communities which resembled each other, and which indulged, in such qualitative diversity as existed only with restraint and discretion'.[49]

The most intriguing aspect of the Sherifian state from the point of view of ties of territorial allegiances was the relationship between the centre and the periphery. It is difficult to define the territory that can be considered 'peripheral' because of the indeterminate nature of the allegiances. The basic state structure accepted by scholars, however, is divided into two broad and fairly distinct sections known as the *Bled el-Makhzen* and the *Bled es-Siba*. The payment of tax essentially differentiated these two sections of the Sherifian society. The lands immediately surrounding the urban areas and the predominantly Arab tribal lands around them were part of the *Bled el-Makhzen* or 'the land of governance'; they paid taxes to the Sultan and provided the backbone of his army. The *Bled es-Siba* on the other hand, translated literally in Arabic as the 'land of dissidence and disorder', was composed mainly of Berber tribes who refused to pay taxes to the Sultan yet accepted him as the spiritual head of the region. This distinction in the comprehension of the Sultan's role as being spiritual rather than temporal is what forms the basis of Moroccan arguments with regard to the territory of the Western Sahara.[50]

David Hart draws on a parallel made in the work of Lahlabi, who compares the whole issue of the relationship between centre and periphery to a Rousseausque idea of 'social contract' with its related concepts of 'opting out', since the issue hinged solely on the 'consent of the governed'.[51] Thus, the *siba* partially opted out of this contract by recognising the Sultan as the spiritual head of the territory but not recognising him as temporal head. The Sultan himself seems to have recognised this partial opting out: while military expeditions were undertaken into the *Bled es-Siba* for rent collection, they were irregular.[52] The structure held together on acceptance of the Sultan of the Sherifian State being a direct descendant of Prophet Mohammed and, therefore theoretically the head of the entire Muslim community in the region. According to one author, the entire region 'belonged' to the Sultan according to *sharia'a* law.[53] Even today, Islam remains the strongest thread in the identity of the peoples of the region, who subscribe to the beliefs of the Orthodox Sunni Islamic school of faith and the Maliki rite.

48. Ibid.
49. Ibid.
50. David M. Hart, 'The Tribe in Modern Morocco: Two Case Studies', in *Arabs and Berbers*, 25.
51. Lahlabi as quoted in ibid., 28; see also David M. Hart, 'The Social Structure of the Rgibat Beduoins of the Western Sahara', *Middle East Journal* 15, no. 4 (1962): 515-27.
52. A fact also acknowledged by all the parties in the *Western Sahara Case* (1975).
53. See Burke, 'The Image of the Moroccan State', 177.

The territorial boundaries of the Sherifian State, i.e., between *Makhzen* and *Siba* as well as its external limits are difficult to determine since vast amount of contradictory data abounds. The Spanish fiercely defend the proposition that the Sherifian State extended only up to the River Draa and no further south; Morocco claims that the Western Sahara and even parts of Mauritania and Algeria were included in the larger *Bled es-Siba*. However, it is important to note that the seat of the Sultan was not territorial in that his court moved around the region, though restricted primarily to the territory that consisted the *Bled el-Makhzen*.[54]

Bilad Shinguitti

The *Bilad Shinguitti* presents an equally fascinating platform for questioning the primacy of the principle of territoriality in the statist discourse. It did not have a defined territory or fixed population at the time of the Sahara's colonisation by Spain. Unlike the Sherifian State north of it, it could not even be identified as having a single authority that tribes swore allegiance to or contested taxes against.[55] Mauritania has been seen to be the successor to the entity, though its argument was negated by the ICJ and its territorial claim to the Western Sahara subsequently dropped.[56] The *Shinguitti* nevertheless throws up a direct challenge to the perception of territorially based identities within international legal discourse.

At the time of the colonisation of the Western Sahara, the Mauritania defined itself in the following terms:

> (a) Geographically. . .lying between, on the east, the meridian of Timbuktu and, on the west, the Atlantic. . .bounded on the south by the Senegal river and on the north by the Wad Sakiet El Hamra. In the eyes of both its own inhabitants and of the Arabo-Islamic communities, that region constituted a distinct entity.
>
> (b) [it] constituted a distinct human unit, characterised by a common language, way of life and religion. It had a uniform social structure, composed of three 'orders': warrior tribes exercising political power; marabout tribes engaged in religion, teaching, cultural, judicial and economic activities; and client-vassal tribes under the protection of a warrior or marabout tribe.[57]

Mauritania also claimed that there were two types of political systems in existence within *Bilad Shinguitti*, one consisting of emirates and the other of tribes independent of the emirates. Neither of these groups bore any tie of territorial

54. Hart, 'The Tribe in Modern Morocco', 26.

55. As given by Article 1, *Montevideo Convention*, 1933.

56. Political factors also saw the withdrawal of Mauritania's claim to the Western Sahara. See Yahia Zoubir and Daniel Volman, 'The United States and Conflict in the Maghreb', *Journal of North African Studies* 2, no. 3 (1997): 10-24. See also Yahia Zoubir and Daniel Volman, eds., *International Dimensions of the Western Sahara Conflict* (London: Praeger, 1993).

57. *Reports of the International Court of Justice* (1975), 57-58, para. 132.

allegiance to the Sultan of the Sherifian State, although he might have been acknowledged as the spiritual head.[58] Mauritania argued that one of the emirates, the Emirate of Adrar, was a centre of Shinguitt culture and proved an attraction for the nomadic *Saharawi* tribes. The claim presented was that, at the time of colonisation of the Western Sahara by Spain, the Emir of Adrar was the most important political figure of the north and north-west Shinguitt country (which, by implication, included the Western Sahara). Tribal chiefs allegedly represented the tribes that existed within the Western Sahara, and hence the origin of the claim of a territorial link between the Emir of Adrar and the nomadic tribes that traversed the desert immediately north of the emirate.

It is clear from uncontested evidence presented that the Emirates and tribal groupings were autonomous; they signed treaties with explorers without 'higher consent' of the Sultan of the Sherifian State.[59] Nonetheless,

> the emirs, sheikhs, and other tribal chiefs were never vested by outside authorities and derived their powers from the special rules governing the devolution of power in the Shinguitti entity.[60]

Each emirate or tribal group was 'autonomously administered', and the rulers derived their power from the *Juma'a*, the locally elected participatory system that functioned as a governing council for each tribe. It appears from the evidence presented by the Mauritanian entity as well as by the work undertaken by Gellner and others on the subject, that the Saharan tribes had a degree of autonomy that would have fulfilled conditions of self-determination.[61] Thus, the argument presented suggested that identity in the Western Sahara was in the guise of allegiance to the system of the *Bilad Shinguitti*. This system, short of a conventional state, constituted a kind of governance which formed part of the customary law for a region including Mauritania and the territory of the Western Sahara. This system, Mauritania claimed, was interrupted by the arrival of the colonialists, and it is to this influence that we shall now turn.

58. This is similar to the relationship between the Vatican City and a theocratic Catholic state such as Ireland. Recognition of the Pontiff as spiritual head does not grant territorial rights. This comparison is intended as an analogy and not meant to compare inherently different systems of allegiance. Vice President Ammoun, in a separate Statement also suggests a similar analogy *Reports of the International Court of Justice* (1975), 98.

59. See Mauritanian Pleadings in the ICJ Case, *Pleadings of the International Court of Justice, CR.75/17*, 24.

60. *Reports of the International Court of Justice* (1975), 59, para. 134.

61. This is used to mean the tribes that existed in this part of the Saharan Desert, rather than the *Saharawi* tribes, which is used here to refer specifically to the tribes that claim to be represented by the Polisario, and that seek to be universally recognised as the Saharawi Arab Democratic Republic (SADR).

Colonial Influence

The main effect of colonisation on the Sherifian State was the transformation of the internal structure of the entity from its original form to that of the independent state of Morocco in 1956. Within close proximity to Europe, Morocco was strongly influenced by European events. The first of these events was the 'Reconquista' when Christian forces pursued Andalusians into the Maghreb in the seventeenth century.[62] This process was accompanied by the expulsion between 1609 and 1612 of 500,000 Mohammedan 'Morisques', Mohammedans, and Jews by Philippe III from Spain. It was under the pretext of protection of these peoples that Portugal and Spain began to exert influence on the north-west tip of Africa.

By 1912, France and Spain had established protectorates over the region, carving it into three segments along different axes.[63] The Treaty of Fés in 1912 set the boundaries of the three states that were to come into existence on withdrawal of the colonial powers. The Sherifian Empire was united into a single unit subsequently known as Morocco. The French protectorate also ensured that the *Bled es-Siba* was absorbed into the *Bled el-Makhzen* and thus, within a period of less than 30 years, the fabric of the Sherifian State was altered by the French, rendering 'anomalous the traditional patterns of government. The *makhzen* no longer needed an army to collect taxes, and, in any case, it was not permitted'.[64]

The Treaty of Fés also laid down the boundary of the present state of Mauritania. After the conquest by France of parts of the Sahara, the term 'Moor' came to be formally used to describe people of the region.[65] The distinction between *bidani* and *sudani*—central to internal precolonial 'Mauritanian' identity—was replaced at the 'national' level by the creation of a supervening identity that papered over the differences and 'united' them under the sobriquet of Moorism.[66] The parallel here between the Moroccan experience and the experience of the Mauritanian entity is striking: the colonial power super-imposed a territorial state and a corresponding identity to go along with it that was non-indigenous to the region. In the words of Charles Stewart:

> Prior to the carving out of the territory which is known today as Mauritania, the Moors inhabited an area vaguely known as the Shinqit, and the lands to the south of the Shinqit, inhabited by Wolof, Toucuolots, Bambara, and Sarakolès, marked the beginning of the *Bled es-Sudan* which was beyond the pale of

62. Rézette, *The Western Sahara*, 50.

63. See Gellner, introduction to *Arabs and Berbers*, 13.

64. David Seddon, 'Local Politics and State Intervention: Northeast Morocco from 1870 to 1970', in *Arabs and Berbers*.

65. The term 'Moor' comes from Latin and has been applied at various times to Muslim peoples from Andalusia to the Senegal Basin.

66. See Stewart, 'Political Authority', 375-98.

Moorish politics and only marginally involved in the historical traditions of the Shinqit.[67]

There seems clear indication that precolonial identity was more localised, especially in the case of Berber tribes which followed ideals that were 'democratic' in spirit and where contact between governed and governing was closer than in larger entities. The arrival of colonial powers and their need to demarcate spheres of influence in the territory forced a centralised identity into being. While in the past allegiance focussed on the tribe, with little awareness of the central power (if any) involved, the emphasis was forcibly shifted to a central administrative power. Thus colonial presence removed local aspects of identity in a bid to 'unite' differences under the umbrella of the sovereign state.[68] Under French influence the territories immediately to the north and south of the region recognised as the Western Sahara took on the guise of modern states. Meanwhile, the Western Sahara (Spanish Sahara) came under the influence of Spain, which was more concerned about having a safe coast to protect its interest in the Canary Islands.[69] As a result it did not impose the kind of colonial state discussed above.

The Western Sahara: A Brief History of the Struggle for Statehood

Spain, as the colonial ruler of the Western Sahara, was responsible for the transition of power to the indigenous people of the region.[70] Traditionally nomadic, these people have wandered across north-west Africa including Morocco and Mauritania for centuries never having to worry about states or borders. In 1966, Mauritania and Morocco—both of which by this stage had gained their independence—called for the self-determination of Spanish Western Sahara.[71] Both countries were certain that exercise of this right would see the region amalgamated into their respective states. This presumption was not surprising since the nomads had traversed across both states through their history and because of a sense of the 'greater Maghreb identity' which encompassed the region of north-western Africa.[72] With statehood increasingly becoming the only legitimate expression of national identity, both Mauritania and Morocco believed they had a good claim to the territory of the Western Sahara, which they believed could not form a 'state' by itself to the satisfaction of the international community. While both countries squabbled over the territory, the UN renewed calls for self-

67. Ibid., 377.

68. Ibid., 382.

69. Rézette, *The Western Sahara*, 54-69; see also the separate opinion of Vice President Ammoun, *Reports of the International Court of Justice* (1975), 85.

70. See the United Nations Charter, Chapter XI, Article 73.

71. Thomas Franck, 'The Stealing of the Sahara', *American Journal of International Law* 70, no. 4 (1976): 694–721. (As will be discussed further below, in fact, Morocco does not see itself of having been 'colonised' because its status was that of a protectorate.)

72. See Rézette, *The Western Sahara*, 4–16; see also Diego Aguirre, *Historia del Sahara Español: La Verdad de una Traición* (Madrid: Martires Concepcionistas, 1988).

determination.[73] However, exercise of this right is a complicated and elongated process; today the task of ascertaining *how* the area might determine its political future has only recently got closer to realisation.

One of the central issues within the quest for self-determination is the nature of the identity of people allowed to vote in the referendum to decide its future. The international legal doctrine of self-determination offers three options of self-determination as cited by General Assembly Resolution 1541 (XV). These include: 'emergence as a sovereign independent State; free association with an independent State; or integration with an independent State'.[74] People admitted to the vote must be ascertained as being the ones who ought to have a say in the determination of the political destiny of the territory. In this context, the 'Green March' of 1975 severely complicates matters. This march of roughly 200,000 Moroccan citizens, orchestrated by King Hassan, involved people 'peacefully' entering the desert to take up land that they believed belonged to them after the departure of the Spanish. The sheer weight of the numbers involved in this event suggests that should a referendum be held, it could easily be influenced by people who were not present in the territory at the time of the Spanish withdrawal. Hence the *Frente de Popular Para Liberacion* (Polisario) demanded that the people admitted to the process of the vote be closely monitored.[75]

The Moroccan argument is equally compelling. It suggests that owing to the nature of the population, many of the people who are entitled to exercise their franchise in the referendum were, at the time of the Spanish withdrawal, away from the territory, a plausible argument for a nomadic people.

At the time of the Spanish exit from the Sahara, the only known demographic information of the region was a census conducted by the Spanish authorities.[76] This census, officially 'democratised' tribal power structures since chiefs were elected to a *Jemma* based in Laayoune (El-Ayoun), the capital of the territory. This census is one of the most controversial documents in the process of determining the eligibility of voters in the referendum.[77] While the Polisario claim that only people included in the census and their descendants ought to be allowed into the vote, Morocco claims that the census was inaccurate since it excluded many tribes absent from the region at the time. The Green Marchers that entered the region in 1975 remain difficult to differentiate from the previous 75,000 residents.

Thus, the Western Sahara imbroglio has been left at the delicate point where the two parties concerned—i.e., the Moroccan government and the Polisario—agree that a referendum needs to be held to let '*the people* decide the fate of the territory

73. United Nations General Assembly, Twenty-Nineth Session, Resolution 3292, 13 December 1974.

74. United Nations General Assembly, Fifteenth Session, Resolution 1541, 16 December 1960.

75. The Polisario Front, operating from Tindouf, Algeria, declared the region's 'independence' in 1976. See [http://www.arso.org] (8 November 1999).

76. See Chopra, *United Nations Determination*.

77. This is especially true with respect to the identification of tribes such as 'H41' and 'H42' (sic). These numbers were given by the Spanish to the *Tribus del Norte* (Northern Tribes) and *Costeras y del Sur* (Southern Tribes).

rather than the territory the fate of the people'.[78] The process of identifying who has a right to vote has been the biggest factor in explaining why the process has continuously stalled since the basic settlement plan came into existence.[79]

UN Involvement

Direct UN involvement in the Western Sahara began in December 1974 with the General Assembly urging the parties to negotiate a plan by which the problem could be resolved.[80] However, with the region being strategically of less significance than others, interest soon dwindled. It was only when the situation headed towards a violent impasse that the Secretary-General in 1991 managed to convince both parties to sign a cease-fire agreement. Thereafter work began on the creation of a settlement plan that would culminate in a referendum to determine the political future of the territory.[81] At this time the UN's involvement in the case was restricted to the use of the Secretary-General's good offices. It was only with Resolution 621 that the Security Council stated its keenness to support the holding a referendum supervised by the UN in co-operation with the Organisation of African Unity (OAU).[82] In his report the Secretary-General suggested deployment of a Mission in the Western Sahara with the purpose of creating preconditions for the successful implementation of the Settlement Plan.[83] By 29 April 1991, the United Nations Mission for the Referendum in Western Sahara, MINURSO[84], was established, aiming to:

> implement the agreed position of the parties that all Western Saharans counted in the 1974 census undertaken by the Spanish authorities and aged 18 years or over will have the right to vote, whether currently in the Territory or outside as refugees or for other reasons.[85]

78. Judge Harry Dillard, 'Dissenting Opinion', in *Reports of the International Court of Justice* (The Hague, 1975), 116, emphasis added. See also Rosalyn Higgins, 'Judge Dillard and the Right to Self-Determination', *Virginia Journal of International Law* 23, no. 3 (1983): 387-94.

79. As expressed by Perez de Cuellar in United Nations, *Report of the Secretary General on the Situation Concerning Western Sahara S/21360*, 18 June 1990, in discussing the agreement between the Kingdom of Morocco and the Polisario negotiated on 30 August 1988. See also Chopra, *United Nations Determination*; and Yahia Zoubir, 'Protracted Conflict and Failure to Achieve Pre-negotiation in the Western Sahara Conflict', *Humboldt Journal of Social Relations* 20, no. 2 (1994): 1-44.

80. United Nations General Assembly, Twenty-Ninth Session, Resolution 3293, 13 December 1974.

81. United Nations, *Report of the Secretary General on the Situation Concerning Western Sahara S/21360*, 18 June 1990.

82. United Nations Security Council, Resolution S/RES/621. This remains controversial since the OAU actually recognised the Saharawi Arab Democratic Republic (SADR) as a state, leading to a walk-out by Morocco who perceived this as a contravention of its right to domestic sovereignty. See Anthony Pazzanita, 'Morocco versus Polisario', *Journal of Modern African Studies* 32, no. 2 (1994): 265-78.

83. United Nations, *Report of the Secretary General on the Situation Concerning Western Sahara S/21360*, 18 June 1990. United Nations Security Council, Resolution S/RES/658, 1990.

84. United Nations Security Council, Resolution S/RES/690, 1991.

85. Chopra, *United Nations Determination*, para. 15.

The preliminary work undertaken by the Identification Commission of the Mission attempted to up-date the 1974 census. By August 1991, Morocco suggested that a number of tribes normally resident in the territory had been excluded from the Spanish census due to their absence at the time of the census. It put forward a list of 120,000 potential voters which it claimed were not included. King Hassan also suggested moving these inhabitants into the region to facilitate their identification. In light of the Green March a few years prior, this caused a storm of protest that resulted in the resignation of the Special Representative of the Secretary-General. Just before his retirement, Secretary-General Perez de Cuellar issued his final report suggesting five criteria for determining the eligibility of people to vote in the referendum:

> Persons included in the revised 1974 census list;
>
> Persons living in the territory as members of a Saharan tribe at the time of the 1974 census but who could not be counted;
>
> Members of the immediate family of the first two groups;
>
> Children born of a Saharan father born in the territory; and
>
> Members of Saharan tribes belonging to the territory and who have resided in the territory for six consecutive years or intermittently for 12 years prior to 1 December 1974.[86]

Disagreement between the parties centred around the final two criteria as well as other issues such as the problem of tribal allegiance and the sources of evidence to be accepted in determining eligibility. As Chopra points out, both parties agreed in principle:

> (i) That a basis for voter eligibility is provided by the first three criteria; and
>
> (ii) That authentic documents issued by the Spanish colonial authorities are acceptable sources of evidence attesting to the identity of an individual.

The Polisario argue that the 1974 census remains the only accurate statement of the *status quo ante belum* and insist that only these people ought to be allowed the right to self-determination. Morocco, however, claims that the Spanish census is limited, and excludes bona fide residents of the territory.

The initial optimistic time schedules of the process had to be revised due to the sheer complexities of the identification process for a tribal society.[87] The

86. United Nations, *Report of the Secretary General on the Situation Concerning Western Sahara S/23299*, 19 December 1991.

87. United Nations Security Council, *Report S/1994/819*, 12 July 1994.

Identification Commission formulated a complex procedure for identification whereby every applicant had to be photographed and fingerprinted prior to appearance before the Identification Teams. The actual teams included sheikhs from both sides (since they were the only ones who could actually verify the identity of the applicants), official OAU observers, and Commission members themselves, who had the final say on acceptance or rejection of a candidate's eligibility. According to the revised timetable, this process was to begin in December 1994 and be completed by 25 January 1995, with the referendum to be held in February 1995.[88] The time period between the proposal in 1974 and its renewed discussion in the early 1990s is important since within international law it could be argued that the disputed area was fast achieving a status quo. The Charter-based system values international peace and security above all else; as long as the region remained relatively free from violent strife the problem would find itself relegated off the international agenda. Moreover, during this period of 20 years, identities and loyalties within the region were crystallising around newer structures, while the referendum process was geared towards determining identity based along older paradigms.

After various delays, the identification process began on 28 August 1994.[89] One of the issues that merits attention here involves the receipt of a large number of applications just before the application deadline.[90] This deluge exceeded all the applications received up to that point and led the Polisario to be highly suspicious.[91] As a result, the process stalled with the Polisario unwilling to accept the legality of these applications. After much negotiation, a new timetable was agreed with the referendum slated for October 1995.[92] By this stage, the Security Council was beginning to question its commitment to the process, and made MINURSO subject to periodic review.[93] Other constraints had derailed the process by April 1995, pushing the deadline out of reach.[94]

The only favourable development during this period was the provision of important archival material by the Government of Spain.[95] These documents were the first official records that the Identification Commission could use to be able to verify various cases. One outstanding issue that directly affected the identification

88. Ibid. For other problems that affected the process see William Durch, 'Building on Sand: UN Peacekeeping in the Western Sahara', *International Security* 17, no. 4 (1993): 151-71.

89. Logistical difficulties included individual identification, therefore slow process, large distances, and not very good communication facilities. United Nations Security Council, *Report S/1994/1257*, para. 17. See also Thilo Maraun, 'Peacekeeping in Critical Stage: The Operation in Western Sahara', *International Peacekeeping* 2, no. 4 (1995): 74-78.

90. United Nations Security Council, *Report S/1994/1257*, para. 14.

91. United Nations Security Council, *Report S/1994/1420*, 14 December 1994.

92. Ibid., para. 21, 22.

93. United Nations Security Council, Resolution S/RES/973, 1995.

94. The constraints involved 'Occasional late or non-arrival of a sheikh and reciprocity observed, Tediousness of the process, Issue of tribal leader representation'. See United Nations Security Council, *Report S/1995/240*, 30 March 1995.

95. *Registro Civil Cheranico del Sahara Occidental* [48 Volumes of birth certificates, 19 Volumes of marriage certificates, 11 Volumes of divorce and death certificates]

process was that of tribal leadership. The sheikhs were required to provide oral testimony relevant to the eligibility criteria. Most sheikhs (elected in 1973) were of mature age and many had died or become incapacitated. As a result, a third of the sub-fractions were without recognised tribal leaders, a situation for which the Secretary General contrived an elaborate system to identify leaders.[96]

With these impediments removed by mid-March 1995, hope rose that the holding of the referendum had become a real possibility.[97] At the same time, the referendum date was pushed further back to January 1996 and the mandate of MINURSO was extended for another four months.[98] The matter was also before the General Assembly Fourth Committee which had been set up to look into the territories that were seeking decolonisation.[99] This is interesting simply because it demonstrates that the region was being considered in some quarters as a problem of independence from traditional colonial rule rather than one of conflicting sovereignty. Meanwhile, the Council realised that the early 1996 referendum plan was optimistic.[100] This was further set back in June 1995 when the Polisario suspended participation after a ruling of a Moroccan tribunal and the announcement by Morocco of the introduction of 100,000 applicants residing outside the territory to the identification process.[101] Many of these applicants were to be entered under the categories of *Chorfa* as well as the Northern (*Tribus del Norte*) and Southern (*Costeras y del Sur*) tribes. The Polisario found this highly unacceptable since these groupings represented minorities under the Spanish census.

96. After much discussion with the parties the Secretary General came up with a hierarchy of people who could be appointed sheikhs. Under this system, a surviving sheikh from 1973 was preferred to any other; failing that his eldest son would be accepted and failing that a candidate from the 1973 elections normally by order of a descending number of votes polled. Finally, if that were not to yield a candidate each party was required to offer a list of three candidates from which the Chairman of the Identification Commission would, after consultation with the other party, select one. These candidates were required to be of 'recognised standing within their community', and themselves included in the census lists of 1974. United Nations Security Council, *Report S/1995/240*, para. 8.

97. United Nations Security Council, *Report S/1995/240*, para. 45.

98. The Security Council also undertook a fact finding mission of its own. See *Report of the Security Council Mission to the Western Sahara From 3 to 9 June 1995*, S/1995/498, 1995. United Nations Security Council, Resolution S/RES/995, 1995.

99. For a history of the proceedings up to this point and the considerations before the Fourth Committee see also 'Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' A/AC.109/2029 of 22 June 1995. See also Jarat Chopra, 'Statement Regarding the Issue of the Western Sahara Before the Fourth Committee of the United Nations General Assembly, 14 October 1993' [http://www.arso.org/Chopra-93] (8 November 1999), and A. Boukhari, 'Statement Regarding the Issue of the Western Sahara Before the Fourth Committee of the United Nations General Assembly, 9 October 1998' [http://www.arso/org/Boukhari98.htm] (8 November 1999).

100. United Nations Security Council, Resolution S/RES/1002, 1995.

101. Moroccan military tribunal's sentencing on 21 June 1995 of eight Saharans to prison terms of 15-20 years for having participated in a demonstration in Laayoune on 11 May 1995. United Nations Security Council, *Report S/1995/779*, 8 September 1995.

Identification of applicants of this group presented a core problem.[102] There were 88 categories of tribes included in the Spanish census of 1974, nearly all of them relating to tribal groupings and allegiances. Of those 88 categories, only three were different in that they placed different tribal groups under the three consolidated headings mentioned above. This was done ostensibly because these groups were not, at the time of the census, represented in the territory by a large number of people, bearing out the Polisario argument that they were minorities. However, this cannot be considered conclusive since they could merely have been away from the region during the time of the census. Thus, while in the case of the 85 tribal groups within the census the chief criteria is tribal identity, the three remaining groups have, as their prime criteria, the territory in which they are generally thought to exist. These three groups are also designated by the amorphous titles of H41, H61, and J51/52.

Meanwhile the identification process of the 85 other groups continued. Yet the difference in perception between the two sides remained, with the Polisario calling for strict application to the plan's reference to tribal 'sub-fractions belonging to the Territory'.[103] With little headway by January 1996 due to the parties' intransigence on the disputed tribes issue, the referendum date was pushed back to May 1996 while leaving open the possibility of MINURSO withdrawal.[104] However in response to the fear of destabilising the region the Security Council extended the mandate of MINURSO until 31 May 1996.[105] With no progress possible on the identification front however, this process was suspended while MINURSO's mandate was extended to 30 November 1996, then 31 May 1997.[106] By this time 77,058 persons had been convoked with as many as 60,112 identified roughly corresponding to the number registered in the Spanish census of 1974 (73,497).[107]

In an attempt to break the deadlock, James Baker III was appointed as Personal Envoy to the Secretary-General to help assess the situation and make recommendations. By May 1997 some progress had been made after intensive consultations and the mandate of MINURSO was extended to 30 September 1997.[108] Direct talks took place for the first time between the parties with a series of meetings in Lisbon, London, and Houston.[109] These provided a significant breakthrough on various matters and raised the prospect of the completion of the identification process aided by the parties compromising on the troublesome

102. Ibid., para. 15.

103. Ibid., para. 16.

104. See United Nations Security Council, *Report S/1996/43*, 19 January 1996, paras. 13, 14, 20, 37.

105. United Nations Security Council, Resolution S/RES/1042, 31 January 1996.

106. United Nations Security Council, *Report S/1996/343*, 8 May 1996; United Nations Security Council, Resolution S/RES/1056, 29 May 1996, clause 11; United Nations Security Council, *Report S/1996/913*, 5 November 1996; and United Nations Security Council, Resolution S/RES/1084, 27 November 1996, clause 6.

107. United Nations Security Council, *Report S/1997/166*, 27 February 1997.

108. United Nations Security Council, *Report S/1997/358*, 5 May 1997; United Nations Security Council, Resolution S/RES/1108, 22 May 1997.

109. Ibid.

groupings, thus demonstrating that the political will existed for the solution of the case. This achievement helped create the conditions to proceed towards the full implementation of the settlement plan, starting with the resumption of the stalled identification process. With these basic issues ironed out, the identification process did finally resume by 13 November and new timetables were set which aimed to complete the referendum on 7 December 1998.[110] Subsequently, the Secretary General reported that the identification process had progressed on the identification of members of the disputed tribal groupings (H41, H61, and J51/52).[111]

Recent Developments

The prime problem with the three tribal groupings remains that they are sparsely represented in the 1974 census and, according to the Polisario, are therefore a minority grouping. However, as many as 65,000 people have submitted applications under this heading, against the 603 persons represented in the census. Clearly, interviewing all the applicants would prove highly time consuming. The parties had remained intransigent throughout the process despite intense negotiations. The deadlock was finally broken by a compromise UN package that included the initiation of an appeals process for already identified applicants and provisions for identification of remaining applicants from tribal groupings H41, H61, and J51/52 wishing to present themselves individually. In addition, a revised schedule was authorised, under which the referendum would be held in December 1999.

To aid the process, William Eagleton was appointed as Special Representative of the Secretary General. The UN package proved initially unacceptable to Morocco, but intensive negotiation finally yielded a breakthrough in March 1999. In accordance with the protocol agreed, the final programme of identification for the remaining individual applicants from tribal groupings H41, H61, and J51/52, was issued on 1 June 1999.[112]

The identification operation resumed on schedule on 15 June 1999 with its proposed completion date November 1999. With the referendum now proposed for March 2000 there have been over 150,000 persons already identified as being eligible to vote. This, however, only includes a small proportion of those who applied under the three problematic tribal groupings. The challenge from hereon until the start of the transition period will be the manner and speed in which the remaining applicants under this heading are interviewed. It will also be instructive to study the exact number of the people admitted under this subheading. That the UN remained committed to the process at all is tribute to the organisation. However, one has to be sceptical about the 'new' deadlines set, since the issue of the three tribal groupings remains far from being satisfactorily resolved.

110. United Nations Security Council, *Report S/1997/882*, 13 November 1997, para. 49, appendix II.
111. United Nations Security Council, *Report S/1998/35*, 15 January 1998, paras. 4-13.
112. United Nations Security Council, *Report S/1999/483/Add.1*.

The reliance on norms of territoriality in deciding identity is particularly questionable in view of the fact that the normal residents of the region were nomadic. Since the imposition of the territorial state north and south this tendency has been curtailed to a certain extent. Experts disagree as to the exact magnitude of this increased sedentarisation; however, with territoriality a significant factor in the statehood of Morocco and Mauritania, this was likely to be a trend within the region. Indeed, a similar process occurred in the gradual formation of the Mauritanian state.

The other issue that needs to be examined is that owing to the nature of the nomadism in the region itself there has traditionally been an inter-mixing between peoples; indeed, the Moroccan kingdom itself could be argued to be formed by people with *Saharawi* blood in them.[113] For the various parties to now be fighting for rule over the land is a direct result of the territorial and colonial bias in the international system of sovereign states. The people of the region find themselves caught in the period 1900-1912 when the Spanish and the French agreed to divide the territory between themselves. The prime Spanish intent at the time was to find a secure coast opposite the Canary Islands to aid their fishing industry and had little interest in the peoples, borne out by the dilapidated state in which they left the territory. It is interesting to note that had the French continued to exercise sovereignty over the territory, there would in all likelihood have been one state emerging from the decolonisation process in 1956 which would have included the Western Sahara and Morocco as a single unit.

Thus, when Morocco gained independence in 1956, calls intensified to put an end to what they saw as an artificial divide within their country. By this time, the *Saharawis* had begun agitating against the Spanish and expressing their own agenda for independence through the Polisario. Their argument is also territorially based, in keeping with the requirements dictated internationally. They insist that *Saharawi* identity can only be granted to peoples who lived in the territory or are direct descendants of people who lived in the territory. This remains difficult to determine due to the constant movement of peoples. Morocco, least affected by colonialism in Africa (being a Protectorate of France only from 1912 to 1956) argues that it is a 'valid' state, and not merely the creation of colonial powers. There is also merit in the Moroccan argument that the entities around them are artificial. Algeria, it is claimed by Morocco, has some Moroccan territory within it. Mauritania, also claimed as part of the old Maghreb Union, was referred to as an 'entity' rather than a state by the ICJ in a 1975 case, as it displayed so few characteristics of statehood. And then there is the contested territory of the Western Sahara.

Thus, while sub-Saharan Africa may present the classic case of the defeat of the juridical state, as suggested by Robert Jackson, north-western Africa provides the

113. See generally Rézette, *The Western Sahara*, 1-27; see also Aguirre, *Historia del Sahara Español*.

classic case of the precedence of territory over identity.[114] To demonstrate this, and the rigid light in which these norms are seem within international legal discourse we shall now turn to the Western Sahara Case before the International Court of Justice.

The Western Sahara Case: Its Treatment of Territoriality and Identity

The events leading up to the referral of the Western Sahara Case to the ICJ were detailed earlier.[115] With the Spanish having withdrawn, and the Moroccan Green Marchers having occupied (in the face of express Security Council resolutions to the contrary) what they saw as their legitimate territory, resolution of the dispute was never likely to be easy. In an attempt to ascertain 'legal' right to the territory, the General Assembly, at the behest of Morocco, referred the case to the International Court of Justice, with two questions. Namely:

> 1. Was the Western Sahara (*Rio de Oro and Sakiet El Hamra*) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?
>
> If the answer to the first question is in the negative,
>
> 2. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?[116]

The answers to these questions are interesting in terms of the discourses of identity and territory since they demonstrate the way in which these norms are believed to have crystallised in a strict legal sense. The prime purpose of this section then is to demonstrate the manner in which international legal discourse treats the issues of territory and identity when faced with the particular circumstances of the Western Sahara. This section is offered so as to enable us to draw broader conclusions vis-à-vis these norms and their treatment within international legal discourse. Towards this aim we shall highlight a few significant tenets of the case that directly reveal an interpretation of territory and identity.

International law recognises 1884 as the year that the Spanish declared a 'protectorate' over the Western Sahara.[117] It is claimed that this protectorate was declared after agreements were signed with independent tribes. The only dispute with respect to *territorial* implications in this case surrounds the exact demarcation of the *Bled es-Siba* prior to the Spanish acquisition. This is significant since the *Bled es-Siba* is uncontested as a part of the Sherifian State. The crux of the Moroccan territorial argument is that the *Bled es-Siba* included Rio de Oro and

114. See Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).
115. The Western Sahara Case (Advisory Opinion) *Reports of the International Court of Justice* (1975), 12.
116. *Reports of the International Court of Justice* (1975), 6.
117. See *Reports of the International Court of Justice* (1975), 41.

Sakiet el Hamra, while the Spanish suggest that it was restricted to the Draa river valley which forms the modern boundary between the Western Sahara and Morocco. Thus, a central part of the dispute concerns the location of the seam between the *Bled es-Siba* and the *Shinguitti*, and whether a space corresponding to the Western Sahara existed between these two entities.

A much more complex issue within the case was that of *terra nullius* which the Court seemed to resolve with considerable ease. *Terra nullius* or 'territory belonging to no one' was 'a legal term employed in connection with occupation as one of the accepted legal methods of acquiring sovereignty over territory'.[118] In a discussion during the pleadings, the Algerian delegate referred to the theory enunciated by Emmerich de Vattel which set out three major epochs of *terra nullius*. These can be briefly summarised as the sixteenth century Roman law concept, where *terra nullius* referred to all non-Roman territory; the seventeenth and eighteenth century tenet, where non-Christian territory was considered *terra nullius*; and finally the nineteenth century claim that territory not belonging to a 'civilised state' could be considered *terra nullius*.[119]

In any case, the Court determined in a very forthright manner that the territory of the Western Sahara was not *terra nullius*:

> in the Western Sahara case at the time of Spanish colonisation the nomadic tribes of the region were clearly organised politically and socially under chiefs competent to represent them.[120]

What is particularly salient in this declaration is that while agreeing that the territory did indeed belong to somebody, i.e., the tribes of the region under the auspices of representative chiefs, the Court did not rule in favour of local governance. Rather, it queried at length, whether it belonged to either of the claimants, thereby suggesting that the territory, as a physical possession, *could* 'belong' to Morocco or Mauritania. In declaring that the tribes were organised under chiefs that were competent to represent them, the Court would have negated completely the need to provide an answer to the second question. An interesting issue to also consider would be: if the nineteenth century caveat of *terra nullius* referred to territories that were noncivilised, could it be that the twentieth century equivalent would be territories of people who were non-sedentary? Modern international law, expressed within rigid territorial structures, has no way of coping with people/peoples that are nomadic; territory traditionally traversed by nomadic peoples has become part of sovereign states while the lifestyle of the people that lived and traversed across it has been rendered *nullius*.

118. *Reports of the International Court of Justice* (1975), 39; see also Malcolm Shaw, 'The Western Sahara Case', *British Yearbook of International Law* 49 (1978), 127-34.

119. See the *Pleadings of the International Court of Justice, CR.75/19*, 2-23. See also Shaw, 'The Western Sahara Case', 128-29, and Dissenting Opinion of Judge Ammoun, *Reports of the International Court of Justice* (1975), 83-101.

120. *Reports of the International Court of Justice* (1975), 39, para. 81.

Identity, Territory, and Possession: Three Plausible Scenarios

The discussion has illustrated that the nomadic population of the Western Sahara had religious allegiance to the Sultan, but had a fairly autonomous political structure. The relations between tribes were governed by certain accepted customs and traditions—regarding issues such as the use of migratory routes, watering holes, burial grounds, and agricultural land—which could be considered indications of a legal regime.[121] It is also important to note that the tribes themselves did not restrict their existence to the territory currently known as the Western Sahara, but also traversed parts of southern Morocco, Mauritania, and indeed, parts of Algeria.[122] This continued through the colonial period when boundaries ascribed to the region were more permeable than in postcolonial states. Nonetheless, with territoriality being the basis of the modern colonial states to the north, south, and east of the Western Sahara, there was an increasing trend towards sedentarism among the peoples within this territory too.

Nevertheless, nomadism still remained central to the identity of these peoples and, in ascertaining the nature of identity in the Western Sahara with respect to the two claimants to the territory, the chief problem faced is that the Western Sahara was not a self-contained unit. Rather, it functioned largely as a frontier-less entity whose peoples had close relations with the two entities that neighboured it. Of course the key question within this case is the nature of allegiance between the peoples of this area and the two entities in question.

A number of possible scenarios arise. First, the region could have been part of the *Bled es-Siba* which extended all the way north towards the imperial cities of the Sherifian State. There is a fair amount of evidence presented for this view in the case before the ICJ.[123] Were this the case though, it still leaves open the larger question of whether being part of the *Bled es-Siba* necessarily means that modern Western Sahara should form a part of modern Morocco. Such a line of argument would be based on a historic fact of territorial possession which could not be said to be demonstrably 'effective' in light of the constant rebellions of the *siba* against the *makhzen*.

The second plausible scenario is that the territory and the tribes within it were part of the culture of the *Bilad Shinguitti* which encompassed modern day Mauritania, the territory north of it (i.e., the Western Sahara), and southwards towards the *Bled Sudan* where 'Black Africa' could be said to commence.[124] Were this the case, and once again the evidence presented is reasonably comprehensive, it would need to be examined whether the tribes had any allegiance to *pax Shinguitti*. This is difficult to determine from this distance of time. Nonetheless, were it to be accepted, it suggests a form of identity and allegiance that is based on

121. See generally, Ernest Gellner, *Saints of the Atlas* (London: Trinity Press, 1969).
122. See Rézette, *The Western Sahara*, 111-26.
123. This is primarily the argument presented by the Kingdom of Morocco in their Pleadings.
124. This argument is presented by the Islamic Republic of Mauritania in their Pleadings.

lifestyle rather than sheer territoriality. This option does not exist legally, with Mauritania having withdrawn its claim to the region.

A possible third scenario is that the tribes of the region were politically independent of both the entities. They did not form a part of the *Bled es-Siba* of the Sherifian State and, although acknowledging the Sultan's spiritual leadership, they did not accept temporal leadership over their lands from the Sherifian State, nor did they have any links to the *Bilad Shinguitti* of whom they functioned independently. They could perhaps have subscribed to a system of allegiances and vassalages similar to the Shinguitti culture, partly dictated by an existence in the same desert, but did not pay political homage to any of the tribes or emirates in the Shinguitt. This scenario is not difficult to imagine since the *Bilad Shinguitti* consisted of tribes that were fairly autonomous in any case. Within this scenario, tribes would be required to be completely politically independent of both entities while perhaps subscribing to various facets of culture that emanate from a common heritage (Arabo-Berberic), common religion (Islam), and a common lifestyle (dictated by the Saharan desert).[125]

As the case progressed, however, an idea developed which focussed on bifurcation of the territory between the two claimants. Thus, the northern tribes would be accepted by Mauritania as being part of the Sherifian State and the *Bled es-Siba* while Morocco would concede the southern tribes as being part of Shinguitti culture. With this compromise, it would have seemed that the homogeneity of the territory as a unit was now being questioned. Some authors have questioned the wisdom of trying to ascertain the existence of ties and their nature in the region.[126] For them, the territory of the Western Sahara, as a unit of colonial rule ought to have the option (in a referendum) of opting for one of three options presented by the international law of self-determination namely:

> Emerging as an independent sovereign State;
>
> Freely associating with either Morocco or Mauritania; or
>
> Integrating with either Morocco or Mauritania.[127]

For these authors the legality or otherwise of historic ties would be subjugated to the process of the people of the territory deciding which of these three options they would prefer. However, such an oversimplification would misunderstand the complexities of identity, would further legitimise colonial boundaries, and force identities to conform to them. It is perhaps not wholly convincing that the tribes in the Western Sahara existed completely independent of the Sherifian State as well as the *Bilad Shinguitti*. The works of Gellner and others in *Arabs and Berbers* suggests that there are significant links in the culture of the Berbers, which spread

125. This argument by default, was presented by the Government of Spain.

126. Notably Judge Dillard, 'Dissenting Opinion', in *Reports of the International Court of Justice* (1975), 116-126; Franck, 'The Stealing of the Sahara'; and Shaw 'The Western Sahara Case'.

127. United Nations General Assembly, Fifteenth Session, Resolution 1541.

across the width of the entire region that could be recognised as the Maghreb. These scholars emphasise this unity in Berber culture spreads beyond externally imposed state boundaries.

At the same time, the discourse of statehood is openly challenged in this case since even though the Berbers may have had a relatively uniform culture, they nonetheless did not function as a single entity.[128] It is an uncontested fact in the context of the case that, during any given period in pre-Spanish Sahara, inter-tribal conflict was fairly frequent, suggesting few external allegiances of any kind between the different tribes. Nonetheless, as far as internal governance was concerned, each tribe had its own internal mechanisms overseeing life within the tribe. Thus, the idea of a supreme power that united the peoples of the region is arguably flawed. And the imposition of statehood on different tribes has not been a process that was accepted without great resistance.[129] Of course it needs to be stressed that this particular phenomenon is not peculiar to the Western Sahara but is fairly common in most postcolonial territories. While imposition of artificial boundaries has been a problematique faced in most decolonisation struggles, it is accentuated in the Western Sahara due to the nomadic nature of the population.

Conclusion

Discussion about self-determination in recent years has taken on increasing importance as the international community lurches from one crisis to the next. *Ethnic cleansing* and *refugees*, as components of these crises, express, in a variety of ways, the two principles that we have been seeking to examine here: *ethnic cleansing* understood as the purifying of a given territory of 'foreign' identity, with *refugees* resulting from this process being rendered 'territoryless'. The international legal discourse of self-determination fails to provide clear guidelines to tackling the problem. Closer legal analysis of the discourse highlights its problematic root. As we have seen in the first section of the paper, one of the key interlinked concepts to the norm is the doctrine of *uti possidetis*. This Roman law interdict treats territory as a possession that may change title. However, framing a legal rule which allows the possessor to keep possession suggests a certain rigidity that cannot allow for any modification. Decolonisation was such a modification, and in the process this question considered foreclosed, was forced open.

With the international community treasuring 'order' above all else, this change was strictly regulated. As a result the entities that came out post-decolonisation were often unrecognisable from their precolonial existence. However, as far as *international* law was concerned these entities were now considered fully-fledged states and took their national identities from the territory allocated to them. This is precisely what conspired in the Western Sahara. North and south of it, two ancient

128. See Dunn, 'Berber Imperialism', 85-108.

129. This remains true to this day for the Berbers of the region. A recent *Economist* article outlines the resistance of the Algerian Berbers to the imposition of Arabic as the national language. *Economist Highlights*, 17 July 1998 [http://www.economist.com] (8 November 1999).

entities maintained a semblance of their indigenous identity, though significantly altered by the French state-building process. In the desert, unconducive to sedentary life, this process was not as easy, nor were the Spanish overtly concerned with initiating state-building. As a result of Spanish abdication under international pressure, the 'normal' process of decolonisation stalled. This cause has subsequently been taken up by the Polisario, but their case remains problematic in the context of the current discourse since it too is based on the territorial assumption that takes as given, the land of the 'Western Sahara'. The question therefore remains as to whether it is possible in the context of modern international law and politics to hold an identity that is not based on a territorial assumption, and still be entitled to 'statehood'.

The Western Sahara Case before the ICJ demonstrates the difficulties in seeking to determine identity. It is also highly significant that the nature of international law and the dispute resolving mechanism of the ICJ could not accommodate the view of the Polisario, which was barred from proceedings since it was not a state party.

The differences between peoples cannot be subsumed to a restrictive territorial definition of identity. While it is impossible to deny that territoriality is *one* of the factors in determining a people's identity, it is dangerous to subordinate all other factors to it. The norm of *uti possidetis* that shaped the postcolonial world has played an important role in maintaining peace and security and preventing newly independent regions from fragmenting during transition periods. The question that needs to be posed today in a scenario of 'post-modern tribalism' is whether these independent quasi-states should still be afforded protection under this norm, despite the inherent blow that it deals to the principle of self-determination. In addition, it is useful to question the treatment of territory as 'possession' within the legal discourse of self-determination. In the pre-decolonisation literature of self-determination, primacy was given to 'identity' over 'territory'. Post-decolonisation, it seems that this process has been reversed. With the colonial definition of territory sacrosanct, it is now the territory that gains precedence over identity.

The fate of the Western Sahara now depends on the political manoeuvring of the Moroccan government and the Polisario in seeking to negotiate their visions of *who* the people are to be consulted in determining the population eligible to vote in the plebiscite deciding the political destiny of the territory. However, as we have seen in the plebiscite held to determine the fate of East Timor, even after this process, the transition may be fraught with difficulties.

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