AN EVALUATION OF MOROCCO'S CLAIMS TO SPAIN'S REMAINING TERRITORIES IN AFRICA

Abstract Ceuta, Melilla, Vélez de la Gomera, Alhucemas and the Chafarinas Islands are Spanish territories that lie along Morocco's northern coastline. Morocco has claimed the territories since its independence in 1956. The sovereignty of a further territory, the islet of Perejil, remains unresolved after a military confrontation between Morocco and Spain in 2002. The author examines the arguments in the ongoing sovereignty dispute. Morocco's claim to Ceuta and Melilla is found to be weak. However, its claim to the remaining territories may be supported by the analogous case of São João Baptista de Ajudá, an unpopulated Portuguese fortress territory in Dahomey (Benin) that was singled out for 'statutory decolonization' by the UN.

Key words: Alhucemas, Ceuta, Chafarinas Islands, colonial enclaves, irredentist claims, Melilla, Perejil/Parsley Island, territorial integrity, Vélez de la Gomera.

Spain controls five territories on, or just off, Morocco's northern coastline. The coastal enclaves of Ceuta and Melilla are the largest of the territories in question and the only two with stable civilian populations. The other three territories—the peninsula of Vélez de la Gomera, the islet of Alhucemas and the Chafarinas Islands—are less well known. They contain small Spanish military garrisons but no civilian populations. They are the only European Union (EU) territories on, or within the coastal belt of, mainland Africa. A sixth territory, the islet of Perejil (sometimes referred to as Parsley Island in the English language press), is unoccupied; its status remains disputed under the terms of a 2002 agreement brokered by the US Secretary of State following a military confrontation between Morocco and Spain over the territory. Morocco has claimed all six territories since it achieved independence in 1956.

This article examines the nature of the territorial dispute between Morocco and Spain. Its central argument is that a breakthrough in the dispute would be easier to achieve if Morocco were to disaggregate its claims to the various territories, instead of advancing them as essentially one claim, as it has done in the past. Each of the territories has a unique history and the basis of title asserted by Spain is different in each case. While Morocco's claims to the populated territories of Ceuta and Melilla have found little international support, its claims to the unpopulated territories may rest on stronger ground, and may have been received more sympathetically in the UN, had they not been bundled together with the claims to Ceuta and Melilla.

Parallels are drawn between the three Spanish fortress territories (Vélez, Alhucemas and the Chafarinas) and São João Baptista de Ajudá, a tiny Portuguese fortress with no civilian inhabitants which, following its inclusion on the General Assembly's list of 'non-self-governing' territories in 1960, was forcibly annexed by

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Dahomey (now Benin) in 1961. The designation of São João Baptista de Ajudá as 'non-self-governing' was curious, because the absence of a civilian population would appear to render the issue of self-governance redundant. The article discusses the possibility that the fate of São João Baptista de Ajudá may be an unusually uncontroversial example of the absorption of a so-called 'colonial enclave' by its contiguous claimant State, or—alternatively—of what Brownlie has referred to as 'the principle of statutory decolonization' in operation (as distinct from decolonization in accordance with the principle of self-determination).[1]

In charting the progress of the Moroccan claim in the UN, the article discusses Moroccan attempts to draw parallels between the Spanish territories in northern Africa and the British non-self-governing territory of Gibraltar. It is suggested that, now that Morocco appears to have abandoned the analogy with Gibraltar, it may be able to advance its cause internationally by invoking the case of São João Baptista de Ajudá in support of its claims to the three unpopulated fortress territories and the islet of Perejil, although it may well be required to drop (or at least shelve) its claims to Ceuta and Melilla as part of any sovereignty deal with Spain.

Before addressing these issues it is necessary to say something about the territories under discussion and the sources of title asserted by Spain.

I. THE TERRITORIES

A. Ceuta[2]

Ceuta lies 14 kilometres across the Straits from the Rock of Gibraltar, at the western entrance to the Mediterranean. It covers a land area of 19 square kilometres and is home to 80,000 people. The majority of the population is divided fairly evenly between people of Iberian extraction and those who originate from the surrounding area. Ceuta's first European rulers were the Portuguese, who took the territory by force in 1415. The city became Spanish with the union of the Iberian Crown in 1580, and when Portugal seceded from Spain in 1640, Ceuta remained under Spanish sovereignty (although it retains the Portuguese coat of arms on its flag). Ceuta (like Melilla below) was designated an 'autonomous city' under the Spanish Constitution in 1995.[3]

B. Melilla[4]

Melilla lies some 200 kilometres east of Ceuta. It covers 12.5 square kilometres and is home to 75,000 people. As with Ceuta the majority of the population is divided fairly evenly between people of Iberian extraction, and those who originate from the surrounding Rif area, the latter demographic group being the faster growing. This

[1] I Brownlie *Principles of Public International Law* (7th edn, Oxford University Press 2008) 162.

[2] On Ceuta and Melilla see generally P Gold *Europe or Africa? A Contemporary Study of the Spanish North African Enclaves of Ceuta and Melilla* (Liverpool University Press 2000) and G O'Reilly 'Ceuta and the Spanish sovereign territories: Spanish and Moroccan claims' in *Boundary and Research Briefings* vol I, no 2, International Boundaries Research Unit, Durham 1994. From an international legal perspective, see D-E Khan 'Ceuta and Melilla' Max Planck Encyclopedia of Public International Law <www.mpepil.com>.

[3] Autonomy Statute of Ceuta 1995 <http://www.congreso.es/constitucion/ficheros/estatutos/e_80_espa.pdf>.

[4] See (n 2).

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diversity is reflected in Melilla's 1995 Autonomy Statute, which demands respect for the population's cultural and linguistic plurality.[5] Spanish forces took the city by force from the Kingdom of Fez in 1497.

C. Vélez de la Gomera

Vélez de la Gomera is a tiny peninsula with a land mass of 0.019 square kilometres that lies 119 kilometres southeast of Ceuta and 126 kilometres west of Melilla. Formerly an islet, in 1934 a storm created a tombolo between Vélez and the Moroccan mainland that, at 85 metres long, is said to be the world's shortest land border.[6] Vélez served as the dividing point between the Spanish and Portuguese zones of influence established by the Pope in 1494, although ownership of Vélez itself was disputed.[7] Spain occupied the territory in 1508, and Spanish rule was consolidated under the Treaty of Cintra in 1509.[8] Troops from the Kingdom of Fez captured Vélez in 1522, and the ruler of Fez then handed Vélez to Ottoman troops in 1554 in return for their assistance in his ascent to the throne. The Spanish captured Vélez from the Ottomans in 1564 and have occupied the territory ever since.[9]

D. Alhucemas

The rock of Alhucemas and its adjacent islets, Isla de Mar and Isla de Tierra, are located within a few hundred metres of the shore of the Moroccan town of Al Hoceima, 146 kilometres east of Ceuta and 84 kilometres west of Melilla. Together they cover a total land area of 0.046 square kilometres. Alhucemas contains a small Spanish garrison. The islets were given to Spain in 1559 by the Saadian sultan of Morocco in return for Spain's assistance in fighting the Ottomans, and Alhucemas has been permanently occupied by Spain since 1663.[10]

E. Islas Chafarinas

The Chafarinas Islands consist of three small islets in the Alboran Sea, 3.3 kilometres from the Moroccan coastline and 45 kilometres to the east of Melilla. The three islets, Isla del Congreso, Isla de Isabel II and Isla del Rey, cover a total land area of 0.525 square kilometres. There is a small Spanish garrison stationed on Isabel II. Spain occupied the Charfarinas Islands in 1848, a few hours before a French expedition was due to land there. Spain considers that the islands were *terrae nullius* prior to their occupation.[11]

[5] Article 5, Autonomy Statute of Melilla <http://www.congreso.es/constitucion/ficheros/estatutos/e_81_espa.pdf>. Article 5 of Ceuta's Autonomy Statute (see n 3) refers to cultural, but not linguistic, plurality.

[6] MW Lewis 'The World's Shortest Border', 30 August 2010, online at <http://geocurrents.info/geopolitics/the-worlds-shortest-border>.

[7] O'Reilly (n 2) para 2.5.

[8] ibid.

[9] See N Barbour 'North West Africa from the 15th to 19th Centuries' in HJ Kissing et al (eds) *The Last Great Muslim Empires: History of the Muslim World* (Markus Wiener Publishers 1996) 98, 103 and 117.

[10] See O'Reilly (n 2) para 2.5, who states that the cession was 'on condition that Spain prevent the Turks from occupying strongholds on the Mediterranean coast of Morocco'.

[11] ibid, para 2.5.

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F. Perejil/Parsley Island

The uninhabited territory of Perejil lies about 8 kilometres west of Ceuta, and some 200 metres off Morocco's northern coast in the Straits of Gibraltar. It covers an area of 0.15 square kilometres. Spain's claim is based on the fact that Perejil was within the 'zone of influence' of Ceuta when the latter was under Portuguese rule.[12] However, the islet has mostly gone unoccupied over the centuries. In 1987, objecting to Spain's inclusion of Perejil and Vélez in Ceuta's draft Autonomy Statute, Morocco issued a note verbale asserting inter alia that Perejil was Moroccan territory and therefore not part of Morocco's territorial dispute with Spain.[13] There was no rebuttal from Spain, who removed the reference to Perejil and Vélez from the draft statute.[14]

In July 2002 Moroccan forces occupied the islet and raised the Moroccan flag, prompting protests from Spain and eventually a military response, in which Spanish forces recaptured Perejil in a bloodless assault. An intervention by US Secretary of State Colin Powell resulted in the disputing parties agreeing to revert to the status quo ante, without prejudice to their positions on sovereignty.[15]

This outcome represented a setback for the recently-crowned Moroccan king, Mohammed VI, whose tactics regarding Perejil appear to have been motivated by a desire to test both Spanish resolve and international opinion over the remaining Spanish territories in Africa more generally, and perhaps give new impetus to Morocco's sovereignty claims.[16] This international incident over a 'virtually worthless piece of rock'[17] marks a recent low point in Moroccan–Spanish relations, and highlights the potentially explosive nature of the wider sovereignty dispute.

The following section deals with how the current impasse was reached. It focuses on the fruitless pursuit of Morocco's claims in the UN, which has included attempts to draw an analogy between Gibraltar and the remaining Spanish territories in Africa.

II. THE PURSUIT OF MOROCCO'S CLAIMS IN THE UN

A. Morocco's Post-Independence Drive To Have the Territories Listed by the UN as Non-Self-Governing Territories

The joint declaration of Morocco and Spain dated 7 April 1956, which declared an end to the Spanish Protectorate established by the Treaty of Fez 1912, recognized

[12] Statement of the Spanish Minister of Foreign Affairs, SpanYIL vol VIII (2001–2002) 99.

[13] JD Gonzalez Campos 'Las pretensions de Marruecos sobre los territories españoles en el Norte de Africa (1956–2002)' (2004) Real Instituto Elcano, Documento de Trabajo No 15/2004, 1.

[14] ibid 14. According to the Tribunal in *Eritrea/Yemen* 'there is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state' unless the case to the contrary is 'fully established' (which is open to doubt in the case of Perejil): *Eritrea/Yemen Arbitration (Phase One: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 ILR 1, 125.

[15] See CJ Tams 'A Sprig of Parsley that Leaves a Bitter Taste – Comments on the Spanish-Moroccan Dispute About Perejil/Leila' 45 GYIL (2002) 269 and I Martinez 'Spain's "Splendid Little War" with Morocco' 37 IntlLaw 871 (2003). On the specifics of the Secretary of State's intervention, see AJ Rodriguez Carrion and MI Torres Cazorla 'Una readaptación de los medios de arreglo pacífico de controversias: el caso de Isla Perejil y los medios utilizados para la solución de este conflicto' LIV Revista Española de Derecho Internacional (2002) 717.

[16] See G Tremlett 'Morocco draws new territories into Parsley row' (*The Guardian* 22 July 2002).

[17] Khan (n 2) para 11.

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Morocco's independence and its 'territorial unity'.[18] A few days before signing the joint declaration, Morocco's King Mohammed V proclaimed that 'nous n'avons jamais dissocié indépendance et unité'.[19]

The discourse of 'unity', characterized by a refusal to accept the division of the country into 'zones' and 'enclaves', was central to Morocco's claims over the various Spanish territories on what it regarded as Moroccan soil (and which at the time included the Spanish Sahara and the quasi-enclave of Ifni on Morocco's Atlantic coast, as well as Ceuta, Melilla and the other northern territories). This discourse was a broader feature of early decolonization. Just before Moroccan independence, similar arguments had already been advanced by Indonesia to justify its absorption of West Irian,[20] and a few years later they would be deployed—to a mixed international reception[21]—as a pretext for India's annexation of Goa and the other Portuguese dependencies on its Arabian seaboard.[22]

Morocco has maintained its position on the 'unity' of its territory over the decades, despite the International Court of Justice (ICJ) deciding that Morocco did not possess legal ties that would trump the exercise of self-determination in Western Sahara, and even as the success of irredentist arguments based on 'unity' appeared to decline after the 1960s.[23] Morocco maintains that Ceuta and Melilla are 'usurped cities' under Spanish occupation[24] and considers them, together with Vélez, Alhucemas and the Chafarinas, to be 'the last colonies in Africa'.[25]

Despite the consistency of its position since 1956, Morocco's pursuit of its claims to the five northern territories took some time to get off the ground in the UN. Early appearances by Moroccan representatives in the General Assembly focused on Spanish Sahara and Ifni.[26] Morocco first protested about Ceuta and Melilla in the UN on 7 October 1960 but did not ask for them to be included on the General Assembly's list of non-self-governing territories at the time.[27]

[18] Declaration by the Governments of Spain and Morocco on the Independence of Morocco (and Protocol) 7 April 1956 Royal Institute of International Affairs *Documents on International Affairs* (Oxford University Press 1956) 694.

[19] Statement of Mohammed V, 3 April 1956, cited in Gonzalez Campos (n 13) 3.

[20] See TM Franck *Nation Against Nation* (Oxford University Press, 1985) 76–82.

[21] For more discussion see (n 40) and accompanying text.

[22] The Indian delegate in the UN Security Council justified his country's annexation of Goa on the grounds that the Portuguese presence there amounted to an illegal colonial occupation dating back to the 1500s. The Indian position regarding its territorial unity was clearly stated: 'India is one; Goa is an integral part of India' (SCOR 16th Year 987th Meeting 18 Dec 1961 paras 46–47, 60).

[23] *Western Sahara* Advisory Opinion [1975] ICJ Rep. International support for the 'territorial unity' claims of Guatemala to British Honduras, Indonesia in relation to East Timor, and Morocco to Western Sahara, appeared to decline after the 1960s. In the former two cases, international recognition of Belize and East Timor, although not easily achieved (especially in the latter case) testifies to this fact.

[24] Gold (n 2) 24–7. [25] ibid 19. [26] See Gonzalez Campos (n 13) 7.

[27] UN Doc A/C4/SR1005, paras 34–35. It has been suggested that there was a tacit agreement between Morocco and the fascist regime in Spain, under which Franco's 75,000 foreign legionnaires stationed in Ceuta and Melilla would have intervened should the need have arisen to prevent a communist coup in Morocco: see 'Morocco: Spanish Foreign Legion Outposts' ITN Report, 3 Aug 1966 <http://www.itnsource.com/shotlist/BHC_ITN/1966/08/03/X03086601/>.

Ifni—which had been ceded by Morocco to Spain in 1859—was 'retroceded' to Morocco under the Treaty of Fez 1969[28] without a consultation of the territory's 50,000 inhabitants, after violent resistance to Spanish rule in the area. It was not until 27 January 1975 that Morocco asked the UN Decolonization Committee to include the 'colonial enclaves' of Ceuta, Melilla, Alhucemas, Vélez and the Chafarinas Islands on the list of non-self-governing territories, saying they were 'among the last vestiges of colonial occupation' and calling for the restoration of Morocco's 'territorial integrity'.[29] In February 1975 the Organisation of African Unity (OAU) expressed its solidarity with Morocco's attempts to recover the territories, which it too referred to as 'colonial enclaves', and support was also received from the Non-Aligned States and the Arab League.[30] In March 1975 (seven months before the ICJ delivered its *Western Sahara* Advisory Opinion) Morocco distributed a memorandum to other States in the General Assembly, calling on them to support its claim to the northern 'colonial enclaves'.[31] Despite all this, the Moroccan letter to the Decolonization Committee went unanswered, and the territories were never listed as non-self-governing territories.

B. Morocco's legal arguments: 'colonial enclaves' and territorial integrity

The reliance by Morocco and the OAU on the concept of a 'colonial enclave' reflects doctrinal developments in 1970s international law scholarship. Rigo-Sureda appears to have coined the term 'colonial enclave' in 1973, in an attempt to rationalize a number of exceptional cases in which the decolonization of a small colonial territory was effected by means of absorption by the contiguous claimant State, with no consultation of the inhabitants of the territory. His assessment of cases like Goa and Ifni is that self-determination is set aside in the case of 'colonial enclaves', due to 'the assumption that the territory concerned is already part of the state surrounding it'.[32] This doctrine was later developed and popularized by Crawford, who defines 'colonial enclaves' as:

> minute territories which approximate to 'enclaves' of the claimant State, which are ethnically and economically parasitic upon or derivative of that State, and which cannot constitute separate territorial units.[33]

A territory that falls into this putative category is said by Crawford to have 'no legitimate separate identity'.[34] He argues, somewhat tentatively, that such a territory

[28] Tratado por el que el Estado Español retrocede al Reino de Marruecos el territorio de Ifni (Fez, 4 January 1969) *Repertorio Cronológico de Legislación* (Pamplona: Aranzadi 1969) 1008.
[29] UN Doc A/AC109/475.
[30] O'Reilly (n 2) para 7.2.
[31] 'Memoria sobre los puertos e islas de la costa Norte de Marruecos aún bajo dominación colonial, llamados "Presidios"' 7 March 1975, in Gonzalez Campos (n 13) 10.
[32] A Rigo-Sureda *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* (AW Sijthoff 1973) 176–7. The notion that contiguity can be a basis for title to territory does not enjoy widespread acceptance: RY Jennings puts the contrary view when he states that 'the proposition that contiguity is not an independent root of title is self-evident, for it is by definition relative and immediately raises the question, contiguous to what? A claim based on contiguity cannot in fact be other than an assertion concerning the definition or extent of a sovereignty the existence of which is accepted *ex hypothesi*' *The Acquisition of Territory in International Law* (Manchester University Press 1963) 74.
[33] J Crawford *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 647.
[34] ibid, 637.

would be destined for absorption by the 'enclaving' State if that State were to lay claim to the territory, rather than for decolonization in accordance with the principle of self-determination.[35] We are not given a conclusive list, but candidates for 'colonial enclave' status have been said by Crawford to include Ifni, São João Baptista de Ajudá, the French and Portuguese enclaves in India, Belize, the Falkland/Malvinas Islands, Gibraltar, Hong Kong, Macao, the British Indian Ocean Territory (BIOT), Mayotte and the Panama Canal Zone; other commentators have suggested that such territories as West Irian, East Timor and Walvis Bay might also be considered 'colonial enclaves'.[36]

The 'colonial enclaves' doctrine comes across as an overly ambitious attempt to rationalize the treatment of a number of very diverse small territories that have fallen prey to—or been treated by the General Assembly in a manner that is to some extent sympathetic with—the territorial designs of covetous neighbours. Some of the territories (eg Mayotte, the Falkland/Malvinas Islands and BIOT) cannot be considered 'enclaves', or even 'approximate to enclaves' (to quote Crawford) in any sense of the term.[37] Others (Belize, East Timor) have—subsequent to being identified in the literature as possible 'colonial enclaves'—attained independence following a consultation of their inhabitants; others still (Ifni) have had their 'inalienable' right of self-determination affirmed explicitly and repeatedly within the General Assembly.[38]

Even if international practice were less inconsistent when it came to the fate of small disputed territories, the notion of 'parasitic' and 'derivative' populations does not appear to enjoy widespread support; indeed, the idea that the inhabitants of Goa, after some 450 years of Portuguese rule, were somehow 'ethnically and economically parasitic upon or derivative of' the Indian Union at the time of annexation, but that the inhabitants of Belize and East Timor are, by contrast, genuine 'peoples' with the right of self-determination, is difficult to accept.[39] Indeed, in the wake of the Indian invasion, a majority of States in the UN Security Council were of the view that the freely expressed wishes of the Goans should prevail in the decolonization of that territory.[40]

Notwithstanding the fragility of the 'colonial enclaves' doctrine, it provides a subtext for the legal arguments raised by Morocco in the dispute under discussion. The doctrine is closely associated with a particular interpretation of paragraph 6 of General Assembly Resolution 1514 (XV), which prohibits '[a]ny attempt at the partial or total disruption of

[35] ibid.

[36] J Crawford *The Creation of States in International Law* (1st edn, Oxford University Press 1979) 377, fns 109, 110. Also J Duursma *Fragmentation and the International Relations of Micro-States* (Cambridge University Press, 1996) 80–8.

[37] The inappropriateness of placing offshore islands in the 'colonial enclaves' category is discussed by Rigo-Sureda (n 33) 176, and Higgins (n 59) 393. However, Argentina regularly refers to the Falkland/Malvinas Islands as a 'colonial enclave': see eg 'Falkland Islands "Not Colonial Enclave" Says UK', (Mercopress South Atlantic News Agency, 30 Sep 2008). <http://en.mercopress.com/2008/09/30/falkland-islands-not-colonial-enclave-says-uk>.

[38] GA Res 2072 (XX), 16 December 1965; GA Res 2229 (XXI), 20 December 1966; 2354, GA Res 2354 (XXII), 19 Dec 1967.

[39] DW Greig argues that it is senseless to draw a factual distinction between Goa and East Timor on the basis that the former is a 'colonial enclave' and the latter is not: see 'Reflections on the Role of Consent' (1988–89) 12 AustYBIL 157.

[40] The Chilean delegate to the Security Council, in support of a draft resolution 'deploring' the Indian action in Goa (which resolution had the support of the majority within the Security Council but not the veto-wielding USSR), stated as follows: 'Neither historical possession [by Portugal] nor violent possession [by India] should prevail, but the freely expressed wishes of the inhabitants of the disputed territories' (SCOR 16th Year 988th Meeting 18 Dec 1961 para 30).

the national unity and the territorial integrity of a country'.[41] Morocco's interpretation of this paragraph is that it can apply retrospectively to an existing situation, and not merely to future action (as the word 'attempt' would appear to suggest).[42] This view is shared by various other States with irredentist claims based—in varying measures—on notions of geographical contiguity, historical-ethnic ties, and the correction of past colonial wrongs.[43] A pointed reference to paragraph 6 of Resolution 1514 in the preamble to Resolution 2353 (XXII) on Gibraltar in 1967,[44] in an apparent nod to the Spanish territorial integrity claim, may have fuelled the enthusiasm of some States for the 'irredentist' interpretation of paragraph 6, an interpretation that arguably reflects the constraints of a contemporary international legal environment, which—outside the decolonization process—leaves very little opportunity for territorial revisionism.

It is important to note for present purposes that Spain has embraced the irredentist interpretation of paragraph 6 fully in the context of its claim to Gibraltar. Morocco has sought to exploit this common normative understanding by insisting on the parallels between Gibraltar and the five Spanish territories in northern Africa.

C. The analogy with Gibraltar

Morocco first made use of this analogy in a discussion concerning Gibraltar in a 1966 meeting of the UN Decolonization Committee. The Moroccan representative declared his country's support for the Spanish claim over Gibraltar. He added that Morocco's arguments in support of its claim to Ceuta and Melilla were exactly those used by Spain to vindicate its rights over Gibraltar.[45] Morocco's letter to the Decolonization Committee in 1975 stated that Gibraltar and Spain's territories in northern Africa were 'in an identical position from all points of view'.[46] In 1980 King Hassan II stated that 'in claiming Gibraltar, Spain is working for us'.[47] However, he would eventually abandon this line of argument, claiming in 1987 that the problem of Gibraltar was 'different'.[48]

Spain has always rejected the analogy with Gibraltar. It has argued in the UN that, unlike Gibraltar, the Spanish territories in northern Africa are 'naturally and ethnically Spanish'.[49] Spain further contends that, apart from the Chafarinas Islands, the territories in northern Africa have been Spanish since before Morocco was a political entity, and it has even claimed to be the successor of the Roman, Byzantine and Visigoth

[41] GA Res 1514 (XV), 14 December 1960.

[42] JES Fawcett notes that the word 'attempt' in this context 'can hardly be apposite to describe an already existing and indeed long-established situation': 'Gibraltar: The Legal Issues' (1967) 43 International Affairs 249. Rigo-Sureda (n 33) argues (at 185) that the word 'attempt' in para 6 'clearly refers to future cases'.

[43] This particular interpretation of paragraph 6 has been advanced by, eg, India in support of its claim to Goa, Indonesia over East Timor, Guatemala over British Honduras (now Belize) and Argentina over the Falkland/Malvinas Islands. It was championed by Indonesia and Guatemala when resolution 1514 (XV) was in its preparatory phase, but it was a minority view: see RS Clark 'East Timor' 7 YaleJWorldPubOrd 29 (1980–1981) 28–31.

[44] GA Res 2353 (XXII), 19 Dec 1967.

[45] UN Doc A/AC4/SR1671.

[46] UN Doc A/AC-109/475.

[47] Gonzalez Campos (n 13) 13.

[48] ibid 16. The King referred to the fact that Gibraltar is in Europe, is controlled by a major European power, and is allied to Spain through the EC and NATO.

[49] UN Doc A/AC-109/477. This claim seems unusual in light of the ethnic diversity that exists in Ceuta and Melilla; indeed, the latter may soon become the first Spanish city since the so-called 'Reconquista' to have a majority Muslim population.

kingdoms.[50] Perhaps the most plausible distinction drawn by Spain is that its northern African territories are 'Sovereign Territories', unlike the 'Crown Colony' of Gibraltar, and cannot therefore be said to be 'non-self-governing'.[51] Spain maintains in this regard that its relationship with its remaining African territories is not 'colonial', and that the same cannot be said for the relationship between the UK and Gibraltar; after all, the General Assembly maintains Gibraltar, a British Overseas Territory, on its list of 'non-self-governing' territories (or to take the longhand version from Article 73 of the UN Charter, 'territories whose peoples have not yet attained a sufficient measure of self-government'). The inhabitants of Ceuta and Melilla, unlike those of Gibraltar, are treated constitutionally and administratively on an equal footing with the inhabitants of the metropole.[52] This may well have been an important factor in the Decolonization Committee's demurral in the face of Morocco's request that the territories be listed as 'non-self-governing' territories.

Nevertheless, the strategic value of Morocco's use of the analogy with Gibraltar becomes more apparent when we consider that Spain's 'anti-colonial' arguments regarding Gibraltar are focused on territory rather than on the 'insufficient measure of self-government' enjoyed by the population;[53] indeed Spain considers the wishes of the 'purely artificial', 'unnatural' population to be irrelevant to the decolonization of the territory.[54] Spain lays claim to Gibraltar—and Morocco lays claim to Ceuta and Melilla—on grounds of territorial integrity, regardless of the fact that the territories contain stable civilian populations, and regardless of the levels of self-government enjoyed by those populations.[55]

The Moroccan and Spanish position, in essence, is that decolonization law is capable of being invoked to correct colonial wrongs by overturning an internationally recognized title to a small enclave-like territory in favour of the contiguous claimant State. For Spain this rupture in the international legal order is only possible if the claimant State was the former sovereign. Rigo-Sureda argues by contrast that the successor of a political unit to which an enclave belonged would also be a legitimate claimant.[56] This view sits more sympathetically with the Moroccan claims, and indeed the irredentist claims of other postcolonial States.

Spain also purports to take into account the question of whether a colonial population is 'artificial, as in the case of Gibraltar' or 'autochthonous' (if the latter, the population's right to self-determination would trump any adverse territorial claim).[57] Morocco, by

[50] O'Reilly (n 2) para 7.2.

[51] ibid.

[52] See the 1995 Autonomy Statutes of Ceuta and Melilla (n 3 and n 5 respectively) and the statement of the Spanish Minister of Foreign Affairs, 17 September 2002 (UN Doc A/57/PV.12)).

[53] See A Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 207–8.

[54] See UN GAOR 19th Sess, Annex 8 Agenda Item 21 ch X 296.

[55] In relation to Spain's claim to Gibraltar there is a further layer of argumentation based on the reversionary clause contained in the treaty of cession (Article X of the Treaty of Utrecht 1713), which gives Spain the right of first refusal should Britain ever 'alienate' the territory. The UK considers that a grant of independence would constitute 'alienation' under the treaty and has ruled out this option ostensibly for this reason (see UN Doc A/AC-109/PV 543). Spain considers that any exercise of self-determination by the Gibraltarians not leading to integration with Spain would constitute an 'alienation' of the territory by the UK (*Spanish Red Book on Gibraltar* (Sucesores de Rivadeneyra 1965) 65).

[56] Rigo-Sureda (n 33) 219.

[57] This view was articulated in the Spanish pleadings before the ICJ in the *Western Sahara* advisory proceedings: *Western Sahara* vol I [1974] ICJ Pleadings 207, para 359.

contrast, has not made a concerted attempt to undermine the 'worthiness' of the populations of Ceuta and Melilla in order to make the idea of those territories passing under Moroccan administration more palatable for those of a democratic disposition; its indifference to the human dimension contrasts with Spain's attempts to argue for a distinction in the law based on whether the population of a territory is 'autochthonous'. Either way, both States agree that an enclave can be absorbed against the wishes of its population in accordance with decolonization law.

A problem faced by both Morocco and Spain is the level of international unease that is generated when the language of 'colonial wrongs' is invoked by an irredentist State as justification for its claim to a territory, especially—as Higgins notes—when this involves treating the inhabitants of the territory 'like chattels in real estate'.[58] There is significant support for the view—memorably expressed by Franck—that such irredentist claims 'are merely relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium'.[59] This was evident in the case of Goa and its dependencies, which were forcibly annexed by India in 1961 without a consultation of the territories' inhabitants. Even though the international community eventually acquiesced to the Indian annexation, UN debates at the time show that there was substantial support for the view that the inhabitants of the territories had the right freely to determine the political future of the territories in accordance with the principle of self-determination.[60]

Although Spain has been able to generate some international support for the view that the inhabitants of Gibraltar are 'aliens imported by a colonial regime',[61] the level of support for a transfer of the territory to Spain against the wishes of the Gibraltarians appears insufficiently strong to swing the situation decisively in Spain's favour;[62] and despite support for Morocco's claims amongst African and Arab States,[63] none have dared to argue explicitly that the wishes of the populations of Ceuta and Melilla should be set aside when determining the political future of those territories.

[58] R Higgins 'Judge Dillard and the Right to Self-Determination' (1983) 23 VaJIntlL 393. An Australian representative in a debate of the UN Decolonization Committee commented that if the Spanish interpretation of para 6 of Resolution 1514 (XV) is correct it would mean that 'nearly every European country, such being Europe's history, could lay claim to some part of another European country on the basis of some earlier conquest or some earlier transfer of land': UN Doc A/AC-109/PV 546 (1967) 66.

[59] *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v Malaysia), Application by the Philippines to Intervene, Separate Opinion by Judge* ad hoc *Franck* [2001] ICJ Rep 652, 657, para 15.

[60] See (n 40).

[61] In the words of a Sudanese delegate to the General Assembly: UN Doc A/C4/SR1754 (1967) 553, para 19.

[62] Each year the General Assembly passes a 'consensus' decision urging the UK and Spain to negotiate over the future of the territory. The decision now refers to the need to listen to the 'interests and aspirations' of the Gibraltarians: 'UN Modifies Gibraltar Statement' (*Gibraltar Chronicle* 15 Oct 2004). For the latest decision see GA decision 66/522, 9 December 2011.

[63] O'Reilly (n 2) para 7.2, documents the support for the Moroccan position from the OAU, the Non-Aligned States, and the Arab League, the latter proclaiming in 1975 its 'support for Morocco in its current fight for the liberation of its territories occupied by the Spanish, including Sebta [*(Ceuta)*] and Melilla as well as the other islands off the Moroccan coast'. The African Union has classified Ceuta and Melilla as African territories under 'foreign occupation' (see 'Le Plan Stratégique de la Commission de l'Union Africaine' vol 1 (2004) 44 <http://www.africa-union.org/au%20summit%202004/volume%203%20final%20-%20french%20-%204%20june%202004%20fr.pdf>.

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Gold argues that, now that the military value of Gibraltar, Ceuta and Melilla is much diminished, the reason the territories are retained by the UK and Spain respectively 'is partly national pride, but more importantly the paramountcy of the wishes of the inhabitants'.[64] 'The wishes of the inhabitants' can also be instrumentalized as a means of discouraging other States from supporting the transfer of a territory against the wishes of a long-established population, or countering the caricature of a population by the claimant State as 'artificial', 'parasitic', 'derivative' or otherwise unworthy of self-determination.[65]

Morocco's only realistic option in relation to Ceuta and Melilla may be to wait for the passage of time and shifting demography in those territories to run their course, in the hope that the populations might eventually favour integration with Morocco. In the shorter term, the prospects of resolving the dispute would be more favourable if Morocco were to shift the focus of its territorial claims onto the unpopulated territories of Vélez, Alhucemas and the Chafarinas Islands. The advancement of its claims may still depend on whether it can bring the territories within the framework of decolonization law. This may prove difficult, especially when we consider that decolonization law appears to address itself to territories with populations that 'have yet to attain a sufficient measure of self-government' (even if one accepts the view that when the non-self-governing population is parasitic upon or derivative of a claimant State it can be decolonized as a 'colonial enclave'), and does not appear concerned with the fate of remote, unpopulated and uncontested territories.[66] However, Morocco may be able to invoke the case of the tiny Portuguese enclave of São João Baptista de Ajudá, an unpopulated fortress territory that bears significant material similarities to Vélez, Alhucemas and the Chafarinas Islands, and which was treated by the General Assembly as a 'non-self-governing' territory under Article 73 of the UN Charter.

III: THE ANALOGY WITH SÃO JOÃO BAPTISTA DE AJUDÁ, AND THE POSSIBLE 'STATUTORY DECOLONIZATION' OF THE THREE SPANISH FORTRESS TERRITORIES AND PEREJIL

The former Portuguese fort that today houses the local museum in the port of Ouidah, Benin, was once one of the world's smallest territorial units. Known as São João

[64] Gold (n 2) 164.

[65] While the sovereignty disputes remain deadlocked, domestic developments in the territories under discussion have increased their levels of self-governance: Gibraltar's 2006 constitution, created by a UK Order in Council, bestows virtually full self-government on the territory and contains a preamble stating that the UK will 'never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes' (see <www.gibraltarlaws.gov.gi/constitution/Gibraltar_Constitution_Order_2006.pdf>) and since 1995 Ceuta and Melilla have been 'autonomous cities' under the Spanish constitution, seamlessly integrated within the EU (see (n 3), (n 5) and (n 53)).

[66] In this regard we might consider cases like Heard Island and the McDonald Islands, the transfer of which from the UK to Australia (effected in 1947 and confirmed by exchange of letters in 1950) did not engage the interest of the UN, at least as far as Chapter XI of the Charter was concerned. The UK was also concerned to evade the scrutiny of the Decolonization Committee when it covered up the existence of a permanent population on the Chagos Islands, before excising the archipelago from Mauritius, leasing Diego Garcia to the USA, and covertly banishing the Chagossians to the slums of the Mauritian capital, Port St Louis: see *R (on the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant)* [2008] UKHL 61, at paras 10, 55 and 169.

Baptista de Ajudá, and covering a mere 0.045 square kilometres, it was first established by the Portuguese governor of São Tomé and Príncipe in 1680. For a time it gave Portugal a lucrative foothold in the trafficking of slaves from West Africa to Brazil. After the abolition of the slave trade the importance of the fort to Portugal diminished. However, although it was abandoned for short periods in the early eighteenth and late nineteenth centuries, it remained under continuous Portuguese occupation from 1872 up until 31 July 1961, when it was overrun by forces from the recently-established independent State of Dahomey (which had been part of French West Africa from 1894 to 1960, and was renamed as Benin in 1975). The fort had never housed a stable civilian population, and the two Portuguese administrators who were its only inhabitants on the day it was seized attempted to burn it down as they fled.

Dahomey's action, despite involving a straightforward violation of Article 2(4) of the UN Charter, which prohibits the use of force against the territorial integrity of another State, appears to have drawn no significant international condemnation. It occurred some seven months after the inclusion of São João Baptista de Ajudá in General Assembly Resolution 1542 (XV)[67] (which focuses on Portugal's obligation to transmit information to the General Assembly on its 'Overseas Territories' in accordance with Article 73e of the UN Charter) and five months before the forcible annexation of Goa by India. Unlike the case of Goa, there was—unsurprisingly, given the absence of civilian inhabitants in São João Baptista de Ajudá—no protest within the UN regarding the right of the 'people' of the annexed territory to self-determination.

Some commentators have attempted to bring São João Baptista de Ajudá within the already rather porous 'colonial enclaves' category. Shaw argues that '[c]laims to the maintenance of colonial enclaves appeared to reach their ultimate absurdity in the case of the Portuguese enclave of Sao Joao Baptista de Ajude.'[68] The inclusion of São João Baptista de Ajudá within the same putative 'colonial enclaves' category as, say, Goa, a much larger territory whose longstanding civilian population numbered more than half a million at the time of the Indian annexation, is open to question. Indeed, it could be argued that when there are so many different ways to be a 'colonial enclave' the category is stripped of any coherence and meaning.

Brownlie eschews the 'colonial enclaves' concept, while still accepting that colonial territory can occasionally change hands in situations where self-determination is not at issue. In this connection he infers the existence of a principle of 'statutory decolonization' from the General Assembly's treatment of the Falkland/Malvinas Islands.[69] The extension of such a principle to the Falkland/Malvinas Islands and other territories where it is claimed that the right of self-determination of the population trumps the irredentist claim, is debatable. However, it is submitted that the international treatment of São João Baptista de Ajudá—where countervailing arguments based on self-determination did not (indeed, could not) arise—could be viewed as a uniquely uncontroversial example of 'statutory decolonization'. If São João Baptista de Ajudá was subject to the operation of such a principle, and not merely to the vagaries of realpolitik, the 'statutory decolonization' of similarly situated territories must also be a possibility.

[67] GA Res 1542 (XV), 15 December 1960.

[68] M Shaw *Title to Territory in Africa: International Legal Issues* (Clarendon Press, 1986) 329, fn 309.

[69] Brownlie (n 1) 162.

The maintenance of Vélez, Alhucemas and the Chafarinas Islands by Spain seems no less 'absurd'—to quote Shaw—than the maintenance of São João Baptista de Ajudá by Portugal. If there is a material distinction to be drawn it is perhaps that São João Baptista de Ajudá was less viable as a political unit, and thus more likely to generate problems of the 'peace and security' variety. Although São João Baptista de Ajudá was located close to the coastline, it was surrounded by Dahomey's territory on all sides, whereas Spain enjoys unfettered maritime access to Vélez, Alhucemas and the Chafarinas Islands. (It is notable that the first Portuguese territories in India to fall into the hands of the Indian Union were the landlocked enclaves of Dadra and Nagar Haveli, where Portugal's problems of access were famously documented in the ICJ's *Right of Passage* case).[70] Another, related, factor to consider is that Spain is much better placed—in terms of resources and its very close proximity to the territories—to defend its interests militarily than Portugal was in São João Baptista de Ajudá, as the confrontation over Perejil demonstrates. However, it is unlikely that the General Assembly's approach towards São João Baptista de Ajudá would have been any different if the territory had been more 'viable' in military and economic terms. The territory's lack of viability may have made it vulnerable to forcible (illegal) annexation by Dahomey, but it does not follow from this that São João Baptista de Ajudá and the three Spanish fortress territories are so materially different as to justify differential treatment by the General Assembly. The territories appear in material respects to be very similar.

The fact nonetheless remains that Vélez, Alhucemas and the Chafarinas were never listed as 'non-self-governing' territories. São João Baptista de Ajudá *was* listed, and it was included in Resolution 1542 (XV), although this act of the General Assembly is not easily explained. Under Principle IV of the previous Resolution, 1541 (XV), there is a prima facie obligation to transmit information in relation to a territory that is distinct ethnically and/or culturally from the country that is administering it.[71] This obligation seems difficult to make out when the only human presence on a territory is a small contingent of administrative or military personnel. How then did São João Baptista de Ajudá come to be listed as a non-self-governing territory, and why were Vélez, Alhucemas and the Chafarinas Islands spared from inclusion on the list?

A clue to the answer may lie in the preamble of Resolution 1542, which expresses 'satisfaction' at Spain's agreement to report to the General Assembly on certain of its overseas territories in accordance with Article 73e of the UN Charter. By 1960 Spain had come to accept that Spanish Sahara, Ifni and Spanish Guinea should be decolonized in accordance with the principle of self-determination, while Portugal continued obstinately to maintain that under its 1933 Constitution its 'Overseas Provinces' were treated no differently in administrative terms from the metropole and could therefore not be considered to fall under Article 73 of the UN Charter.[72] While this may have been true of Madeira and the Azores, the General Assembly was not dissuaded from its view that territories such as Goa, Angola and Mozambique were 'non-self-governing'. As Spain began its rehabilitation within the General Assembly, Portugal's overseas presence was increasingly being viewed by the growing anti-colonial majority in the

[70] *Right of Passage over Indian Territory* [1960] ICJ Rep 6.
[71] GA Res 1541 (XV), 15 December 1960.
[72] See CA Anderson 'Portuguese Africa: A Brief History of United Nations Involvement' 4 DenvJIntlL& Pol 133 (1974).

General Assembly as a threat to international peace and security.[73] The inclusion of São João Baptista de Ajudá in Resolution 1542, while unusual when viewed against the emancipatory rhetoric in the Resolution,[74] arguably reflects the 'peace and security' imperative that underpins the UN Charter and much of decolonization law. The listing of São João Baptista de Ajudá by the General Assembly alongside territories with subjugated colonial populations was at the very least a convenient way of addressing exhaustively the perceived Portuguese 'threat' to international peace and security. It shows the international community of the 1960s favouring the 'statutory decolonization' of an unpopulated enclave, during the same period that saw it divided over the role that the populations of some other territories (eg Goa, Gibraltar) should have in the decolonization process.

By the time Morocco began to pursue its claim to Ceuta, Melilla, Vélez, Alhucemas and the Chafarinas Islands in the UN in 1975, Spain had withdrawn from Spanish Sahara, Ifni and Spanish Guinea. Crucially, Morocco's claim—advanced as one essential claim to all five territories—paid no regard to the wishes of the inhabitants of Ceuta and Melilla, just as its internationally unpopular actions in Spanish Sahara (now Western Sahara) paid no regard to the wishes of the Saharawi population. It is possible to see how Vélez, Alhucemas and the Chafarinas Islands could have slipped under the General Assembly's radar in the circumstances.

IV. CONCLUSION

'The problem of the so-called "colonial enclave"' is described by Crawford as a 'persistent and troublesome aspect of the UN practice'.[75] It is a troublesome problem primarily because any given case typically involves a complex interaction between the claimant State, the administering power, the international community, and the colonial population. The stickiest aspect of the enclave problem is its human dimension. Crawford's 'colonial enclaves' doctrine is arguably at its most problematic when it purports to explain the treatment of small colonial territories by referring, in general terms, to the 'parasitic' or 'derivative' qualities of their populations. By classifying the populations of certain small territories as unworthy of holding a right of self-determination Crawford provides a principled—but highly contestable—justification for the differential treatment of territories like Goa. An alternative view, advanced by Greig, is simply that the judgmental discretion of the international community sometimes allows self-determination to be derogated from in the face of an adverse territorial claim.[76]

If territorial disputes over populated enclaves appear difficult, even intractable in some cases, it is clear that when there is no population involved—such as in the case of São João Baptista de Ajudá—we are left with a 'real estate' dispute that, for all its complexity, is likely to be more manageable than a problem with a human dimension at

[73] The Ghanaian Ambassador to the UN put the point in a somewhat circular fashion: 'The very fact that . . . all African countries are behind the nationalists . . . means a threat to international peace and security': UN Doc S/PV1042, 24 July 1963, 33–5.

[74] See (n 68). Para 3 of the Preamble recognizes that 'the desire for independence is the rightful aspiration of peoples under colonial subjugation'.

[75] Crawford 1979 (n 37) 377.

[76] Greig (n 40) 154–7. See also J Irving 'Self-determination and colonial enclaves: the success of Singapore and the failure of theory' (2008) 12 SYBIL 97–112.

its heart. Spain has been resolute in its refusal to negotiate over Ceuta and Melilla, and in this respect we have seen that it appears to have the tacit backing of the General Assembly. However, there may be more room for negotiation in relation to the unpopulated fortress territories; indeed, as far back as 1871 the Spanish government was considering abandoning Vélez.[77] Spain is likely to insist that Morocco renounce its claims to Ceuta and Melilla, or at least shelve them for a period of time, as part of any sovereignty deal over the other territories. This may prove to be a sticking point, because the absorption of Ceuta and Melilla is Morocco's main goal in the broader sovereignty dispute, and it will therefore want to avoid giving any undertakings that could lead to it being estopped from pursuing that goal.

Nevertheless, a breakthrough in the dispute might be achieved if Morocco were to change its approach by disaggregating its claims to the fortress territories and Perejil from its claims to Ceuta and Melilla, and acknowledging that the presence of stable civilian populations in Ceuta and Melilla makes those territories qualitatively different as far as the application of the international law on territory and self-determination is concerned. A shift in focus onto the three fortress territories gives Morocco the scope to draw on the example of São João Baptista de Ajudá, and to avoid the accusation that its sovereignty arguments necessarily entail ignoring the rights of the populations of Ceuta and Melilla. The Moroccan king Hassan II proclaimed in 1982 that 'time, friendship and flexibility' would be the key to resolving the dispute.[78] After its military and diplomatic failure over Perejil, the time may have come for Morocco to inject some flexibility—and a little humanity—into its irredentist strategy.

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[77] See T García Figueras *La acción Africana de España en torno al 98, 1860–1912* vol 1 (Instituto de Estudios Africanos 1966) 292.

[78] F Moran *Una politica exterior para España* (Barcelona, 1990) 82, cited in Gonzalez Campos (n 13) 13.

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