EDITORIAL COMMENTS

African Imperialism

Some international cases are hard. The facts are controverted, the norms uncertain, hence determining the lawfulness of unilateral actions is difficult. In the *Western Sahara*[1] case, facts and law are clear and condemnation of unlawful action must not be evaded.

For years, the Kingdom of Morocco neither claimed nor indicated any aspirations for the Spanish Sahara. Indeed, from 1966, Morocco joined in resolutions for Saharan independence.[2] But phosphate deposits and the potential strategic value of the Sahara apparently caused revisions of the Moroccan position. The announcement by Spain in 1974 that it would conduct a referendum under UN auspices and supervision in 1975 moved Morocco to seek to have the International Court adjudicate an issue essentially within the competence of the Saharan people;[3] neighboring Mauritania's appetite was whetted, and it too joined the scramble. The Court, to its credit, affirmed the primacy of the principle of self-determination in the case.[4] The shabby diplomacy of threats and secret deals which followed the decision discredits all who participated in it. Despite a series of resolutions by the UN General Assembly and the opinion of the International Court, the Kingdom of Morocco, in flagrant violations of law, has entered Western Sahara, annexed part of the territory into Metropolitan Morocco, the other part going to its accomplice, Mauritania, and conducted a mock referendum.[5]

The implications of this case for minimum order in Africa and for the continued vitality of the principle of self-determination in general are grave. Decolonization is a mockery if a non-self-governing territory passes from the hands of one alien Metropolitan to another, with the transaction conducted by secret agreement of elites and not by the free expression of the people. Self-determination is frustrated if the transfer of territory does not include a plebiscite or some other form of popular consultation. The effectiveness of the International Court and of the General Assembly in matters of human rights and non-self-governing territories is undercut, if authoritative decisions of fact and policy are rudely ignored. It is sad to

[1] Advisory Opinion on Western Sahara, [1965] ICJ Rep. 12. Full text also in 14 ILM 1355 (1975); excerpted 70 AJIL 366 (1976). For a further account of the case, see T. Franck, *The Stealing of the Sahara, supra* p. 694.

[2] For a concise review of the political history of the dispute, see the separate opinion of Judge De Castro, Western Sahara [1975] ICJ Rep. 127 *et seq.*

[3] Originally King Hassan invited Spain to join in contentious jurisdiction. When he was rebuffed, Morocco pressed the General Assembly to request an advisory opinion. *See* G.A. Res. 3292, 29 GAOR, Supp. 31, at 103–4, UN Doc. A/9681 (1974).

[4] [1975] ICJ Rep. 31–33.

[5] For details, see Le Monde, Feb. 27, 1976, at 4, cols. 1–3; *id.* Feb. 28, 1976, at 2, cols. 2–4; *id.* Feb. 29, 1976, at 1, col. 1; Washington Post, Feb. 2, 1976, at A.10, col. 5.

note that two "Third World" and "new" states here openly violate principles to which the Third World, in substantial part, owes its existence.

In the most immediate sense, Moroccan and Mauritanian behavior in the *Western Sahara* case threatens to ignite flammable irredentist situations existing throughout Africa. Political borders on the continent do not correspond to the distribution of tribal, ethnic, and linguistic communities. Virtually every African state has, in the language of the General Assembly and the International Court, "legal ties" of some sort with people and events in neighboring countries. Any doctrine that authorizes the consolidation of inchoate "legal ties" into territorial sovereignty will prove, at the least, mischievous and at the most, calamitous for regional order. The actions in Western Sahara thus violate not only the rights of the inhabitants of the territory, but also the hopes for minimum order for all Africans.

The reluctance of the Organization of African Unity to take a forthright position on the case is understandable, but it is wrong. The perniciousness of this case will go far beyond the sands of the Sahara.

W. MICHAEL REISMAN

FOREIGN POLICY AND FIDELITY TO LAW: THE ANATOMY OF A TREATY VIOLATION

On April 13 President Ford signed a bill unilaterally to extend the fisheries jurisdiction of the United States from the present 12-mile limit to 200 miles onto the high seas (and even thousands of miles at sea with regard to salmon) effective March 1, 1977.[1] Barring a sudden breakthrough in the law of the sea negotiations, as of March 1, 1977 the Coast Guard may begin arresting vessels on the high seas pursuant to this act in violation of the treaty obligations of the United States. This action again exposes the inadequacy of the present foreign policy process for taking an international legal perspective into account.[2] It may also prove the greatest mistake in the history of U.S. oceans policy.

During the past decade fishing pressure on stocks off the U.S. coasts has increased dramatically, largely as a result of an increase in foreign fleets using newer technologies. The result has been that some stocks such as haddock were largely fished out and many others were severely depleted. These problems off our coast mirror a worldwide crisis in fishery management with existing international law not providing jurisdiction coextensive with the range of the stocks. The resulting "common pool problem" actually created a disincentive to conserve similar to early experiences with depletion of oil reserves in the East Texas oil fields. Thus the culprit itself was to a significant extent an outmoded legal structure. The plethora of

[1] *See* the "Statement of the President Upon Signing the 200-Mile Fishing Legislation," April 13, 1976. 12 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 644 (1976), full text in *Contemporary Practice* section, *infra* p. 820.

[2] *See, e.g.*, Moore, *Law and National Security*, 51 FOR. AFF. 408 (1973); Falk, *Law, Lawyers, and the Conduct of American Foreign Relations*, 78 YALE L.J. 919 (1969).