

Selective lessons on Walvis

President Saddam Hussein of Iraq invaded and annexed Kuwait because it was rich, it was contiguous and it was convenient. The inhabitants were strongly opposed: but so what?

President Galtieri of Argentina invaded the Falklands (Malvinas) because they were potentially rich (offshore oil), they were nearby and he thought the world would support him against a former colonial power. The inhabitants were also strongly opposed, but once again, so what?

Prime Minister Nehru of India invaded and annexed the tiny Portuguese enclaves of Goa, Daman and Diu because they were contiguous, Portugal was weak and of course the world would never support a colonial power. The fact that the inhabitants of Portuguese India — brown and white — preferred to stay Portuguese was irrelevant.

That — although she does not say so quite so bleakly — is the kind of international "law" Lynn Berat appears to believe should be applied to the situation regarding Walvis Bay and the guano islands along the Namibian coast.

Selective

Referring to previous writings about the dispute, she notes: "... authors on both sides were little more than polemicists, unable to appreciate the dynamic nature of international law or to recognise the ways it has evolved from a colonialist legal order that denied sovereignty to indigenous peoples, to one that accorded them full sovereign rights. It is these changing concepts of sovereignty, however, that are applicable to the Walvis Bay dispute."

But unfortunately, she is herself a polemicist.

Not that this detracts from the value of the work — once it is realised that the author has an unacknowledged set of values that precondition her judgment. Her research into the documents and arguments is wide-ranging: like any

good lawyer arguing to a brief, however, she is selective in the lessons she draws from them.

There is ample evidence of this. For instance, to refer to the South West African Government of National Unity in March 1987 as a "puppet government" (page 187) is emotive and unjudicial language. To use the phrase "a colonialist claim such as South Africa's" (page 180) is the equivalent of suggesting in a criminal court that certain laws of evidence are only there to protect the "good" people, while for the accused they may be thrown out the window.

Her summing up of the respective claims is reasonable.

"South Africa bases its claims to Walvis Bay upon its chain of title, citing three factors to support the contention that, under the principles of international law, Walvis Bay is part of the Republic of South Africa.

"These are (1) the formal annexation of Walvis Bay at a time when it was *terra nullius*, (2) the effective and unchallenged occupation of the territory after annexation by the relevant lawful authorities, and (3) its formal incorporation into SA by due constitutional process."

On the other hand, she writes, "Swapo's claim ... rests on various complementary and complex arguments of international law.

"First, Swapo argues that the original British title, which had no consensual element, was invalid or at least will no longer support a colonialist claim.

"Second; the South African Government voluntarily relinquished its sovereignty over Walvis Bay by voluntarily transferring it to South West African administration and leaving it under that administration for more than half a century.

"Third, Walvis Bay is geographically, economically and historically a part of Namibia. At best, South

BOOK OF THE WEEK

Walvis Bay: The Last Frontier by Lynn Berat (Radix R32,95)

Reviewed by JAMES MITCHELL

Africa exercised colonial jurisdiction over the Bay before transferring it to SWA administration.

"Fourth, the United Nations has insisted that Namibia achieve its independence with territorial integrity. History, economics, and political and military considerations all indicate that this cannot be achieved if Walvis Bay remains excised from Namibia."

Possibly the strongest portion of Berat's argument revolves around the concept of *estoppel*.

This is "the rule that a party which has acquiesced in a certain situation or has taken a particular position with respect to it cannot later act inconsistently". Thus, she argues — quoting cases in international law set as far apart as Greenland and Cambodia — because for many years administrative convenience dictated that Walvis was treated as part of South West Africa (in matters legal, political, educational and economic), this meant that Pretoria, as well as the local inhabitants, had accepted Walvis was no longer part of the Union, later Republic, of South Africa.

Inconclusive

A more intriguing argument comes where the author draws upon an extremely little-known and well-mannered dispute between Britain and France regarding a group of rocks and islets lying between the British Channel island of Jersey and the French coast. The Minquiers and Ecrehos featured prominently in an Alistair MacLean thriller some years ago, but have been little noticed elsewhere.

The International Court of Justice found in 1955 that evidence of sovereignty relating to the above case before the 19th century was inconclusive, throwing out amounts of delightful antiquarian detail as to

what did or did not happen in 1204 AD. Although she does not say so, Berat might have noted that this tends to lessen support for her suggestions that because ostrich eggshell beads dating from 1460 have been found in Walvis Bay, there is some sort of inherent link with the rest of Namibia.

The 1955 ICJ judgment on the Minquiers was, basically, a reasonable finding arrived at by reasonable judges (ie lawyers unaffected by anti-colonial, anti-Western, Third-Worldist rhetoric), admittedly about a rather absurd matter.

Reasonable countries were also involved. There were no protestations of "national honour" or suggestions that the rocks and shoals of the Minquiers (known to sailors as the "Minkies") would be used by perfidious Albion to blockade la belle France.

Must Switzerland control Antwerp because her trade goes down the Rhine? Obviously not, because the countries involved are reasonable states.

And, although this is nowhere mentioned in Berat's book, there are numerous cases where geographical oddities are permitted to exist without anyone getting in the least upset.

Oddest of all, perhaps, is the little-known Spanish city of Llívia, which this reviewer once visited, and which lies entirely surrounded by French territory. But who cares? If one used Berat's arguments, Llívia would be considered not economically viable, and must either be joined to Spain by a peninsula of sovereign territory, or swallowed up by France. But the difference is this: Spain and France are both reasonable countries, and a *modus vivendi* is found.

Of course, all this — and Berat's book — may be totally irrelevant: a future ANC-controlled South Africa may decide to hand over Walvis to a friendly Swapo-controlled Namibia.

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