

Western Sahara Legal Case: The International Law Narrative of Unresolved Conflict

Jamal Ait Laadam¹, Yasmine Hasnaoui², Paul Wang³

¹International Relations & Law Department, Faculty of Government and Economic and Social Science, Poly-Tech Marrakech, Marrakech, Morocco

²Political Science Studies, American International University, Al Jahra, Kuwait

³Public Law & International Relations Department, Shi Liang School of Law, Changzhou University, Changzhou, China
Email: Jamel555hope@gmail.com, hasnaouielyasmine@gmail.com, wanglichangzhou@cczu.edu.cn

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Abstract

The legally and internationally labeled Spanish Sahara is the oldest colonized territory in Africa. Colonized by Spain in 1884, Western Sahara has been an unchallengeable statutory case file in the UN tasks of the dispute between various actors at different times. Following trilateral negotiations, Spain ceded control of this territory to Morocco and Mauritania under the Madrid Agreement of 1976. The Polisario fully refused this treaty and with the help of Algeria waged an armed group to struggle specifically against Morocco. After fifteen years of an intense military fight, the United Nations (UN) brokered a ceasefire in 1991 that terminated the war and established a new phase of a long and pointless peace process. After outlining the history of the Western Sahara conflict, this paper analyzes the question of legality case starting from the settlement plan process through the Baker plans to the 2007 proposals by both parties, and finally clarifies the reasons and motives behind the deadlock in the Western Sahara. Therefore, the United Nations has been fastened in the middle of a perplexed conflict that several parties are directly or indirectly involved in. The key reason for the failure of this statutory question was the lack of management and supervision of serious diplomatic negotiations.

Keywords

Western Sahara, Morocco, Legal Case, ICJ, Polisario Front, OAU, Self-Determination

1. Introduction

Formerly a Spanish colony known as Spanish Sahara, the area is characterized by

an historical and on-going territorial conflict between the Kingdom of Morocco and the Sahrawi rebel movement Polisario (the Frente Popular de Liberación de Saguía el Hamra y Río de Oro), which is backed by Algeria. A dispute marked by colonization, decolonization, invasion, and an intermittent political stalemate has given rise to “one of the longest, most intractable conflicts in Africa” (Mundy, 2009: pp. 115-122).

In 1884, Spain, a latecomer to the colonial scramble for Africa, occupied Western Sahara. Local tribes refused to accept this territorial claim, instead choosing to engage in a 50-year fight against the colonial power for control of the land. After Morocco won independence of its northern territory in 1956, Spain maintained control over the coastal region of the country known as Western Sahara. June and July 1956 marked the start of the Morocco Liberation Army’s (MLA) actions and two major Saharan tribes, Tekna and Reguibat, against Spanish rule to have Western Sahara reintegrated into Morocco (Attilio, 1972: pp. 195-205).

Western Sahara’s settlement has been undermined by the conflicting interests of involved actors at the expense of the Moroccan Saharawi people, this opens up larger discussions on the integrity of international law and reveals a weakness in the ability of international organizations especially the United Nations (UN) to ensure the significant right of the states which is sovereignty. The conflict in Western Sahara commenced in 1975 (Jensen, 2005: pp. 56-59) after the Spanish withdrew as a colonial power, allowing the Kingdom of Morocco to legalize the region of Western Sahara territory. Morocco’s possession was challenged by the Polisario Front (SADR) group that had been created to fight for independence from Spain (Hodges, 1982). Originally, the Polisario (SADR) began effective guerrilla warfare against the Moroccan forces, with extraneous support from Algeria (Harvey, 1988: pp. 12-13).

The United Nations (UN) was involved in and brokered a ceasefire in 1991 that prevented the war between Morocco and the Polisario Front (SADR) and began a new adventure of diplomatic scenes and ineffective peace settlement resolutions to the Western Sahara dispute.

The United Nations has indeed been so keen on promoting its resolutions of peace and stability in the conflict of Western Sahara, even if that meant peaceful instability and the stop of decisive diplomatic talks. In response to all the United Nations (UN) resolutions to solve this issue, the UN was trapped on the edge of a puzzling conflict that required regional states’ efforts to end this protracted territorial issue. All these circumstances explore the reasons that caused the United Nations (UN) failure of the peace settlement in terms of international law doctrine.

Due to this complicated Western Sahara’s status, this peace agreement brought about an end to active confrontation, but in the end, it did not resolve the dispute. Voting on the referendum was frequently delayed, and diplomatic discussions still existed, making the Western Sahara conflict remain neglected and

generally unresolved for decades (Hodges, 1982).

2. The UN Vision through Western Sahara Dispute

Under the UN supervision, the Western Sahara conflict has seen ineffective legal mechanisms including unsuccessful dispute resolution, and a lack of autonomy. By 1963, the Kingdom of Morocco positioned the Western Sahara dispute, then under Spanish occupation, in the hands of the United Nations. The UN was previously asked to study the Western Sahara conflict as a case falling under the branch of decolonization. This is deemed to be lawful involvement, during which the UN attempted to define the legal and institutional structure of the dispute (Hanauer, 1995: Rev 133). By that time, the UN General Assembly announced a resolution approving the provisions of a resolution issued on October 16, 1964, of the UN “Special Committee on the situation about the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples relating to Ifni and Spanish Sahara”. This mainly encouraged Spain to give up these regions from colonial occupation and, to this end, to enter into negotiations on the problems concerning sovereignty given by these two territories.

The UN’s focus then moved from reshaping the principles of the legitimate structure of the conflict in the early 1960s and 1970s to a phase of conflict management which was taken over by the Security Council. Even though the Security Council was not responsible for resolving the Western Sahara dispute, its involvement in this issue implemented new and lasting criteria for its settlement.

The Kingdom of Morocco’s backing for self-determination was established on a well-structured hypothesis that the population of Western Sahara, if given the chance, would go for reunification with the Moroccan mainland (Hannum & Babbitt, 2006: pp. 135-157).

In 1976, the Western Sahara dispute was assessed by the United Nations General Assembly which recognized the position of the Organization of African Unity (OAU) in solving the dispute as an African issue. The United Nations General Assembly, advocated by the OAU Resolution, approved the parties to the conflict, the Kingdom of Morocco and the POLISARIO Front, to engage in direct negotiations with an opinion of bringing about a cease-fire to set up the essential circumstances for a peaceful and legal referendum for self-determination (Paz-zanita, 2006: p. 138) of the people of Western Sahara, under the accords of the OAU and the UN.

Morocco was an important force in the establishment of the Organization of African Unity (OAU) known today as the African Union (AU), through “The Casablanca Group”—an organisation composed of Algeria, Egypt, Ghana, Guinea, Libya, Mali and Morocco—which merged with its rival, the Monrovia Group, and eventually led to the creation of the OAU in 1963. Within the same year, Morocco successfully lobbied to have the United Nations formally declare the Western Sahara a non-self-governing territory and requested Spain to deco-

lonize it. A year later the OAU gave its first sign of its involvement in the conflict.

In October 1966, the OAU's political committee called for the region's independence. In 1979, in order to resolve the Western Sahara conflict, the OAU adopted a decision that called for a cease-fire and the holding of a free referendum during which the voters would decide between total independence and preservation of the status quo. During this period, Morocco faced the unfavorable circumstances of having the OAU be a great supporter of the Polisario and the independence of the Western Sahara. The main parties that helped the SADR take lead within this organization were Algeria and Libya. These two countries tried all they could to undermine Morocco's lobbying for international endorsement of its legitimate claim to the territory. Additionally, these governments have also actively helped the Polisario gain international recognition as the government-in-exile.

The following year, the question of the SADR's admission as a member of the OAU was broached. In June 1981, King Hassan II proposed a referendum in conformity with the OAU *ad-hoc* committee recommendations. King Hassan II presented what he suggested as a referendum that would take into account "Morocco's historical rights to the territory" (Gupte, 1981: p. 1; Damis, 2003: pp. 99-101). The Algerian president Chadli Bendjedid came to the first session of the OAU Implementation Committee in Nairobi during the same month holding a 91-page memorandum citing King Hassan II Referendum pledge as no more than "a glimmer of hope, as yet a tenuous one," and enumerating the conditions which would have to be abided by to allow the committee to conduct its mandate in order to "guarantee the exercise of a general and regular referendum of self-determination".

At the OAU, Algeria had a hand in every decision made by the Polisario; it was indeed the most important party dictating and guiding SADR's moves. The second session of the Nairobi summit on February 8-9, 1982, culminated in the decision that stipulates *inter alia* that the committee and the Chairman would set up a date for the cease-fire and a peace-keeping force and/or a military observer group would supervise the confinement of troops to their bases. An interim administration lead by a Commissioner was in charge of the legislative and administrative powers necessary for the implementation of the referendum in the presence of the Moroccan administration; the latter would be invited to cooperate whenever it was needed (OAU Doc. AHG/IMP.C/WS/Dec.2).

As a matter of fact when the Secretary General of the OAU Edem Kodjo made the unilateral decision to allow the SADR to take part in the deliberations as a member state without consulting with the Implementation Committee or the OAU chairman, a decision which was borne of back room deals, confusion arose, and 19 states left angrily staunchly protesting at the Secretary General's ignorance for the ongoing efforts by the Chairman, and the Implementation Committee to resolve this matter. Even furthermore, Edem Kodjo allowed the proceedings to pursue in the presence of the SADR's representatives despite the

absence of the quorum (Bahajjoub, 2010: p. 351).

This unexpected act pushed the OAU into chaos and threatened not only the end of the Implementation Committee's mandate but also the advancement of its work (Shelley, 2004: p. 36). Kodjo's move was intended to bring the work of the Committee to a halt. In actual fact, the motives behind Kodjo's act were that his term of office was coming to an end with no hope of reelection, Gaddafi made him an irresistible offer to change the course of events. Strong evidence suggests that Kodjo exceeded his mandate in determining the legal basis for Western Sahara's admission, specifically by allowing, without prior consultation with OAU chairman, Kenyan president Daniel Arap Moi, or the newly established Implementation Committee on the territory's future—a self-proclaimed republic to take a seat as a member before a referendum on its status organised and supervised by the organisation was held. His diplomatic coup was masterminded by skillful Algerian and Libyan lobbying within the OAU and arm-twisting of some African heads of state dependent upon aid from Algeria and Libya (Bahajjoub, 2010: p. 352). One may even deduce the reasons behind this *coup de force* as being ascribed to the fact that Libya and Bendjedid, in particular, were rather dissatisfied about the outcome of the referendum. Indeed, if the results of the referendum were in favor of Morocco, this would have jeopardized all of Algeria's longstanding efforts in helping the Polisario in its fight against Morocco. Thus, President Bendjedid would have found himself in a complicated and embarrassing position.

Algeria and Libya were capable at the time of such policies due to the two countries' extensive wealth from oil income, whereas, their neighbor, Morocco, endured a difficult complex economic period that witnessed chronic drought.

Libya and Algeria did all they could to have the SADR's admission secured and were not bothered about the division in the OAU. Indeed, by this time, the Pan-African Organization was almost split by country leaders—led by Algeria and Libya on one hand, and, led by Morocco on the other. The OAU was almost so equally divided that it was unable to simply hold a summit meeting, let alone to come up to terms with issues on the Agenda regarding the Western Sahara.

Nothing more occurred until the OAU summit, which took place in Addis Ababa on November 12-15, 1984. Most African state leaders had become intensely confused over the Saharan issue; for many, it jeopardized OAU progress and resulted in a split of opinions within the organization. The SADR delegation was eventually seated in the Conference Hall in AddisAbaba. Moroccan officials left without asking their supporters to join them. Before the Moroccan delegation left the conference, King Hassan's advisor, Guedira, delivered a message from King Hassan to OAU members that SADR's presence was unacceptable and left Morocco no choice but to resign from the Pan-African Organization.

Under Bendjedid's term, given the pressure from the Algerian Military toward the Republic President, the OAU witnessed a staunch push by Algerian diplomacy for self-determination of Western Sahara and to have the SADR admitted within the organization through Algerian-sponsored resolutions. Indeed, this

episode ended the OAU's authority to handle the Western Sahara conflict by the OAU, as the problem was then handed off to the United Nations. Hence, the African Union's role has been to support and accompany the United Nations efforts in strict compliance with its prerogatives defined by resolution 693 (Decision on the Report of the Chairperson of the Commission of the African Union on the issue of Western Sahara Doc. Assembly/AU/4 (XXXI)).

3. The International Community Stand and ICJ Advisory View

Spain issued plans to hold a referendum in early 1975, the kingdom of Morocco reported its opposition and proposed along with Mauritania mediation by the ICJ to determine to whom the sovereignty of the territory belongs. The court was required to investigate "whether the territory, first to the Spanish colonization, was nobody's territory, or without legitimate relation to a sovereign, or whether such relations sustained, and if they existed, whether such titles approved in either Morocco or Mauritania or both. The ICJ reported its terminations on October 16, 1975, and as pointed out in the formal document, "the documents and information given on the Court show the existence, at the time of Spanish colonization, of legitimate relations of loyalty between the Sultan of Morocco and some of the Saharan tribes living in the territory of Western Sahara (Hodges, 1982: p. 12). The ICJ emphasized that Rio de Oro and Saguia el-Hamra were not unoccupied and uninhabited territory before their colonization by Spain and that there existed legal relations of loyalty between the Sultan of Morocco and some of the entities living in the territory of Western Sahara (Advisory Opinion, I.C.J. Reports 1971: pp. 31-32, paras. 52-53).

Thus, the ties between Morocco and Western Sahara were regarded to be chronologically puissant and only broken and divided by colonial rule. It is certain that at that time when Spain colonized Western Sahara, the Kingdom of Morocco had its own character, and this special character stemmed from the fact that this state was founded on a common bond of Islam, as well as the allegiance of Saharaoui tribes through their caids or Sheikhs to the Sultan. Conversely, the ICJ stated that its findings are insufficient to Morocco's claims to have excised territorial sovereignty over the Western Sahara. Here, the difference appears clear between the Western and Moroccan concepts of the meaning of sovereignty. Sovereignty is represented by the person of the Sultan in which his subjects accept his political and religious authorities, and his legal authority on the land in through his influence on the people residing in it. This was completely disregarded by the ICJ.

4. A Critique of the ICJ through the Western Sahara Dispute

The interpretation of the Advisory Opinion in the international court has not been specifically positive towards the Western Sahara case. From a general point of view, as Carrillo Salcedo highlighted in the "Libre determinación Journal...,"

it is very wrong that the court made the possibilities offered by the call for an opinion to escape, since it could have been an excellent occasion, which had not been fully taken advantage of, for the ICJ to specify certain unclear aspects of the Law on decolonization though, at least in law doctrine, this was the objective engaged by the recall from the General Assembly. From a deep understanding and, it should be questioned to what extent the General Assembly would have been able to debate its policy, created through an endless sort of resolutions, in response to an opinion of the ICJ which it had demanded. Indeed, if, after twenty years of action by the General Assembly in the struggle for the rights of the peoples of Western Sahara, (Ben-Meir, 2010: pp. 63-86) the opinion had disproved the concept of the General Assembly, the Assembly would have discovered itself in a very hard position, particularly taking into account the fact that, even if the Advisory Opinions of the ICJ are not of a mandate nature, if the decisions of the latter set up the existence and the content of the international rule with authority, it seems only rational that the requesting organ should adapt its conduct to the legitimate decision unless it wants to disprove this rule. Meanwhile, the view of an Advisory Opinion of the ICJ is not officially necessary for the parties. Its objectives are to identify “the legal issues involved in conflicts among States,” and in this norm to support the General Assembly in negotiating the dispute. Advisory opinions do, after all, have influential aspects and real authority (Rockower, 2002: p. 12). They represent in the end the legal statements of the Supreme International Court; both the Court itself and the General Assembly have viewed advisory opinions as authoritative expressions of law shaping authority equal to that of judgment. Therefore, the Court was incapable of coming up with any relationship creating ties of sovereignty between either of the challenging states and the Western Sahara, in impact returned the dispute to the General Assembly, rendering the non-binding character of the advisory opinion of no real meaning.

5. The Right of Self Determination in the Frameworks of International Law

The doctrine of the right to self-determination is a right of people to engage in their political administration, far from the unnecessary influence of external actors. In some circumstances, for instance, when a territory is coming out of occupation or colonial control, or rationally, its people are subject to significant positions of injustice and coercion within their current state structure, self-determination describes the right of the people to establish an independent state and decide its government for itself (de Cherif, 1991: pp. 49-58). In other cases, a state’s right to territorial integrity under international law doctrine may demand that people who at the present remain within a recognized state practice their rights to self-determination internally and domestically, signifying within the remaining state’s governmental framework.

A conclusion that the right to self-determination is a basic principle of custo-

mary international law has shaped the basis of a total of opinions, resolutions, and judgments of the ICJ both first and following the Western Sahara Case. It was indicated in the Court's Advisory Opinion in legitimate constitutional circumstances for States of the Continued Presence of South Africa in Namibia notwithstanding the Security Council Resolution. It was also noted and tested to another Non-Self-Governing Territory in the Judgment.

As stressed upon, Regarding the Western Sahara Conflict, the notion of self-determination which came into the context of resolutions 1514, 1541 and 2625 does not stipulate that self-determination applies to a part or a region of a sovereign UN Member State on the contrary, it states that it is applicable to peoples, who are geographically separate, or ethnically, culturally or linguistically distinct from the country administering them and in western sahara more than 80% of the Saharaoui population live there, they participate in the political life, they are part of the public policies of the regions.

In addition, the implementation of self-determination is framed by a fundamental principle, namely that of territorial integrity which is inscribed in the United Nations Charter.

Specifically paragraph 6 of resolution 1514, states that "any attempt aimed at partially or totally destroying the national unity and the territorial integrity of a country is incompatible with the aims and the principles of the United Nations".

The Moroccan endorsement of self-determination was built on a well-grounded assumption that the population of Western Sahara, if given the opportunity, would choose reunification with the Moroccan motherland. The links between Morocco and Western Sahara were considered historically strong and only broken and divided by colonial rule (UN. General Assembly (29th Sess. A/9631), 1975: pp. 103-104).

6. The UN Peace Settlement Process in Western Sahara Case between Morocco and Polisario Front (SADR)

In terms of a peaceful legal settlement process in the Western Sahara case, the dispute on voting acceptability and efforts to advance voter drafts delayed the referendum that was at the end released in 2000. The peace settlement procedure would take another direction when James Baker II, former US Secretary of State, was selected as UN Secretary Personal Envoy to Western Sahara in 1997. Baker would come up with two alternatives during the time of his presence: the Baker Plan I in 2001 and the Baker Plan II in 2003. Despite common intermediation and negotiation works, Baker failed to get the two parties together to agree on his plans. In 2004, Baker fully failed his mission leaving the peace process in an unsolvable stalemate (Zunes & Mundy, 2010). In pursuit of filling the gap made by the lack of a clear settlement process of this dispute, the UN Security Council (1997) has been frequently calling upon the parties and countries of the North African region to cooperate with the United Nations to break up the current deadlock and to reach progress through a political solution. By 2007, particularly, both parties presented their propositions and suggestions to the United Na-

tions. On April 10, 2007, the Polisario didn't bring anything new to the table and presented to the UN Secretary-General Ban Ki-Moon his same proposal; a draft called "Proposal of the Frente Polisario for a jointly acceptable Political Resolution convincing the Self-Determination of the people of Western Sahara." On the other hand, the Kingdom of Morocco, had submitted a new proposal to the United Nations, in response to Security Council calls for a definitive political solution. Morocco named the proposal the "Moroccan Initiative for Negotiating an Autonomy Status for the Sahara within the Moroccan Sovereignty", which would see some administrative, legislative and judicial powers transferred to residents, who would themselves run their affairs democratically.

Finally, for a long-standing dispute in North Africa on one hand and among the Maghreb region on the other, the United Nations has been working hard to find a definite resolution to the Western Sahara case, and attempting to bring together the protagonist parties into a table of negotiations and effective diplomatic attitudes no matter how autonomy, sovereignty or self-determination. For the current situation of Western Sahara status quo, the upcoming outcomes would be seen in two following points: First of all, the outcomes of this conflict are not very attractive, despite the ongoing significant increases of terrorist sects in the Sahel region, where affiliated between Al-Qaeda in the Islamic Maghreb region (AQIM) and the Polisario Front (SADR) have been exposed (Martin 2004: pp. 651-660). Similarly, since Morocco's reintegration of Western Sahara, Algeria has contested the move and in retaliation, began supporting the Polisario militarily, diplomatically, and financially. The Algerian Republic was determined that by challenging Morocco's claim to Western Sahara, it would prevent it from strengthening and enriching its position in North Africa, paving the way for Algeria to become the pre-eminent power in the region (Laadam, 2019: pp. 92-99). For the Moroccan side, the solution to this Western Sahara dispute increases from a legal surges of the Algerian regime that must, genuinely, give the essential political attitude to end the unresolved case over Western Sahara. Finally, the international actors are incapable of coming up with a compatible solution for the rational reason that there are no international outcomes in the conflict.

7. Conclusion

The Western Sahara case from the international law approach refers to the ongoing dispute over the sovereignty of the Western Sahara region, a territory situated in Northwest Africa. This issue involves examining the legal aspects and principles of international law that apply to the regional conflict.

The case has been brought by various international actors, including the International Court of Justice (ICJ) and the African Union. The ICJ issued an advisory opinion in 1975 stating that there were legal relations of allegiance between the Sahrawi people of Western Sahara and the Kingdom of Morocco, but it did not determine the sovereignty of the territory due to the involvement of the Algerian government to undermine Moroccan foreign policy in Northern

Africa.

Based on this statutory case, the UN has been engaging in facilitating negotiations among the conflictual parties, including Morocco, the SADR, and the neighboring country Algeria. Thus, the UN has established the United Nations Mission for the Referendum in Western Sahara (MINURSO) to monitor the ceasefire between Morocco and the Polisario Front. Despite numerous attempts to resolve, the Western Sahara dispute remains unresolved.

Understandably, the failure of the Security Council to resolve Western Sahara dispute is characterized by the following: the UN member states' failure to agree to a peaceful resolution of the conflict from the outset and to hold the Polisario Front (SADR) along with Algeria solely responsible for maintaining the status quo by impeding any resolution outcome from Morocco and thus cutting off the political negotiations (Kleiboer, 1996: pp. 360-389). This means in practice more refugees suffering in Tindouf camps as well as human violations. These two parties, the Polisario and Algeria weakened the efficiency of the Security Council and made it part of the crisis and not an important part of the peaceful settlement.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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