

Western Sahara: The 'question' of sovereignty

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The Western Sahara conflict is often described as a territorial dispute that pits Moroccan irredentist claims to the territory against the indigenous Saharawi population's countervailing desire to create an independent state there. From 1997 to 2004, James Baker, the former United States Secretary of State, mediated this issue, which has been on the Security Council's agenda since 1988 and subject to a cease-fire monitored by the United Nations Mission for the Referendum in Western Sahara since 1991. Shortly after he resigned his position as Personal Envoy of the United Nations Secretary-General to Western Sahara, Baker, in an interview with the United States public television program, *Wide Angle*, described the conflict in the following terms:

This issue is really not unlike the Arab-Israeli dispute: two different peoples claiming the same land. One is very strong, one has won the war, one is in occupation [ie, Morocco] and the other is very weak [ie, Polisario].

Ahead of recent negotiations between Morocco and Polisario in Manhasset, New York, the United Nations Secretary-General, Ban Ki-moon, likewise wrote,

If the negotiations [in Manhasset] are to lead to a positive outcome, both parties must recognize *that the question of sovereignty is, and always has been, the main stumbling block in this dispute,* and that it is in this highly sensitive area that a solution will need to be found.¹

While such descriptions of the Western Saharan conflict are technically accurate, they elide over a very important fact. With respect to Western Sahara, there is no 'question' of sovereignty. The landmark 1975 opinion of the International Court of Justice on Western Sahara concluded that the indigenous people of Western Sahara, at the time of Spanish colonisation in 1885, constituted the sovereign power in Western Sahara. This is the legal basis of Western Sahara's right to self-determination, which Morocco has attempted to block since taking the territory from Spain in 1976.

To justify these claims, I shall simply summarise the arguments of the court and Morocco as found in the International Court of Justice's *Western Sahara Advisory Opinion* of 1975. From this reading of the court's opinion, this paper will make two interlocking conclusions that are important when analysing and mediating the Western Sahara conflict:

- Legally, Western Sahara belongs to the native people of the territory as the sovereign power; and
- Morocco's occupation of Western Sahara is a blatant violation of the United Nations Charter prohibition of aggression and forced annexation.

Western Sahara: No man's land?

The International Court of Justice opinion on Western Sahara was (ironically, in hindsight) requested by Morocco in 1974, shortly after Spain declared its intention to hold a referendum on independence. On 30 September of that year, Morocco addressed a request to the United Nations General Assembly. Morocco wanted a binding decision of the International Court of Justice as to whether or not Spain had occupied Moroccan territory when it established a colony in 1885. Mauritania, having also raised a claim to Spanish Sahara, backed

Morocco's request. Spain, however, would not submit to binding arbitration. Instead, Madrid would accept an advisory opinion on the question of Western Sahara in the context of the United Nations Charter and applicable resolutions.

So, on 13 December 1974, the United Nations General Assembly passed its resolution 3292, which requested an advisory opinion of the International Court of Justice on the following questions:

- I Was the Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?
If the answer to the first question is in the negative,
- II What were the legal ties between this territory and the King of Morocco and the Mauritanian entity?

The ICJ heard to arguments from Morocco, Mauritania, Spain and Algeria in the summer of 1975.

The first hurdle that the court had to clear was to determine whether or not Western Sahara was a 'no man's land' at the onset of Spanish colonisation in 1885.

To this first question, the court quickly answered 'No'. Western Sahara was not a no-man's-land. Western Sahara belonged to a people, but it was neither Morocco nor Mauritania. Based on all the evidence, the court found that the lands were

inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.

The fact that Spanish colonial officials had entered into agreements with these indigenous inhabitants, further invalidated any suggestion of *terra nullius*.²

In other words, the International Court of Justice determined that Western Sahara had belonged to the Western

Saharans at the time of colonisation. This is an important point to remember. The court had determined that the native Saharawi were the sovereign power in Western Sahara *before* hearing Morocco's arguments. The court was able to proceed to the second question, not because Morocco or Mauritania ever held sovereignty over Western Sahara, *but in spite of it*.

However, under its United Nations General Assembly mandate the court had to give Moroccan and Mauritanian claims a fair hearing.

First, however, the court had to determine the meaning of 'legal ties'. In this case, the International Court of Justice decided that it was looking for legal ties 'as may affect the policy to be followed in the decolonization of Western Sahara'. The onus was on Morocco and Mauritania to prove that their 'legal ties' to Western Sahara were sufficient to deny the Saharawi the sovereign right to self-determination.

The Moroccan case for 'internal' recognitions of sovereignty over Western Sahara

Morocco's presentation to the International Court of Justice had four major points. Morocco's argument began with a claim of 'immemorial possession' dating from the Islamic conquest of North Africa over thirteen hundred years earlier. Remarking on this claim, the court was dismissive: The court felt that the 'far-flung, spasmodic and often transitory character of many of these events' rendered 'the historical material somewhat equivocal as evidence of possession of the territory'.

The second claim presented by Morocco's jurists was an assertion of 'geographical continuity' between their nation and Western Sahara. On this point, Morocco cited an International Court of Justice precedent, the *Legal Status of Eastern Greenland*, where Denmark's possession of a part of Greenland

translated into sovereignty over the whole. The court, however, did not accept this argument because, as had already been established, Western Sahara was, in 1885, populated by a highly organised people. In the case of Greenland, on the other hand, its status as *terra nullius* was fundamental to the court's ruling in favour of Denmark. The court not only found Morocco's claim to geographical continuity 'somewhat debatable', but was unimpressed with Morocco's 'indirect inferences drawn from events in past history'.³

The third and fourth aspects of Morocco's case were, what it termed, evidence for 'internal' and 'external' displays of Moroccan sovereignty over Western Sahara. Regarding the former, the Moroccan delegation explained the nature of the pre-colonial Moroccan state. The 'Sherifian State', according to the Moroccan delegation, was such that whether or not certain social groups fell under the direct control of the central power of the Sultan, all groups acknowledged his 'spiritual authority' as a descendant of the Prophet Mohammed (*al-sharif*) and the commander of the faithful (*amir al-mu'minin*). The pre-colonial Moroccan state not only included the lands under the formal control of the Sultan (*bilad al-makhzan*), but also lands outside of it (*bilad al-siba*) where his spiritual authority was still allegedly supreme. 'Because of a common cultural heritage', the Moroccan delegation argued, 'the spiritual authority of the Sultan was always accepted'. (Although it is not mentioned in the court's opinion, the Moroccan assertion was that Friday prayers were always said in the name of the Sultan, whether in the *bilad al-makhzan* or the *bilad al-siba*.)

While the International Court of Justice allowed this fluid conception of sovereignty, it nevertheless found Morocco's empirical backing unsatisfactory. Indeed, some of the 'historical evidence' seen by the court suggested that Morocco could not

demonstrate sovereignty *within parts of southern Morocco*, not to mention Western Sahara. As the court commented, the southern region of Morocco between the Sus and the Dra'a rivers (just north of Western Sahara) was in 'a state of permanent insubordination and part of the Bled Siba'. This, the court felt, 'implies that there was no effective and continuous display of State functions even in those areas to the north of Western Sahara'.⁴

The Moroccan case also attempted to demonstrate that Western Sahara had 'always been linked to the interior of Morocco by common ethnological cultural and religious ties', which were severed by European colonisation. The Moroccan delegation claimed ties of allegiance between the Moroccan Sultan and certain Saharan leaders (*qa'ids*), particularly of the *Tiknah* tribal confederation, whose ranges traditionally spread from the region of the Nun river in southern Morocco to the *Saqiyah al-Hamra'* region in northern Western Sahara. The court, however, felt that the evidence presented 'appears to support the view that almost all the *dahirs* [decrees by the Sultan] and other acts concerning caids [*qa'ids*] relate to areas situated within present-day Morocco itself' and therefore 'do not in themselves provide evidence of effective display of Moroccan authority in Western Sahara'. The court added that none of the evidence was convincing enough to conclude that the Moroccan Sultan had imposed or levied taxes in Western Sahara.

The Moroccan delegation then highlighted the career of Shaykh Ma' al-'Aynayn, a recognised and powerful leader in westernmost Sahara. Ma' al-'Aynayn became the personal representative of the Moroccan Sultan in the late nineteenth century and led resistance movements against colonial domination. The court, however, was not convinced that Ma' al-'Aynayn was always acting in Morocco's interests. 'As to [Shaykh Ma' al-'Aynayn]', the Court noted, 'the complexities of his career may

leave doubts as to the precise nature of his relations with the Sultan'. Indeed, history suggests that Ma' al-'Aynayn led anti-colonial resistance movements to take the Moroccan throne, not to restore it. The court was well aware of this: 'Nor does the material furnished lead the Court to conclude that the alleged acts of resistance in Western Sahara to foreign penetration could be considered as acts of the Moroccan State'.

Most important of all, the Moroccan team noted that King Hassan I personally visited parts of Western Sahara in 1882 and 1886, where some Saharan tribes reaffirmed their ties of allegiance (*baya'ah*) to the Sultan. Yet Hassan I's expeditions to the south before colonial domination, the court pointed out, 'both had objects specifically directed to the Souss [Sus] and the Noun [Nun]', well north of Western Sahara.

Though the International Court of Justice remained unconvinced of 'Morocco's claim to have exercised territorial sovereignty over Western Sahara', it did not 'exclude authority over some of the tribes in Western Sahara' (ie *Tiknah* tribes). This claim, however, did not extend to the two Rgaybat confederations, the most dominant in Western Sahara by population and range', or other independent tribes living in the territory'. So far, 'even taking account of the specific structure of the Sherifian State', the court could not find 'any tie of territorial sovereignty', nor could it believe that Morocco had 'displayed effective and exclusive State activity in Western Sahara'. The only thing that the court found, at that point, was that 'a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory'.⁵

The Moroccan case for external recognition of sovereignty over Western Sahara

The fourth and most important aspect of the Moroccan case

was claims of international or 'external' acknowledgement of sovereignty over Western Sahara. This final part of the Moroccan argument was based upon treaties between the Moroccan Sultan and governments Spain (1767 and 1861), the United States (1836) and Great Britain (1856). All of these 'shipwreck' treaties dealt with the safety and recovery of sailors and cargo. Morocco also presented an 1895 treaty with Great Britain, which pertained to the lands between the Dra'a river (in Morocco) and Cape Boujdour (Western Sahara); an 'alleged' 1900 protocol of the 1860 Treaty of Tetuan with Spain; and a Franco-German correspondence in 1911.⁶

The Moroccan delegation argued before the court that the eighteenth article of the 1767 Spanish-Moroccan Treaty of Marrakesh, recognised the Moroccan Sultan's ability 'to have the power to take decisions with respect to the "Wad Noun and beyond"'. Yet the Spanish text of the treaty, which differed from Morocco's Arabic version, stated, rather unambiguously, that the Moroccan Sultan

refrains from expressing an opinion with regard to the trading post which His Catholic Majesty wishes to establish to the south of the River Noun, since he cannot take responsibility for accidents and misfortunes, because his domination [*sus dominios*] does not extend so far.⁷

To further authenticate the Spanish version of the treaty, the Madrid delegation provided relevant diplomatic exchanges to the court.

Moving closer to the time of Spanish colonisation, the court heard arguments over a shipwreck clause (art 38) in the 1861 Hispano-Moroccan Treaty of Commerce and Navigation. The Moroccan delegation argued that article 38 was explicit Spanish recognition of the Sultan's sovereignty over Saharan tribes, later exercised in the safe delivery of the sailors back to Spain in the

case of the vessel *Esmeralda*, taken captive after a shipwreck 180 miles south of the Nun river. The Spanish delegation, however, provided documents showing that it was not the Moroccan Sultan's influence, but rather the actions of 'Sheikh Beyrouk', a prominent local leader (*qa'id*) in the Nun, who had freed the sailors by negotiating directly with the Spanish Consul at Mogador (now Essaouira). The court quickly came to the realisation that the 1861 treaty and *Esmeralda* case did not 'warrant the conclusion that Spain thereby also recognized the Sultan's territorial sovereignty'. Instead, Morocco's argument only reaffirmed what the court had already determined: the Moroccan Sultans exercised 'personal authority or influence' on Tikhah *qa'ids* of the Nun. The court, however, was clear in that this should not 'be considered as implying international recognition of the Sultan's territorial sovereignty in Western Sahara'.⁸

The next piece of evidence presented to the court was an 1895 Anglo-Moroccan agreement. Morocco claimed this as proof of British recognition of the Sultan's authority as far south as Cape Boujdour in Western Sahara. The International Court of Justice, however, felt that Morocco's interpretation of the agreement was 'at variance with the facts as shown in the diplomatic correspondence', and that 'the position repeatedly taken by Great Britain was that Cape Juby [Tarfaya, present-day Morocco] was outside Moroccan territory'. Far from proof of sovereignty, the court described the 1895 treaty as a British promise 'not to question in future any pretensions' of the Moroccan Sultans in that area. It was not, the court made clear, 'recognition by Great Britain of previously existing Moroccan sovereignty over those lands [ie Tarfaya, Morocco]'.⁹

Regarding the 1860 Treaty of Tetuan, the Moroccan delegation entered into evidence an additional protocol on the enclave of Ifni, allegedly signed in 1900. Yet the Spanish

delegation denied the protocol's existence, and so the court could not consider it.

The last piece of evidence in the Moroccan case for externally recognised sovereignty was a 1911 Franco-German understanding, which suggested that the region of Saqiyah al-Hamra' (northern Western Sahara) was a part of Morocco, even if Río de Oro (southern Western Sahara) fell outside. The Spanish delegation, however, pointed out that the 1904 and 1912 Franco-Spanish Conventions, which had established the colonial borders between Spanish Sahara, Mauritania, Morocco and Algeria, unmistakably recognised Saqiyah al-Hamra' as falling outside of Morocco's control. The court ultimately did not see the 1911 exchange of letters as much more than an acknowledgement of France's 'sphere of influence', rather than as 'constituting recognition of the limits of Morocco'.¹⁰

The International Court of Justice's Final Opinion

From the four arguments the Moroccan delegation had made before the International Court of Justice (immemorial possession, geographical continuity, internal displays of sovereignty, and external displays of sovereignty), the court could not find 'any legal tie of territorial sovereignty between Western Sahara and the Moroccan State'. This finding was reiterated with respect to both Mauritanian and Moroccan claims: 'the materials and information presented to [the Court] do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity [ie *Bilad Shinqiti*']'. The court acknowledged that there had been 'a legal tie of allegiance between the Sultan and some, though only some, of the tribes of the territory' (ie *Tiknah* sub-groups). Yet in its final conclusion, the court explained the significance of these minimal 'legal ties':

Thus the court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.¹¹

The sixteen judges voted 14 to 2 against Morocco and 15 to 1 against Mauritania. In both cases, the dissenting vote was an *ad hoc* judge appointed by Morocco under a special International Court of Justice rule. Yet in the case of Morocco, the other dissenting voice felt that the court should have rejected Morocco's claims more vehemently.

Indeed, hours after the opinion was read on 16 October 1975, King Hassan took the court's caveat – there had existed some ties between the Moroccan monarch and some of the *Tiknah* tribes – and announced to the world that Morocco would march 350 000 civilians into Western Sahara whether Spain left or not. In this game of chicken, it was Madrid who flinched. Almost a month after the International Court of Justice declared its support for Western Saharan self-determination, Spain announced on 14 November that it would soon leave Western Sahara, handing it over to Morocco and Mauritania. The fact that Morocco deliberately misconstrued the International Court of Justice opinion to justify an invasion of the Spanish controlled Western Sahara, is a flagrant contravention of the United Nations Charter, which explicitly prohibits the expansion of territory by force. Morocco's major crime in Western Sahara is not simply a thirty-three year denial of self-determination for the Western Saharans, but more importantly, a premeditated act of aggression almost without parallel.

Conclusion

'Realism' in international affairs, as opposed to 'Liberalism' or

'Idealism', attempts to achieve two contradictory aims. On the one hand, realism claims to accurately analyse 'the way things really are' based upon two fundamental concepts: interests and power. On the other hand, realism is also the language of diplomacy. In the name of 'objectivity' (read: neutrality), this kind of realism values descriptions that are either non-offensive or the least offensive possible. In the case of Western Sahara, we can see clearly how realism as a kind of diplomatic etiquette is incompatible with realism as an accurate description of international politics. While it is true that both Morocco and Polisario have launched claims to Western Sahara, and why both claim sovereignty over Western Sahara, it is not true that both claims are equal. The major defect of realism is that it does not often correspond to reality, whether historical reality or contemporary reality.

In recent months, the claim to realism has been (ab)used by officials of the United States government who now argue that a solution to the conflict based upon respect of self-determination is not feasible. The major reason for this is that Morocco will not accept any solution that could lead to Western Sahara's independence, nor will the United Nations Security Council (read: France and the United States) force Morocco to accept the independence of Western Sahara through a referendum. The obvious blind spot in this 'realist' argument is the existence and legitimacy of Western Saharan nationalism. To assume that the best solution to Western Sahara is to take the mutually exclusive positions of the parties and divide in half, is to ignore history and present realities.

Recently retired lead United Nations negotiator to Western Sahara, Peter Van Walsum (Baker's replacement), recently acknowledged that the law is on the side of Polisario. The problem, as Van Walsum explained, is that France and the

United States are not willing to force Morocco to accept anything Morocco does not like. But the Security Council is not wise King Solomon. It should realise that Morocco's willingness to have the baby metaphorically cut in two – in the name of 'autonomy' – reveals the real mother of Western Sahara. If the Saharawi refuse to share Western Sahara with Morocco, it is because Western Sahara is their land. Cynical pleas to 'realism' will not change this reality.

For the international community, at least the part that cares about the fundamental international norms, it is not necessary to reiterate that Western Sahara is clearly an exceptional country. It is Africa's last colony, after all. Yet that is not the most important part. The case of Western Sahara presents a more fundamental challenge to international order. Morocco's invasion, occupation and colonisation of Western Sahara is the most-egregious attempt by any country to expand its territory by force since the end of World War Two. Indeed, it could be argued that Morocco's invasion of Spanish Sahara was more intentional than Israel's occupation of territories seized after the 1967 Arab-Israeli war. It is true that Morocco is clearly in violation of the norms governing Non-Self-Governing Territories. But Morocco is even more clearly in violation of the most fundamental, basic rules prohibiting aggression and occupation.

The International Court of Justice opinion on Western Sahara is most often cited as proof definitive that Western Sahara is owed a referendum on self-determination. However, this claim is based upon a half-reading of the *summary* of the court's opinion. A full reading of the court's entire opinion shows that the ICJ was very clear that the sovereign power in Western Sahara lay and still lies with the native Western Saharans. The purpose of a self-determination referendum in Western Sahara is not to decide between competing sovereignties, whether

Moroccan or Saharawi, but to poll the Saharawi as to whether or not they wish to retain, modify or divest their sovereignty. We need to stop talking about self-determination as an act that constitutes sovereignty in Western Sahara. Sovereignty is already constituted in Western Sahara. As the International Court of Justice said, Western Sahara has never been *terra nullius*.

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Endnotes

¹UN Security Council document S/2007/385, par 13, emphasis added.

²ICJ opinion pars 81-3.

³*Id* pars 90-3.

⁴*Id* pars 94-7.

⁵*Id* pars 99,103-7.

⁶*Id* par 108.

⁷*Id* pars 109-10; brackets in original.

⁸*Id* pars 112-18.

⁹*Id* pars 119-20.

¹⁰*Id* pars 121-7.

¹¹*Id* pars 129, 162.