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The right to self-determination and the indigenous people of Western Sahara

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Abstract *This paper discusses the right to self-determination of the indigenous people of Western Sahara. It studies their post-colonial struggle for self-determination, which has been denied owing to Morocco's occupation and forcible annexation of their territory in 1975. It also looks into the process by which the right of the Sahrawi people to self-determination has been institutionalized within the United Nations (UN) system as well as the ongoing UN peace efforts to implement this right and the prospects to which they may lead. Overall, the paper seeks to demonstrate that the continuation of the conflict in Western Sahara is a strong reminder of an enduring violation of a fundamental norm of international law, and the responsibility of the UN and the international community as a whole to redress this aberrant situation.*

Introduction

The political developments taking place in Western Sahara since 1975 have brought to the fore the actualities of the Sahrawi people as a people still engaged in a post-colonial struggle to exercise their right to self-determination. The Moroccan occupation and forcible annexation of Western Sahara in 1975 has constituted a clear denial of the right of the indigenous Sahrawi population to self-determination as established by the United Nations (UN) and its associated bodies. The prolongation of this conflict, which has lasted well over three decades, is a reminder of an enduring violation of a fundamental norm of international law and a responsibility incumbent upon the UN and international community as a whole to redress this aberrant situation.

Against this backdrop, this paper will discuss the right to self-determination from the perspective of the indigenous people of Western Sahara. More precisely, it will look into the process by which the right of the Sahrawi people to self-determination has been 'institutionalized' within the UN system, especially by the General Assembly (GA), the Security Council and the International Court of Justice (ICJ). Although this process has been progressing for more than 40 years, the people of Western Sahara have yet to exercise their right to self-determination. In this context, the paper will examine how this right has been violated owing to Morocco's illegal annexation of Western Sahara. The UN's successive efforts to tackle this situation will also be discussed with special emphasis on the current UN peace process in Western Sahara and its prospects.

This article emphasizes that the discussion of the right of the Sahrawi people to self-determination is prompted not only by academic interest but also by the fact that the implementation of this right still constitutes the legal and political prerequisite for achieving a just, viable and lasting solution to the conflict in Western Sahara.

Self-determination and international law

On the founding of the UN in 1945, Article 1 (paragraph 2) of its Charter specified that one of the purposes of the organization is 'to develop friendly relations among nations based on respect for the principle of equal rights *and self-determination of peoples*' (emphasis added).¹ Self-determination was also alluded to in Chapter VII on the International Trusteeship System² and in Chapter XI on the Declaration Regarding Non-Self-Governing Territories.³ In particular, GA Resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples affirmed that 'all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.⁴ As will be discussed later, this resolution is of great importance to the case of Western Sahara.

Scholars point out that upon the adoption of GA Resolution 1514 (XV), also termed the 'Magna Carta' of decolonization, self-determination emerged as a right rather than a simple principle of international law. Hurst Hannum (1990) suggests that the political imperative of decolonization served as the driving force behind the shift from the Charter's principle of self-determination to the right of self-determination expressed later in the international human rights covenants of the 1960s. It is evident that the relationship established by the UN between self-determination and decolonization provided the basis for the widespread acceptance in international law of the fact that this right is solely applicable to peoples under colonial and alien domination, thus excluding 'indigenous peoples' as subjects of the same right. However, the objective of the present paper is limited to examining the right of self-determination in relation to a particular case in which the applicability of this right to the people concerned has been established by the UN and its concerned bodies.

Juan Soroeta Licerias (2001) points out that although the issue remains unsettled, self-determination has become a peremptory norm of international law, of which violation is expressly characterized as a crime. In particular, GA Resolution 2621 (XXV) of 12 October 1970 (paragraph 1) declared, 'the further continuation of colonialism in all its forms and manifestations is a crime which constitutes a violation of the Charter of the United Nations, the Declaration on Granting Independence to Colonial Countries and Peoples and the principles of international law'.⁵ These terms are again reaffirmed in GA Resolution 2625 (XXV)

¹ < <http://www.un.org/aboutun/charter/> >, accessed 20 November 2007.

² Ibid.

³ UN Charter, Chapter XI, Article 73, < <http://www.un.org/aboutun/charter/> >, accessed 20 November 2007.

⁴ A/RES/15/1541 of 15 December 1960.

⁵ A/RES/25/2621 of 12 October 1970, paragraph 1.

of 24 October 1970.⁶ Another closely related issue is the prohibition in contemporary international law of the use of force against peoples under colonial and alien domination. In accordance with the two international covenants of 1966, all states not only have a negative legal duty to refrain from taking any measures that would deprive colonial peoples of exercising their right to self-determination, but also are under positive obligation to respect, promote and assist them in the exercise of this right.⁷

The exercise and implementation of the people's right to self-determination presupposes the free expression of their will. Resolution 1514 (XV) (paragraph 5) provides that colonialism is to be brought to an end in accordance with the 'freely expressed will and desire' of the peoples concerned. Furthermore, GA Resolution 1541 (XV) of 15 December 1960 details the principles that determine the outcomes to which the exercise of self-determination could lead in the case of a 'Non-Self-Governing Territory'. Principle VI states that

a Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State.⁸

What is of great importance is that all three cases should be the result of a free and voluntary choice by the people of the territory concerned and expressed through informed and democratic processes.

In its discussion of the Western Sahara case, the ICJ referred to the principle of self-determination as a right held by peoples. Gros Espiell (1980) suggests that 'peoples' here denotes 'a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future'.⁹ On the basis of this understanding I will now look into the historical, social and political processes that had given rise to the sense of 'people' among the indigenous population of Western Sahara and consequently their collective desire to ensure a common future.

The Sahrawis: indigenous people of Western Sahara

Western Sahara (the former Spanish Sahara) is located in northwest Africa and covers an area of 266,000 square kilometres. It is bordered by Morocco to the north, Algeria to the northeast and Mauritania to the southeast and has a 1,200-kilometre-long Atlantic Ocean coastline. The present internationally recognized borders of the territory were defined as a consequence of three Franco-Spanish treaties in 1900, 1904 and 1912. Western Sahara is rich in mineral resources; in addition to its extensive phosphate deposits, it is believed to harbour substantial iron ore and to have a great potential of large offshore oil reserves. The territory is also renowned for the rich fishing waters off its long coastline.

⁶ Also known as the 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations'; see A/RES/25/2625 of 25 October 1970.

⁷ A/RES/21/2200 of 16 December 1966.

⁸ A/RES/15/1541 of 15 December 1960.

⁹ E/CN.4/Sub.2/405/Rev.1 (1980).

In its advisory opinion on Western Sahara of 16 October 1975, the ICJ held,

The information furnished to the Court shows (a) that at the time of colonization Western Sahara was inhabited by *peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them*; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over *terra nullius*: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes. (Emphasis added)¹⁰

The overarching conclusion of the Court, drawn from the many historical facts at its disposal, was that an indigenous population inhabited Western Sahara prior to Spanish colonization and that due to their subsequent subjection to alien domination they were therefore entitled to exercise their right to self-determination. The importance of this conclusion can also be appreciated against the backdrop of both Moroccan and Mauritanian claims that denied the existence of a distinct socially and politically organized precolonial Sahrawi entity.

Given this context, it is perhaps useful to examine the historical, social and political processes that had given rise to the sense of a collective 'self' or 'people' among the indigenous population of Western Sahara. Although it is difficult to tell with certainty when a sense of a common Sahrawi identity emerged for the first time, there is much evidence that prior to Spanish colonization there was a widespread sense of belonging to Western Sahara as a distinctive territory with a distinct population. The majority of the inhabitants of the territory were able to 'imagine' themselves as a sociopolitical community with relatively demarcated borders before and after the Spanish colonial administration of their land during the 19th century.

Taking a constructivist or performative approach to understanding identity formation, the formative phases of Sahrawi national identity were forged and maintained through 'performative acts' (Austin 1962). These acts, on top of the narratives that simply identify a pre-existing collective identity, brought into being the Sahrawi national identity. However, focusing on the constructed and imagined nature of national identity does not mean that it is neither real nor tangible. What it means is that national identity is not pre-given, but is socially produced, reproduced and normalized through various institutional and discursive practices.

Historical studies on the region indicate that the present-day Sahrawis represent a fusion of the indigenous Sanhaja Berbers, Africans and Arabs who came from Arabia during the 13th century (Mercer 1976; Hodges 1983a). Successive invasions of the territory by the Arabs led to the gradual Islamization and Arabization of the indigenous people. This process gave rise to an ethnic, linguistic, religious and cultural symbiosis that gradually led to the formation of the constitution of the Sahrawi people represented by the tribes and tribal confederations that inhabited the area now known as Western Sahara.

Traditionally, the Sahrawis lived as nomads and pastoralists; they spoke a common dialect called Hassaniya that is much closer to the classical Arabic than other dialects spoken in the region. They developed their own sociopolitical forms of organization such as Ait-Arabin ('Council of the Forty'), an inter-tribal assembly that would meet to discuss the affairs of the population in times of peace

¹⁰ ICJ (1975) Advisory Opinion on Western Sahara, 1975, ICJ 12, paragraphs 75–83.

and war. These forms of government were distinctly different from the system of emirates in neighbouring Mauritania and the monarchical dynasties in Morocco. Francisco Palacios Romeo (2001) suggests that the elements that serve to confer upon the Sahrawis the category 'people' are language, religion, territory and common essential habits giving rise to uniform and interrelated ethnicities, and in this sense 'the Sahrawi collectives deserve the double consideration as an ethnicity and a people' (Palacios Romeo 2001, 49). It is in this context that the inhabitants of the territory became aware of their existence as a people, an awareness whose constitutive elements consisted in their sociopolitical structures, their common culture and territory and the self-identification of themselves as Sahrawis. As some authors have also observed, the discursive construction of national identities is always accompanied by the construction of difference and singularity (Hall 1996). In the Sahrawi case, it was the set of elements and social practices, mentioned above, that progressively contributed to defining the Sahrawi identity and outlining the 'limits' between it and other neighbouring social and cultural identities that inhabited northwest Africa.

Colonial rule in Western Sahara began in 1884 when the territory was declared a Spanish protectorate as a result of the Berlin Conference (1884–1885) that divided Africa among the European powers. In the colonial period, Sahrawi national identity was further developed and consolidated by the emergence of more organized political expressions of Sahrawi modern nationalism. Certain factors intervened significantly in these transformative processes. Spain's decision in 1958 to turn Western Sahara into a Spanish province with its own legislation and general assembly, known as Djemaa, transformed the territory into a purportedly autonomous entity where the local population would gradually take control of managing its own affairs (Aguirre 1988). The policy of sedentarization pursued by the colonial administration led to substantial changes in the social configuration and socioeconomic reality of the territory. As a result, the originally nomadic population slowly became sedentary with many Sahrawis becoming employed as cheap labour for developing and expanding the colonial infrastructure (Hodges 1983a; 1983b).

The evolution of the Sahrawi indigenous population from the nomadic to the 'modern' era reinforced the sense of belonging to a larger community that went beyond traditional kinship ties. The incipient Sahrawi national consciousness was initially translated into demand for greater political participation in the affairs of the territory, and then developed into renewed anti-colonial sentiments creating the conditions for the emergence of the first Sahrawi movement with a strongly nationalist direction. It was in this context that Harakat Tahrir ('Liberation Movement') was established in the late 1960s by a group of Sahrawi nationalists. Unlike the past forms of Sahrawi resistance, Harakat Tahrir was the first urban-based Sahrawi political movement. It pressed for greater social and economic reforms and demanded the decolonization of the territory. Although the movement was crushed by the colonial authorities in 1970, it paved the way for the re-emergence of Sahrawi nationalism in a more organized and vigorous form. The emblematic moment of this historical process was the creation of the Frente popular para la Liberación de Saguaiat El Hamra y de Rio de Oro (or 'the Frente POLISARIO' as it is better known) as a liberation movement with the declared objective to use armed struggle to achieve independence from colonial domination. The movement immediately gained overwhelming support among the Sahrawi

population and was later recognized as the sole and legitimate representative of the Sahrawi people.

Spain terminated its colonial administration of the territory in 1976. Though it failed to fulfil its responsibilities in decolonizing it in line with the wishes of its indigenous population, it nevertheless created the conditions and structures on which a common sociopolitical and national Sahrawi entity would be founded. First, Spain delimited the borders of the territory through a series of international agreements—borders that the Organization of African Unity (OAU) maintained in line with the principle of intangibility of frontiers inherited from the colonial era. Second, it contributed, through its colonial policy, to the emergence of a relatively homogeneous demographic community united and conscious of its own distinctive self: the Sahrawi people. It was in this context that the Frente POLISARIO proclaimed the Sahrawi Arab Democratic Republic (SADR) on 27 February 1976. The SADR is now a full member of the African Union and is recognized by more than 80 countries. Its creation has undoubtedly contributed to deepening the Sahrawi population's sense of their collective identity. The new state structures and symbolic representations have been instrumental in promoting and normalizing a distinct Sahrawi national identity.¹¹ In view of the foregoing analysis of self-determination and the formative stages of the Sahrawi collective identity, it could be concluded that it was logical for the UN to affirm the applicability of the right of self-determination to the indigenous people of Western Sahara and set in motion a process to decolonize the territory.

The United Nations and the decolonization of Western Sahara

The UN has been involved in the issue of Western Sahara for over 40 years since the territory was placed in 1963 on the list of Non-Self-Governing Territories under Chapter XI of the Charter. The list includes those territories whose peoples have not yet attained a full measure of self-government.¹² However, it was on 16 December 1965 that the UN's involvement in the issue began in earnest when the GA adopted its first resolution on what was then called Spanish Sahara. In Resolution 2072, recalling Resolution 1514 (XV) of 14 December 1960, the UN requested Spain to take all necessary measures to liberate the 'Spanish Sahara from colonial domination'.¹³ By virtue of this resolution, Spain was also recognized as the 'administering power' of Western Sahara. This meant that Spain was requested to regularly transmit to the UN statistical and other information of a technical nature relating to the territory in accordance with the UN Charter (Article 73[e]).

Between 1966 and 1973, the GA adopted seven more resolutions on the territory, all of which affirmed the right of the Sahrawi people to self-determination. The resolutions also reiterated the need to hold a referendum on self-determination

¹¹ For a discussion of the role of the SADR in the promotion and sedimentation of Sahrawi national subjectivity, see San Martin (2005).

¹² See A/RES/15/1541 of 14 December 1960 on the principles that should guide member states in determining whether or not an obligation exists to transmit the information called for under Article 71(e) of the Charter.

¹³ A/RES/20/2072 of 16 December 1965, paragraph 2.

while reaffirming Spain's responsibility as an administering power.¹⁴ Thus, the GA had unequivocally established, from the outset, that the Spanish/Western Sahara should be decolonized through the exercise of the indigenous people's inalienable right to self-determination in accordance with Resolution 1514 (XV).¹⁵ Yet, Spain disregarded the UN resolutions. Despite the pressure brought to bear by increasing attacks of the Frente POLISARIO and the UN's successive calls for the decolonization of the territory, it was not until August 1974 that Spain finally declared that it was prepared to organize a referendum on self-determination in Western Sahara in early 1975. To that end, it started compiling a census of the local population. In response to Spain's decision, King Hassan II of Morocco announced that his country could not accept a referendum that included the option of independence for Western Sahara. Mauritania, for reasons of self-preservation, also joined Morocco in claiming Western Sahara and in calling for arbitration by the ICJ to make a judgement on the precolonial legal status of the territory.

By the end of 1974, the GA sought a resolution urging Spain to postpone its planned referendum until the GA was able to decide on a decolonizing process that included an ICJ advisory opinion. It also decided to dispatch a visiting mission to the territory to report the situation on the ground. The UN decision marked the beginning of what would be a major turning point in the process of decolonization of Western Sahara. The visiting mission toured the region from 8 May to 14 June 1975. It visited Western Sahara, Morocco, Mauritania and Algeria. In its report, the mission stated that a huge majority of Sahrawis wanted independence and were against the territorial claims of both Morocco and Mauritania. It also stated that the Frente POLISARIO appeared to be the dominant political force in the territory and enjoyed unprecedented support among the population (Soroeta Licerias 2001, 51).

At the request of Morocco and Mauritania, the GA adopted Resolution 3292 (XXIX) of 13 December 1974 requesting the ICJ, without prejudice to the application of the principles embodied in resolution 1514 (XV), to give an advisory opinion at an early date on the following questions:

1) Was Western Sahara (Río 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 was negative:

2) What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?¹⁶

Morocco and Mauritania were hoping that the ICJ would find sufficient legal ties between them and Western Sahara to legitimize their acquisition of the territory. However, the Court, after an extensive examination of the documents presented by Mauritania, Morocco and Spain, decided unanimously that Western Sahara

¹⁴ A/RES/21/2229 of 20 December 1966, A/RES/22/2354 of 19 December 1967, A/RES/23/2428 of 18 December 1968, A/RES/24/2591 of 16 December 1969, A/RES/25/2711 of 14 December 1970, A/RES/27/2983 of 14 December 1972 and A/RES/28/3162 of 14 December 1973.

¹⁵ A/RES/15/1541 of 15 December 1960.

¹⁶ A/RES/29/3291 of 13 December 1974.

was not *terra nullius* prior to Spanish colonization in 1884, since it was inhabited by socially and politically organized peoples.¹⁷ Regarding the legal ties between the territory and Morocco and Mauritania, the Court concluded that

The materials and information presented to it *do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity*. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly 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. (Emphasis added)¹⁸

The Court's ruling was unequivocal in terms of (a) denying the existence of any ties of territorial sovereignty between Morocco and Mauritania and Western Sahara and (b) endorsing the decolonization of the territory on the basis of the principle of self-determination exercised through the free and genuine expression of the will of its indigenous population. The ICJ advisory opinion's groundbreaking ruling continues to constitute the main legal framework in which the question of Western Sahara has been dealt with by the UN and its relevant bodies.

Denial of self-determination: Morocco's illegal annexation

The GA's decision to ask for an advisory opinion from the ICJ enabled it to determine a policy aimed at accelerating the decolonization process in the territory. The ICJ ruling put the decolonization of Western Sahara back on track by enabling Spain to resume its efforts to hold the self-determination referendum in the territory. However, two major events took place that have come to embody the persistent denial of the right of the indigenous people of Western Sahara to self-determination. But first it is important to locate Morocco's wider claim to Western Sahara. Morocco's sovereignty claims to the territory of Western Sahara originated in the 'Greater Morocco' ideology advanced in the late 1950s by Alal al-Fasi, the leader of the Moroccan Istiqlal party, shortly after Morocco gained its independence from France in March 1956.¹⁹ This expansionist ideology, endorsed by the monarchy, asserted that the then Spanish Sahara, Mauritania, part of Mali, a large part of the western Algerian desert and even part of Senegal all belonged to a distant Moroccan empire (Villar 1982; Hodges 1983a).

However, in practice Morocco's numerous claims were fraught with contradictions. For instance, on 14 October 1957 the Moroccan representative before the UN Special Committee on Decolonization expressed radical opposition of his

¹⁷ It is to be noted that the ICJ did not hear from any representatives of the indigenous population of Western Sahara, since the Court could only hear evidence from states.

¹⁸ ICJ (1975) Advisory Opinion on Western Sahara, 1975, ICJ 12ICJ, <<http://www.icj-cij.org/docket/index.php?sum=323&code=sa&p1=3&p2=4&case=61&k=69&p3=5>>, accessed 20 November 2007.

¹⁹ In the Spanish–Moroccan Declaration signed in Madrid on 7 April 1956 whereby Spain recognized Morocco's independence, Spain committed itself to respect 'the territorial unity' of Morocco 'in accordance with international treaties' (Soroeta Licerias 2001, 36–37). The treaties referred to in the declaration were the ones signed in 1910 and 1912 where Western Sahara was not considered part of Morocco's territorial unity.

government to the inclusion of Spanish Sahara, Ifni (a region in southern Morocco) and Mauritania on the list of Non-Self-Governing Territories. The argument was that these territories were all 'integral parts of Moroccan territory' (Soroeta Liceras 2001, 38). But as early as 1966 Morocco publicly recognized the right of the Sahrawi people to self-determination at a meeting of the same UN committee. This position was reiterated consistently until 1974. Furthermore, by the early 1960s, Morocco had quietly dropped its claims to parts of Mali and Senegal. The claim to Mauritania was upheld throughout the 1960s, but in 1969 King Hassan II finally recognized the country as an independent state. As for Algeria, Morocco's failed military campaign (known as the Sand War) to forcefully take part of Algerian western desert in 1963 eventually led to the signing of an agreement in 1972 recognizing the existing borders between the two countries. However, Morocco refused to ratify it.

After dropping all its territorial claims to the other countries, Morocco was hoping that its claim to the Spanish Sahara would be legally endorsed by the ICJ. The advisory opinion, however, dealt a heavy blow to Morocco's plans and put the monarchical regime in a very difficult situation. It is also noteworthy that the monarchy was challenged by two military coups against King Hassan II in 1971 and 1972. Although the monarch survived both attempts, the mounting discontent in the country, particularly amid the Moroccan military, made it even more difficult for the monarchy. Thus the monarchy stepped up its search for an outlet for its domestic problems. Shortly following the release of the ICJ advisory opinion, King Hassan II ordered the so-called 'Green March' of 350,000 Moroccans to 'peacefully' march into the Spanish Sahara in order to reclaim it. The march was finally set in motion on 6 November after Moroccan armed forces had already advanced and penetrated the northern part of the territory on 31 October 1975. In response, the Security Council unanimously adopted Resolution 380 of 6 November 1975 in which it deplored the holding of the march and called upon Morocco 'to withdraw from the Territory of Western Sahara all the participants in the march'.²⁰ However, the Green March was to set the stage for yet another development that would have serious consequences for the decolonization of Western Sahara.

While the march was withdrawn from the territory three days later, a secret deal was discussed in Madrid between the governments of Spain, Morocco and Mauritania. On 14 November 1975 a 'declaration of principles' (also known as the Madrid Tripartite Agreement) was signed by officials of the three countries. Under this declaration, Spain agreed to institute a temporary tripartite administration in the territory which would include representatives from Morocco, Mauritania and Spain. As a result, on 14 April 1976, Morocco and Mauritania signed an agreement in which Western Sahara was partitioned with the northern part given to Morocco and the southern part to Mauritania. It was also reported that Spain was assured of a 35 per cent share of the phosphates of Western Sahara (Hodges 1983a, 224). The Madrid agreement was then brought before the UN. On 10 December 1975, the GA ambiguously adopted Resolutions 3458 A (XXX) and 3458 B (XXX), which, notwithstanding their different wordings, both affirmed the right of the Sahrawi people to self-determination. Resolution A, whilst reaffirming all preceding UN resolutions regarding Spanish Sahara,

²⁰S/RES/380 (1975).

reaffirmed the responsibility of Spain and the UN towards 'decolonization of the Territory'.²¹ It also took note 'with appreciation' of the ICJ advisory opinion, whilst taking note 'with satisfaction' of the report of the UN visiting mission to the territory. By contrast, Resolution B, whilst reaffirming all preceding UN resolutions regarding Spanish Sahara and taking note of the advisory opinion and report of the visiting mission, also took note of 'the tripartite agreement'.²²

The fact that the GA took note of the agreement has raised many questions not only from the standpoint of international law, but also from that of *realpolitik*. It seems that the UN acted this way not only because of Spain's involvement as an administering power of the territory, but also and perhaps more significantly because of the role played by countries such as the United States (US) and France whose support for Morocco's position at the time was described as 'an act of political expediency grounded in East–West political alliances' (Franck cited in Mundy 2006, 291).²³ Still, what is important to stress is that the agreement did not transfer sovereignty over Western Sahara to Morocco and Mauritania.²⁴ This explains the fact that neither the UN nor any country in the world has recognized Morocco's claims of sovereignty over the territory.

Many scholars extensively discuss the illegality of the Madrid agreement (Saxena 1981; Ruiz Miguel 1995; Soroeta Licerias 2001). For Soroeta Licerias (2001), the agreement is illegal on account of the subjects intervening in it, its objective, its content and its effects. In particular, he points out that the agreement should be declared null and void because 'its objective was to deprive a people of their right to self-determination and independence' (Soroeta Licerias 2001, 149). By signing the agreement, the three signatories have thus violated two fundamental principles of international law, namely the right of colonial people to self-determination and the duty of states to fulfil in good faith their obligations in accordance with the UN Charter. The agreement has also led to a situation of enduring violation of international law following Morocco's annexation of Western Sahara in 1975—an annexation in violation of GA Resolution 2625 (XXV) of 24 October 1970, which prohibits territorial acquisition resulting from the threat or use of force.²⁵ In sum, the agreement constituted a 'forcible action' leading to depriving the Sahrawi people of their right to self-determination and independence.

In a situation where the logic of *realpolitik* was clearly allowed to displace international law, the international community did not intervene to forestall the consequences of the agreement which eventually led to the forcible and illegal annexation of Western Sahara by Morocco and Mauritania in 1975. The immediate result was the forced exile of a large number of the Sahrawi population and their eventual settlement in southwest Algeria. There are roughly 150,000 Sahrawis who have been living in refugee camps for the past three decades. In the territories

²¹ A/RES/30/3458 of 10 December 1975.

²² It also notable that Resolution 3458 A (XXX) was approved by a vote of 44 in favour, 41 abstentions and none against, while Resolution 3458 B (XXX) was adopted by a vote of 56 in favour, 34 abstentions and 42 against (Soroeta Licerias 2001, 145).

²³ For an interesting account of the US involvement in the '1975 Moroccan takeover of Spanish Sahara', see Mundy (2006).

²⁴ S/2002/161 of 12 February 2002, paragraph 6.

²⁵ A/RES/25/2625 of 25 October 1970.

under Moroccan occupation, the Sahrawi population has been systematically subjected to gross abuses of human rights.²⁶ In addition, Morocco has been engaged in massive resettlement campaigns whereby Moroccans are given incentives to settle in Western Sahara to the detriment of its local population.²⁷

In line with Resolution 2625 (XXV), which stipulates that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal', the UN has neither approved the occupation nor recognized the legality of the Moroccan annexation of Western Sahara. More precisely, in its Resolution 34/37 of 21 November 1979, the GA deeply deplored 'the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania'.²⁸ Once again, on 11 November 1980, the GA adopted Resolution 35/19, declaring again that it was 'deeply concerned at the aggravation of the situation deriving from the continued occupation of Western Sahara by Morocco'.²⁹ In the two resolutions mentioned above, the GA reaffirmed the inalienable right of the people of Western Sahara to self-determination and independence while also recognizing the Frente POLISARIO as the representative of the Sahrawi people. In particular, Resolution 34/37 recommended that the Frente POLISARIO 'should participate fully in any search for a just, lasting and definitive political solution to the question of Western Sahara'³⁰ in accordance with the resolutions and declarations of the UN, the OAU and the non-aligned countries. This recommendation would constitute the cornerstone of the UN policy when it again took up the question of Western Sahara at the end of the 1980s.

The peace process in Western Sahara

By the end of the 1980s, the huge costs incurred during the war made King Hassan II of Morocco realize the impossibility of a military victory in Western Sahara, particularly after the 'berm' strategy proved inadequate.³¹ This new situation gave both the UN and the OAU a greater chance to intervene to seek a peaceful and negotiated solution to the conflict. The possibility of reaching a negotiated solution in Western Sahara also began to take shape at a time when the political

²⁶ For example, refer to the reports of Amnesty International and Human Rights Watch on Morocco and Western Sahara from the 1990s onward: <<http://www.amnesty.org/ailib/aireport/index.html>>, accessed 20 November 2007. A recent account of the situation of human rights in Moroccan-occupied Western Sahara is contained in the report of the Office of the UN High Commissioner for Human Rights, dated 8 September 2006, which was leaked to the press; see <<http://www.arso.org/OHCHRrep2006en.pdf>>, accessed 20 November 2007.

²⁷ For an overview of the Western Sahara conflict, see Shelley (2004).

²⁸ A/RES/34/37 of 21 November 1979.

²⁹ A/RES/35/19 of 11 November 1980.

³⁰ A/RES/34/37 of 21 November 1979.

³¹ To stop the increasing attacks by the Sahrawi army, Morocco started building a series of defensive walls (known as 'berms') in the 1980s, the last of which is a wall 2,400 kilometers long dividing the territory in two and sealing the occupied areas from the outside world. This rock and sand installation is fortified with trenches, barbed wire and an estimated four million antitank and antipersonnel landmines, all of which are patrolled by some 120,000 soldiers. It is interesting to note that, unlike the Israeli wall in the Palestinian occupied territories, the Moroccan berm in Western Sahara has received little attention from

situation in the world was undergoing major developments. The end of the Cold War ushered in a 'new world order' in which the UN appeared more empowered to mediate, intervene and settle international conflicts.

In this context, the UN and OAU jointly elaborated a Settlement Plan that was agreed to by the two parties, the Frente POLISARIO and Morocco, on 30 August 1988 and adopted by Security Council Resolutions 658 (1990)³² and 690 (1991).³³ The objective of the plan was to hold a free and fair referendum under UN supervision in which the Sahrawi people could exercise their right to self-determination in choosing between independence and integration into Morocco. The two parties also agreed that the basis of voter eligibility in the referendum would be the last census conducted by the Spanish colonial administration in 1974, which counted some 75,000 individuals. With the deployment of the UN Mission for the Referendum in Western Sahara (MINURSO) in the territory to supervise the ceasefire, executed on 6 September 1991, the referendum was expected to take place in early 1992.³⁴ The referendum nevertheless has not yet taken place due primarily to Morocco's dilatory tactics and the passivity of the UN in the face of Morocco's obstructionism, coupled with the UN's inability to enforce its own resolutions.

Despite its earlier commitment to the self-determination referendum, Morocco immediately started to obstruct the implementation of the Settlement Plan. One main tactic was to try to impose on the UN an electoral body including the Moroccan settlers who were transferred to Western Sahara with the clear objective of altering the demographic composition of the territory and then tilting the ballot in Morocco's favour. It was only in August 1994 that MINURSO was able to start the identification of potential voters in the referendum. The process was shortly stalemated owing to Morocco's insistence on including more of its own people in the voter rolls. Instead of pressing Morocco to abide by the provisions of the Settlement Plan, the UN simply did nothing. The stalemate could only be overcome with the involvement of former US Secretary of State James Baker, who was appointed in 1997 by Kofi Annan as the Secretary-General's Personal Envoy for Western Sahara. Baker managed to reactivate the implementation of the Settlement Plan by bringing the two parties to direct talks on many occasions. The talks culminated in the Houston Agreement that was signed by the two parties in September 1997, satisfactorily resolving the main contentious issues that had impeded the implementation of the Settlement Plan.

As a result of Baker's efforts, MINURSO resumed the identification process in December 1997 and had completed it by January 2000. Of the approximately 200,000 applications to participate in the referendum, most of them lodged by Moroccan authorities, MINURSO eventually concluded that only 86,386 were genuine Sahrawis eligible to take part in the vote. This figure was close to what could be conceived of as a reasonable update of the last Spanish census of 1974.

Footnote 31 continued

world public opinion and the media, although it has been around for more than two decades.

³² S/RES/658 (1990).

³³ S/RES/690 (1991).

³⁴ MINURSO is the French and Spanish acronym for the United Nations Mission for the Referendum in Western Sahara.

With the voter rolls established, the next step was to hold the referendum. However, Morocco decided at this time to undermine the remaining stages of the peace process by lodging, in the name of its people, 131,038 appeals against the UN voter list. Once again, instead of pressing Morocco to abide by the provisions of the Houston Agreement, the UN chose to remain passive in the face of this new challenge, thus allowing the peace process to stall once more. It was then obvious that Morocco, contrary to its earlier commitments, was unwilling to go forward with a referendum when it was not sure of its outcome.³⁵ Despite all the procedural arguments advanced at the time, the fear of losing the referendum was the reason behind Morocco's change of heart and its rejection of the referendum.³⁶ The new Moroccan king, Mohamed VI, went as far as to declare in November 2002 that the referendum idea was 'obsolete'.³⁷ Since then, Morocco has sought to influence the UN through its privileged relations with some members of the Security Council, such as France, in a process aimed at legitimizing its occupation and illegal annexation of Western Sahara.

In 2003, in an attempt to break the deadlock, Baker presented his 'peace plan for self-determination of the people of Western Sahara' (also known as the Baker Plan), which was supported by the Security Council in its Resolution 1495 (2003).³⁸ The plan envisaged 4–5 years' autonomy for Western Sahara which would end with a referendum on the final status of the territory. Voters would then vote for independence, continued autonomy or integration. A new crucial element introduced by Baker was that the electoral body would include not only the indigenous Sahrawis but also 'residents' or Moroccan settlers in the territory since December 1999. As a gesture of goodwill, the Frente POLISARIO accepted the plan despite the risks it involved. Unfortunately, Morocco rejected it. Morocco's main objection was that the plan included independence as one of the ballot options. However, the Secretary-General in his report of 16 October 2006 stated that the 'United Nations could not sponsor a plan that excluded a referendum with independence as an option while claiming to provide for the self-determination of the people of Western Sahara' (paragraph 14).³⁹ In June 2004, Baker resigned from his post due mainly to Morocco's unwillingness to accept and implement the new plan and the realization that the Security Council was not prepared to compel Morocco to do so. With Baker's resignation, the peace process was again brought to a standstill.

As a reaction to the lack of firmness by the UN in the face of Morocco's obstructionist attitude, the Sahrawis in the occupied territories started, on 21 May

³⁵ In his report of 19 February 2002, the Secretary-General pointed out that 'Morocco has expressed unwillingness to go forward with the settlement plan' (S/2002/178 [2002], paragraph 48).

³⁶ In August 2004, in an interview with the Public Broadcasting Service (PBS), James Baker noted that Morocco became more nervous every time the UN got closer to holding the referendum, saying, 'the closer we got, the more nervous I think the Moroccans got about whether they might not win the referendum'; see <<http://www.pbs.org/wnet/wideangle/shows/sahara/transcript.html>>, accessed 22 June 2007.

³⁷ Speaking on the 27th anniversary of the Green March on 6 November 2002, King Mohamed VI of Morocco said that the referendum provided for under the UN Settlement Plan was 'obsolete' because it would be unrealizable in practical terms.

³⁸ S/RES/1495 (2003).

³⁹ S/2007/817 of 16 October 2006.

2005, a series of peaceful demonstrations, an intifada (or uprising). They called for respect of the right of the Sahrawi people to self-determination. There are numerous reports by major human rights bodies that document the gross human rights abuses perpetrated by Moroccan authorities against the Sahrawi population in the occupied territories. In the meantime, Morocco continues to plunder the natural resources of Western Sahara in violation of the right of its population to have permanent sovereignty over its resources. Today, after having rejected the idea of a UN-supervised self-determination referendum, Morocco is trying to use the UN to legitimize its illegal annexation of Western Sahara. On 11 April 2007, it presented to the UN a proposal entitled 'Moroccan initiative for negotiating an autonomy statute for the Sahara region'⁴⁰ within Morocco's sovereignty and territorial integrity. This initiative would allow all Sahrawis 'to run their affairs democratically, through various representative legislative, executive and judicial bodies'.⁴¹ In effect, the proposal is another Moroccan dilatory tactic aimed at gaining international recognition of its illegal annexation of a Non-Self-Governing Territory without meeting the essential requirements of UN doctrine and practice relating to decolonization.

This proposal evidently departs from the assumption that Western Sahara is already an integral part of Morocco's territory, which is clearly unfounded. As the Secretary-General stated in his report of 19 April 2006 (paragraph 37), no member state of the UN recognizes Morocco's sovereignty over Western Sahara.⁴² Besides, from a self-determination perspective, the proposal is clearly inconsistent with the UN rules applicable in colonial contexts, which require the free and genuine expression of the will of the people concerned through a popular consultation including independence as an option. The Frente POLISARIO has obviously expressed its complete rejection of the proposal because any autonomy project is contrary to the principle of self-determination as an inalienable right exercised by the people concerned (and not by the occupying power). In order to overcome the deadlock caused by Morocco, the Frente POLISARIO presented to the UN, on 10 April 2007, a proposal entitled 'Proposal of the Frente POLISARIO for a mutually acceptable political solution that provides for the self-determination of the people of Western Sahara'.⁴³ The proposal is based on two pillars: first, the need for the referendum on self-determination that includes the options already agreed to by the two parties and endorsed by the Security Council, and, second, should the referendum lead to the independence of Western Sahara, the Sahrawi state will be willing to establish strategic relations with Morocco in all domains particularly those that are or could be a cause of real or assumed concern to its northern neighbour. The position of the Frente POLISARIO, therefore, consists in defending the inalienable right of the Sahrawi people to self-determination to be exercised in conformity with UN-relevant resolutions and doctrine relating to decolonization.

On 30 April 2007, the Security Council adopted Resolution 1754 (2007) in which it called upon 'the parties to enter into negotiations without preconditions

⁴⁰ <<http://www.maec.gov.ma/Initiative/Docs/Initiative%20ang.pdf>>, accessed 20 November 2007.

⁴¹ Ibid.

⁴² <<http://www.arso.org/N0631054e.pdf>>, accessed 20 November 2007.

⁴³ <<http://www.arso.org/PropositionFP100407.htm#en>>, accessed 20 November 2007.

in good faith, taking into account the developments of the last months, with a view to achieving a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara' (paragraph 2).⁴⁴ In the context of the resolution, under the UN Secretary-General's auspices, delegations from the Frente POLISARIO and Morocco met in Manhasset (Greentree Estate) in the US, on 18–19 June and 10–11 August 2007. Delegations from the two neighbouring countries, Algeria and Mauritania, were also invited to the opening and closing sessions of the meetings. As the two rounds of negotiations did not yield any substantive results, the two parties are set to meet for a third round in the near future.

Prospects

Overall, in view of the foregoing account of the UN peace efforts, the situation in Western Sahara remains volatile, which may lead to many possibilities. Will it lead to a final solution to the conflict in line with the right of the Sahrawi people to self-determination, the continuation of the impasse, or, worst, the resumption of hostilities? This question cannot be easily answered. In my view, it now seems more likely that the impasse will continue for some time. Given the already known positions of the two parties and the lack of interest by the key powers in the Security Council to press for any solution, there seems to be no way out in the near future and the status quo is likely to continue for many months to come. Obviously, the continuation of the impasse has hitherto benefited Morocco, which continues to control three-quarters of Western Sahara whilst seeking to obtain international recognition of its *de facto* annexation of the territory.⁴⁵

Another possibility is that the two parties engage in direct negotiations in good faith, without preconditions, to achieve a mutually acceptable political solution in line with Security Council Resolution 1754 (2007) as outlined above. However, given the past history of negotiations between the two parties, where agreements were concluded and sanctioned by the UN and then violated with impunity by Morocco, negotiations may not lead to any substantive results unless new factors are brought into play. Among these factors may be the intensification of the Sahrawi popular uprising in the occupied territories, which may make the situation much harder for Morocco, compelling it to consider negotiating. However, it is still too early to assess what impact it may have on the situation in Morocco in the long run. Another related factor is the possibility of drastic internal change taking place in Morocco, which may compel Morocco to return to the negotiating table. What happened in Indonesia in 1998 in relation to the case of East Timor is an example of how significant changes in one camp could lead to the settlement of a protracted conflict.

Another important factor, which has hitherto been clearly absent, is a stronger involvement of the UN in resolution of the conflict and a stronger interest of key powers in exerting considerable pressure on Morocco to allow the

⁴⁴ S/RES/1754 (2007).

⁴⁵ In his report of 16 October 2006, the UN Secretary-General stated that 'for as the impasse continues, the international community unavoidably grows more accustomed to Moroccan control over Western Sahara' (S/2007/817, paragraph 20).

self-determination referendum to take place. Obviously, for the UN to engage very actively in the issue it may have to resort to Chapter VII of its Charter (which provides for enforcement measures). However, it is very likely that France will oppose any resolution imposing an unfavourable solution on Morocco.⁴⁶ Lastly, should all these factors fail to bring about a solution to the conflict, the likelihood of active hostilities between the parties would be greater. Although violent conflict will be in nobody's interest, it may be the last resort for the Sahrawi people to resume their legitimate struggle for their right to self-determination.⁴⁷ What is certain, however, is that any new war in Western Sahara will be a source of extreme instability not only in northwest Africa but also in the whole Mediterranean region.

Conclusion

To conclude, there are two main facts that frame the right of the Sahrawi people to self-determination in its legal and political aspects, and therefore the context in which a just, viable and lasting solution to the conflict could be achieved. First, on the basis of the detailed discussion above, it can be readily established that the legal basis for the right of the Sahrawi people to self-determination lies in the UN doctrine relating to decolonization and the continuing status of Western Sahara as a Non-Self-Governing Territory. This means that the Sahrawi people should exercise their inalienable right to self-determination and decide the status of their territory in a free, democratic and genuine way. Second, the cause of the armed conflict in Western Sahara was the joint Moroccan and Mauritanian invasion and subsequent annexation of the territory in 1975 in violation of international law and the ICJ advisory opinion. This forcible annexation still represents a clear violation of a fundamental norm of international law that the UN and the international community should address for the sake of peace and stability in the whole region.

As many commentators have observed, the conflict of Western Sahara is a classic example of the conflict between the logic of power or realpolitik and international law, which includes the right to self-determination. As such, its solution raises serious questions concerning not only the responsibility of the UN and the international community in this instance but also a fundamental principle and right underpinning the international system itself, namely a people's right to self-determination. In this context, the conflict of Western Sahara can only be resolved through the exercise of the Sahrawi people's right to self-determination through a free, democratic and UN-supervised referendum in which they can decide their political future, either to be independent, integrate into Morocco

⁴⁶ Franco–Moroccan relations date back to colonial times, when Morocco was a French protectorate. After Morocco's independence in 1956, relations between the two countries were further consolidated, making Morocco probably the closest African ally of France. With regard to Western Sahara, France has usually sided with Morocco, especially during the tenure of French President Jacques Chirac, who once referred to the occupied territories of Western Sahara as 'the southern provinces of Morocco' (*The Economist* 2001).

⁴⁷ A/RES/28/3162 of 14 December 1973.

or settle for another arrangement. In any case, the final word should rest with the Sahrawi people.

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