

The Question of Sovereignty in the Western Sahara Conflict

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1. Introduction

Most of us, I hope, are familiar with the history of the Morocco-Polisario conflict. Some of the conference participants have even lived through it.

So, for now, it is only necessary to briefly outline the context. In 1975 Morocco invaded Western Sahara to prevent Spain -- the colonial power since 1885 -- from organizing a UN-mandated referendum on independence. Since then, the Western Saharan independence movement, the Polisario Front (founded in 1973), has challenged Morocco's attempt to annex the territory by force. The first fifteen years of the conflict witnessed a low-intensity guerrilla war between Western backed Moroccan forces and the Algerian supported guerrillas of Polisario. Since a ceasefire was declared in 1991, a UN mission in Western Sahara has been on the ground, charged with the task of organizing a referendum on independence. Nearly seventeen years later -- to make a long story short -- Morocco still refuses to allow such a vote.

The Western Sahara conflict is often described as a case of competing sovereignties. In 2007, for example, the UN Secretary-General made this 'observation', which was subsequently removed from the record:

'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'. (UNSC S/2007/385, paragraph 13, emphasis added)

While we have come expect statements like these from mediators, there is a problem with the Secretary-General's reasoning. Regarding the question of sovereignty, he is simply wrong.

There is no question of sovereignty in Western Sahara. Yes, it is true that both Morocco and Western Saharan nationalists have launched mutually exclusive claims to Western Sahara. But to say that there are competing claims over Western Sahara obscures an important fact. One claim is legitimate and the other is not.

According to the landmark finding of the International Court of Justice (ICJ) in 1975, the native Sahrawi people of Western Sahara are the sovereign power in Western Sahara. Though Sahrawi nationalists were not allowed to present arguments before the court in 1975, the ICJ opinion ultimately found in their favour. The Court simultaneously called for the immediate holding of a self-determination referendum on independence while vehemently rejecting all Moroccan claims to historical title over Western Sahara.

I hope what I have just said is not controversial. The reason I have come to this conclusion is based upon a reading of the *entire* opinion of the ICJ on Western Sahara, rather than the oft-cited *summary*.

The first step in my argument is to provide some background to the questions put to the ICJ in 1974-5. Next I will look at how the Court came to the conclusion that the Western Saharans are the sovereign power. In the third and fourth sections, I will look at Morocco's case, which was based overwhelmingly upon claimed displays of domestic and international sovereignty. (I will ignore Mauritania's case because it has renounced all territorial claims and recognized Sahrawi sovereignty.) There is a good reason I will spend a great deal of time detailing Morocco's case. It is not, however, to argue that Western Sahara is self-sovereign because all other claims are weak or invalid. Rather, I think we need to be reminded that the Moroccan claim is, to be generous, very weak. And when juxtaposed against the limitations of Morocco's case, the claim for Sahrawi sovereignty becomes even stronger.

2. Western Sahara: *terra nullius*?

The ICJ opinion on Western Sahara was (ironically, in hindsight) requested by Morocco in 1974, shortly after Spain declared its intent to hold a referendum on independence. On September 30 of that year, Morocco put a request to the UN General Assembly. Morocco wanted a binding decision of the World Court as to whether or not Spain had occupied Moroccan territory when it established a colony in 1885. Mauritania, having also raised a claim on 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 UN charter and applicable resolutions.

So on December 13, 1974, the United Nations General Assembly passed its resolution 3292, which requested an advisory opinion of the ICG 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 listened 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 start of Spanish colonization 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 made agreements with these indigenous inhabitants further invalidated any suggestion of *terra nullius* (ICJ opinion, para. 81-3).

In other words, the ICJ had determined that Western Sahara had belonged to the Western Saharans at the time of colonization. This is an important point to remember. The ICJ had determined that the native Sahrawis 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 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 ICJ 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 enough to deny the Sahrawis sovereign right to self-determination.

3. The Moroccan case for internal recognitions of sovereignty

Morocco's presentation to the ICJ 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 ago. Remarking on this claim, the Court was dismissive: The ICJ 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 ICJ 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 buy this argument because, as had already been established, Western Sahara was, in 1885, populated by a highly organized people. In the case of Greenland, on the other hand, its status as *terra nullius* was fundamental to the Court's opinion in favour of Denmark. The ICJ 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' (ibid.: para. 90-3).

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 alleged 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 ICJ 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*, forget Western Sahara. As the ICJ 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' (para. 94-7).

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 colonization. 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 ICJ 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 recognized and powerful leader in the 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 Moroccan 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 ICJ remained unconvinced of 'Morocco's claim to have exercised territorial sovereignty over Western Sahara,' the Court did not 'exclude authority over some of the tribes in Western Sahara' (i.e., *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' (para. 99, 103-7).

4. The Moroccan Case for External Recognition of Sovereignty

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 (para. 108).

The Moroccan delegation argued before the Court that the eighteenth article of the 1767 Spanish-Moroccan Treaty of Marrakesh recognized 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'. (para. 109-10; brackets in original)

To further authenticate the Spanish version of the Treaty, the Madrid's delegation provided relevant diplomatic exchanges to the Court.

Moving closer to the time of Spanish colonization, the Court heard arguments over a shipwreck clause (Article 38) of 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 realization 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' (para. 112-18).

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 ICJ, 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 sultan's in that area. It was not, the Court made clear, 'recognition by Great Britain of previously existing Moroccan sovereignty over those lands [i.e., Tarfaya, Morocco]' (para. 119-20).

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 recognized 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 recognized 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' (para. 121-7).

5. The ICJ's final opinion

From the four arguments the Moroccan delegation had made before the ICJ (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 [i.e., *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' (i.e., *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 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. (para. 129, 162)

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 ICJ 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 Tikhah 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 ICJ declared its support for Western Saharan self-determination, Spain announced on 14 November that it soon leave Western Sahara, handing it over to Morocco and Mauritania. The fact that Morocco deliberately misconstrued the ICJ opinion to justify an invasion of the Spanish controlled Western Sahara, means that Morocco is guilty of two egregious and ongoing breaches of international order:

- 1) One : a flagrant attempt to expand territory by force and
- 2) Two: a deliberate denial of a people's right to self-determination.

6. Conclusion: What is to be done?

To conclude, I do not think that this analysis will change many opinions in Washington or Paris vis-à-vis Western Sahara. The problem is not that high officials are ignorant of the fact that Morocco has no right to be in Western Sahara. I have had enough conversations with policy-makers to know that the only people who think Morocco has a right to Western Sahara are paid to believe it. Lead UN negotiator Peter Van Walsum even recently acknowledged that Polisario is in the right. The problem, as Van Walsum explained, was France and the United States. They are not willing to force Morocco to accept anything Morocco does not like. The stability of Morocco -- whether real or imagined -- is a top strategic priority for the West. And whether we like it or not, Western Saharan nationalism threatens Morocco's stability. I do not think that these facts will change anytime soon.

But I am not addressing policy-makers. Rather, I think it is more important to talk to people who want to change policy. And so today I am asking all of us to re-think how we approach the issue of Western Sahara. Traditionally, we have tended to focus on the issue of self-determination. However, this is not the only approach. We would be doing ourselves a favour by re-framing our discussions around the issues of aggression, occupation and the denial of national sovereignty, not just self-determination.

Western Sahara is clearly an exceptional country. And I am not just talking about the people, whose generosity, compassion and patience is beyond belief. Western Sahara is indeed Africa's last colony. Yet that is not the most important part. We also need to remember that Western Sahara presents a more fundamental challenge to the post-World War Two international order. Morocco's invasion, occupation and colonization 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. Morocco is not only in violation of the norms governing Non-Self-Governing Territories. Morocco is also in violation of the most fundamental, basic rules prohibiting aggression and occupation.

The ICJ 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 was and is the native Western Saharans. The purpose of a self-determination referendum in Western Sahara is not to decide between competing sovereignties, whether Moroccan or Sahrawi, but to poll the Sahrawis 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 ICJ said, Western Sahara has never been *terra nullius*.