

## **State of Self-Determination: The Claim to Sahrawi Statehood**

*J.J.P. Smith\**

One must therefore address the question of self-determination in this case from the firm foundation of a territory unquestionably entitled to self-determination. The question for examination is what consequences follow from that fact.<sup>1</sup>

First, in dealing with those nations that break rules and laws, I believe that we must develop alternatives to violence that are tough enough to change behavior – for if we want a lasting peace, then the words of the international community must mean something.<sup>2</sup>

WESTERN SAHARA occupies an important place in contemporary international law. While its circumstances as the last colonial country in Africa and the right of its people to self-determination may now be unique, the case of Western Sahara presents compelling issues for the rule of law in the international order. The territory, marginally populated, remote from centres of power, and of little diplomatic import, ought to have scant relevance as a subject of law. But the nature of its people's right to self-determination and the persistent failure to of the organized international community to take positive steps in the assurance of that right offers useful lessons for the future, including the uniform application of the *United Nations Charter*, the role of the UN Security Council in cases of territorial annexation, the resolution of claims to self-determination by groups within existing states and the legal norms to apply in defining and creating new States.<sup>3</sup>

### **The question of Western Sahara**

The “question” of the right to self-determination for the people of the former Spanish Sahara, now Western Sahara, has been dealt with extensively.<sup>4</sup> The legal consideration of the matter,

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\* J.J.P. Smith, Barrister, Toronto, Canada. © 2010. Jeffrey.Smith@Tufts.Edu  
The remarks and conclusions in this paper are solely mine and are not intended to represent the views of any person or organization.

<sup>1</sup> Judge Christopher Weeramantry, *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports 1995, Dissenting Opinion, 107.

<sup>2</sup> United States President Barack Obama, “Nobel Peace Prize Acceptance Speech,” 10 December 2009 (accessed 10 December 2009); available from: <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>

<sup>3</sup> *Charter of the United Nations*, 1 UNTS XVI (hereinafter *The Charter* and the *UN Charter*). See <http://www.un.org/en/documents/charter/> (accessed 02 November 2009).

<sup>4</sup> “Western Sahara” is used here as the accepted English language name for the territory. The name “Spanish Sahara” is used in a colonial context as the name of the territory prior to November 1975. “Sahrawi” is meant to apply to persons and the people of the territory and its derivative, Saharawi, is used as part of the formal name of the Saharawi Arab Democratic Republic. Finally, “Saharan” is employed in a geographic context, for descriptions of the Saharan territory

tracing its origins to a 1975 advisory opinion of the International Court of Justice, has been exhaustive. Few issues seem to remain for analysis - let alone action of any kind - except for the hypothetical exercise of how a change in events might allow the people of the territory to make a choice about political future, in other words, to determine their status in a post-colonial setting.<sup>5</sup> All diplomatic efforts by the United Nations and interested parties to achieve the exercise of self-determination have failed because of the parties' intransigence. The Kingdom of Morocco denies the application of international law to the status of a territory it continues to occupy by force. The Polisario Front, for its part, steadfastly refuses to accept a less-than-proper self-determination process, one to be arrived at by a legitimate vote, including with it an option for the Sahrawi people to chose independence outright. For the past decade, these positions have been expressed in the comparatively minor issue of Sahrawis and Moroccan settlers in the territory entitled to vote, a controversy that cannot be resolved. The unique right of self-determination for post-colonial (that is, "non-self governing") peoples in territorially defined entities, having its basis in United Nations General Assembly Resolution 1514 (XV), will or will not have a final significant application in the case of Western Sahara.<sup>6</sup> The right of self-determination for colonized peoples, a legal norm it should be recalled that is binding on all states to support, is now something *sui generis*, with Palestine and Western Sahara the last, and egregiously stalled, examples. For the Sahrawi people, that right has been denied for 35 years stalled and the irony – if one can accept irony in the working of international law – of that is apparent when considering the right of self-determination in the non-self governing/post-colonial context has become steadily more absolute during such years. In the case of Western Sahara, the right to self-determination is now all but lost, obscured by an impasse of the conditions for a consultative referendum of the Sahrawi people and Moroccan settlers in the territory. It is not just politics that is to blame, including the intransigence of the organized international community in such a case of continuing illegal occupation, or that of the United Nations Security Council which has arguably failed in its Charter duty to reverse an act of international aggression, it also the lack of enforceability to the right. It is these circumstances which make the case of Western Sahara compelling, for if the organized international community is unwilling to reverse an illegal taking of territory (to say nothing of the displacement of the Sahrawi people) in the face of such a clear right, then there may be little hope of the capacity for international law to apply in all other cases of aggression and territorial conflict.

Given the impasse in the Sahara, a reframing of the dispute is timely. The question of Western Sahara has long and exclusively been framed as that of post-colonial self-determination. But every case is unique, as Palestine as a parallel example illustrates. But there is no compelling reason or legal norm to reject defining Western Sahara - the Saharawi Arab Democratic Republic (the SADR) - as an existing state. The problem in doing so, as least in response to a universal or United Nations or much more widespread recognition of

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<sup>5</sup> *Western Sahara Advisory Opinion*, ICJ Rep. 1975, 12.

<sup>6</sup> UN General Assembly Resolution 1514 (XV), *Declaration of the Granting of Independence to Colonial Countries and Peoples*. (December 14, 1960) (accessed 15 September 2009); available from <http://www.un.org/documents/ga/res/15/ares15.htm> (hereinafter Resolution 1514). Western Sahara is the last non-self governing, post-colonial territory in Africa. 14 other territories are regarded as non-self governing under Chapter XI of the *UN Charter*, almost all of them island possessions of the United Kingdom, including the Falklands, Pitcairn, and the Turks and Caicos.

the legal personality of the SADR is that a new range of more compelling, if not urgent, principles would apply in the case of a state occupied through force by another. Hence the paradox in moving from a paradigm of a clear right under international law, to one where a resolution would be necessarily diplomatic and political. There may yet be other options for resolution of the question of Western Sahara, even perhaps the vindication of an effective right of self-determination for the Sahrawi people. But they are few in number. The facts on the ground tend to become more cast in lead over time. To consider the options. The *status quo* might be accepted, as could a more assertive (and interventionist) posture by the United Nations Security Council. Partition of the territory - largely but not entirely occupied by Morocco - could be a further alternative. But these are hardly workable and not at all just. They would underscore the denial of the Sahrawi's right to self-determination. The circumstances suggest something else: creation or, more accurately, the full emergence of a Saharawi statehood. In other words, the question of Western Sahara has come to a point of considering whether there already exists a Saharawi state or if one by operation of international law should be created. The issue is usefully framed as a question:

Has Western Sahara become, consistent with established norms and state practice, a self-governing, independent state? If so, what are the *indicia* of that legal personality including by reference to precedent, the state's actual and presumed capacity, and the tests imposed by international law for the emergence of a new state?

It is submitted that an analysis to discern or "find" Sahrawi statehood is useful in its own right as contributing to the assessment of what would otherwise be done in respect of a stalled or defunct right of post-colonial self-determination. Equally, however, if such statehood already exists under international law or could emerge readily *ex statu nascenti* then the analysis is useful for a contribution to the law of the creation of states and perhaps a resolution of the Western Sahara case. Among other things, identity as a state would offer fresh diplomatic and legal perspectives on Morocco's occupation of the territory and the Polisario Front's standing as representative of the Sahrawi people. Within these, safeguards for human and minority rights in Western Sahara and a possible compelling of Morocco's withdrawal can be assessed from a new perspective. For 35 years the "question" of Western Sahara has been one of self-determination.<sup>7</sup> It may now properly be one of statehood.

## Spanish Sahara

The history of European colonization in the greater Maghreb and particularly in the Spanish Sahara after 1885 is well known.<sup>8</sup> Having fished the Saharan coast from the Canary Islands

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<sup>7</sup> See e.g. United Nations General Assembly Resolution 3437 (XXXIV), "Question of Western Sahara", 21 November 1979. "The General Assembly ... reaffirms the inalienable right of the people of Western Sahara to self-determination and independence ..."

<sup>8</sup> See Tony Hodges, *Western Sahara: The Roots of a Desert War* (Westport, Connecticut: Lawrence Hill & Co., 1983); Erik Jensen, *Western Sahara: Anatomy of a Stalemate* (Boulder, Colorado: Lynne Rienner Publishers, 2005); Yahia H. Zoubir and Daniel Volman, eds., *International Dimensions of the Western Sahara Conflict* (Westport, Connecticut: Praeger, 1993). See also documents tendered by the parties in the *Western Sahara Advisory Opinion* case, *supra* note 1. (Available at the ICJ website: <http://www.icj-cij.org/docket/index.php> [accessed 25 September 2009]). See also Jean Chappetz, "L'avis consultative de la C.I.J. du 16 Octobre 1975 dans l'affaire du Sahara occidental," *Revue générale de Droit International Public* (1976): 1132.

in varying degrees over the previous centuries, Spain pursued a progressive dominion over that coast, having first acquired enclaves in southern Morocco at Cape Juby and Sidi Ifni.<sup>9</sup> What became known as Spanish Sahara and later Western Sahara began as two colonial entities, Saguia el-Hamra in the north and, nearer Mauritania in the south, the Río de Oro. Their physical extent and thus territorial existence were defined by colonial frontier agreements between 1885 and 1912.<sup>10</sup> From Cape Blanc in the south to El-Ayoun 800 kilometers north, the Saharan coastline was the Atlantic edge of a windswept and inhospitable desert. It was not surprising that European colonial expansion had passed by, and that Spain's interest and presence would remain limited, only reckoning with the status of the Spanish Sahara following World War II. The development of the territory and advancement of the Saharawi people was slow until the 1960s. It was when decolonization became an imperative and phosphate mineral deposits in large, commercial grade quantities had been discovered inland that an impetus for a change in the colony's status began. During this time, Spain returned to Morocco the enclaves at Cape Juby (in 1958) and Sidi Ifni (in 1969). This was easily determined, given the insular nature and limited economic and political value of the two enclaves. Spain's overarching position in respect of decolonization was, however, one of intransigence, meeting the call of the U.N. in the 1960s with indifference. In the early part of the decade Spain simply did not heed calls for Western Sahara to be decolonized pursuant to General Assembly Resolution 1514, the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.<sup>11</sup> But the United Nations would not be dissuaded. In 1965, General Assembly Resolution 2072 required Spain "to take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination ..."<sup>12</sup> Similar hortatory resolutions followed through the early 1970s. Spain, like Portugal, proved intransigent on the issue of decolonization during the final years of its *ancien regime*.<sup>13</sup> The first steps toward decolonization began only in 1970 after Spain had suppressed a nationalist demonstration outside el-Ayoun, on the north coast of the colony, that June. Partly in consequence of this, the Sahrawi people's nationalist and independence movement, the Polisario Front, emerged over the next three years. In 1973 Spain was petitioned by the territory's provincial council, the Djemaa, for a consideration of

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<sup>9</sup> "In practice the Spanish presence remained entirely restricted at this time to the Lilliputian settlement at Villa Cisneros ... no attempt was made to control points in the interior until 1934." *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 49.

<sup>10</sup> The definition and application of the doctrine of *uti posseditis* in a consideration of Western Sahara's territory is considered below. On the territory's colonial boundary arrangements, see especially Ian Brownlie, *African boundaries: a legal and diplomatic encyclopaedia* (London: C. Hurst & Co., 1979) at 98, 147 and 149.

<sup>11</sup> *Supra* note 6. See generally Malcolm Shaw, *International Law*, 5<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003) at 225 ff. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

<sup>12</sup> UN General Assembly Resolution 2072 (XX), "Question of Ifni and Spanish Sahara," 16 December 1965. Available online: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/218/35/IMG/NR021835.pdf?OpenElement> (accessed 30 September 2009).

<sup>13</sup> As Indonesia proved by its occupation of East Timor until the end of the Suharto regime in 1998.

autonomy.<sup>14</sup> Later the same year, Spain gave the promise that “self-determination will take place when the population freely so requests.”<sup>15</sup> During these years Morocco’s stated position on the status of Spanish Sahara seemed uncontroversial: “It is known that [Morocco] proclaims solemnly and in front of other international authorities to be in favour of the self-determination of the people in this territory.”<sup>16</sup>

1974 brought an acceleration of events concerning Spanish Sahara. Spain now understood the financial gains to be had from developing the rich phosphate mine at Bou Craa in the north central part of the territory.<sup>17</sup> A “Statute of Autonomy” (*Estatuto Político*) was drafted for and approved by the Djemaa that July.<sup>18</sup> On August 20, Spain formally engaged the UN’s decolonization requirements, informing Secretary-General Kurt Waldheim that a self-determination referendum would be held in the first half of 1975.<sup>19</sup> Spain’s resolve had seemingly fallen into step with the UN’s decolonization agenda. These events progressed to the successful completion of a census in the territory in late 1974. A population of 73,497 persons was recorded.<sup>20</sup> To verify the necessary conditions for a self-determination referendum, a General Assembly “Visiting Mission” was dispatched to the Spanish Sahara. The three-person mission, General Assembly representatives from Côte

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<sup>14</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 149-173. “On May 10 [1973], at a secret congress, held somewhere near the Western Saharan-Mauritanian border, the Frente Popular para la Liberación de Saguia el Hamra y Río de Oro was finally born.” *Idem* at 160.

<sup>15</sup> *Ibid.* at 167. (Letter of Spanish President Francisco Franco to the Djemaa, 21 September 1973.)

<sup>16</sup> Declaration of Morocco’s Minister of Foreign Affairs in the UN General Assembly, 3 October 1973, in Ahmed Boukhari, “Memorandum by the Frente Polisario on Western Sahara Peace Process,” United Nations Doc. CRS/2009/CRP.15 (May 2009). “De 1966 á 1973 le Maroc et la Mauritanie ont approuvé ces résolutions et se sont prononcés en faveur d’un référendum ...” “L’avis consultative de la C.I.J. du 16 Octobre 1975 dans l’affaire du Sahara occidental,” *supra* note 8 at 1137.

<sup>17</sup> See *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 122 ff. “It is phosphate that has really put Western Sahara on the world mineral map.” *Idem* at 126. The continuing relevance of the phosphate industry at Bou Craa to Morocco’s occupation of Western Sahara is noteworthy. See Hans Corell, “The legality of exploring and exploiting natural resources in Western Sahara,” Conference on Multilateralism and International Law with Western Sahara as a Case Study”, Pretoria, 5 December 2008 (accessed 22 September 2009); available from: <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>

<sup>18</sup> *Western Sahara: The Roots of a Desert War* *supra* note 8 at 169. “The statute also converted the Djemaa from a purely consultative body into a legislative assembly with powers to enact laws relating to internal affairs, including the territory’s budget.”

<sup>19</sup> Letter from the Permanent Representative of Spain to the United Nations to the Secretary-General (20 August 1974), UN Doc. A/9714.

<sup>20</sup> “Milestones in the Western Sahara Conflict,” U.N. document, United Nations Mission for the Referendum in Western Sahara (MINURSO) (undated) (accessed 22 September 2009); available from: <http://www.minurso.unlb.org/milestones.pdf> The application of the results of the 1974 census would be a central issue in the efforts to conduct a self-determination referendum. “It must have been a matter of ever increasing concern to Morocco that the identification of nearly all those included in the 1974 census would be completed long before serious identification of the many applicants from the contested groups was advanced ... Morocco rejected ‘excessive reliance on the 1974 census’ ...” *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 at 80.

d'Ivoire, Iran and Cuba, visited widely throughout the colony in May 1975. Their report was unambiguous and perhaps unique for its consensus in the annals of UN monitored decolonization efforts, finding "an overwhelming consensus among Saharans within the territory in favor of independence and opposing integration with any neighboring country."<sup>21</sup>

### **Ad curiam sine referendum**

But a referendum would be delayed. Morocco and Mauritania, by 1974 more fully understanding the likely outcome of the self-determination process referendum and the tide of decolonization, were successful in arranging for the General Assembly consider the matter anew. It was decided that year by the General Assembly to refer the status of the territory (and therefore the Sahrawi people) to the International Court of Justice for an advisory opinion. General Assembly Resolution 3292 of 13 December 1974 asked two questions of the Court under its advisory jurisdiction:<sup>22</sup>

- I. Was Western Sahara (Río de Oro and Sakiet el Hamra) at the time of colonization by Spain at territory belonging to no one (*terra nullius*)?

If the answer to the first question is in the negative,

- II. What were the ties between this territory and the Kingdom of Morocco and the Mauritanian entity?<sup>23</sup>

In retrospect, there was perhaps only a single question that ought to have been properly put to the Court if the UN's decolonization process was to be credibly maintained. That was simply whether the Sahrawi people in the Spanish Sahara colony were entitled to exercise a right of self-determination. The case of Kosovo, with its advisory opinion request to the Court some 35 years, demonstrates the importance of framing clearly such questions on reference. Was the Court in the case of Spanish Sahara to find any connection or ties of the Sahrawi people to either neighboring state, that result would predictably serve as a pretext to deny self-determination.

Diplomatically and legally, however, the circumstances for a credible and peacefully achieved referendum would be never better than in October 1975. The Visiting Mission issued its report on October 15. It had recommended that "the General Assembly should take steps to enable those population groups to decide their own future in complete freedom and in an atmosphere of peace and security ..."<sup>24</sup> The ICJ published its advisory opinion the next

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<sup>21</sup> See "Report of the United Nations Visiting Mission to Spanish Sahara, 1975", UN Doc. Official Records: Thirtieth Session, Supp. no. 23, Volume 3, Chapter XIII, A/10023/Add.5, annex, page 7.

<sup>22</sup> See Article 96 of the *UN Charter*, *supra* note 3 and Article 65 of the *Statute of the International Court of Justice* (accessed 24 September 2009); available from: <http://www.icj-cij.org> See also John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford: Oxford University Press, 1999) at 182.

<sup>23</sup> "Question of Spanish Sahara" (accessed 24 September 2009); available from: <http://www.un.org/documents/ga/res/29/ares29.htm> The questions were posed "without prejudice" to the principles of Resolution 1514, *supra* note 6.

<sup>24</sup> "Report of the United Nations Visiting Mission to Spanish Sahara, 1975", *supra* note 21.

day. The Court found that the Spanish Sahara had been occupied by the Sahrawi people when Spanish colonization began, but not with pre-existing connections to Morocco or Mauritania sufficient for either state to claim sovereignty.<sup>25</sup> The right of a colonized, non-self governing people to self-determination had never been expressed more clearly.<sup>26</sup>

The exercise of that right by the Sahrawi people would be fundamentally denied them, with the events of the next few months casting the impasse in the Western Sahara that continues today. On October 17, 1975, in response to the Visiting Mission and the ICJ, Morocco declared a “Green March” whereby 350,000 civilians from that country would move into Spanish Sahara in “recognition of [Morocco’s] right to national unity and territorial integrity.”<sup>27</sup> The following weeks saw Spain – and the Security Council – lose any resolve to oppose the march. Morocco steadily occupied Spanish Sahara from the north, and Mauritanian army units entered from the south. By early November, with Francisco Franco incapacitated and soon to die, Spain yielded. All that remained was a formality of an agreement to give the circumstances legal cover.<sup>28</sup>

The arrangement by which Spain would cede the Spanish Sahara to Morocco and Mauritania was negotiated over the following weeks. The UN and the Sahrawi people were not consulted in the matter. The agreement of the three parties, known as the Madrid Accord, was premised on a “‘declaration of principles’ ... [including] that Spain would withdraw from Western Sahara by the end of February 1976 and in the meantime ‘proceed forthwith to

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<sup>25</sup> *Western Sahara Advisory Opinion*, *supra* note 5. Spain had argued during the proceedings that a question on what amounted to the assessment of historical claims was improper. Its concern was valid. “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”. *Idem* at paragraph 162.

<sup>26</sup> The ICJ’s first decision about self-determination was *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16. Three decisions following the *Western Sahara* advisory case addressed post-colonial self-determination: the 1995 *Case Concerning East Timor*, *supra* note 1; *Sovereignty over Pulau Ligitan and Pulau Sipadan, Application by the Philippines for Permission to Intervene (Indonesia/Malaysia)* (judgment of 23 October 2001), ICJ Rep. 2001 at 574 (separate decision of Judge *ad hoc* Thomas Franck); and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Rep. 2004, 136. In 2010 the Court will for the first time, if implicitly, consider self-determination by secession from an existing State in the case *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, an advisory opinion reference of the General Assembly under Resolution A/Res/63/3 (8 October 2008) (hereinafter the “*Kosovo advisory opinion case*”).

<sup>27</sup> Letter from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council (18 October 1975), UN Doc. S/11852. In response to the concerns of other member States, the Security Council requested the Secretary-General to consult with the parties “concerned” and “interested”. Security Council Res. 377 (22 October 1975).

<sup>28</sup> The Green March occurred on the scale with which it had been threatened, if only a short distance into the Spanish Sahara. *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 220 ff. It is evident Moroccan armed forces units moved into the territory at an early time.

institute a temporary administration in the Territory, in which Morocco and Mauritania will participate in collaboration with the Djemaa’.”<sup>29</sup> The Accord was only later made public and then provided to the UN formally as required by Articles 73(e) and 102 of the UN *Charter*.<sup>30</sup> However, the operative text of the Accords is generally understood.<sup>31</sup> Spain would leave the territory, giving up its status to the two occupying States and, presumably, the Djemaa. What became apparent in later years is that an undisclosed agreement (or agreements) done by Spain and Morocco in parallel to the Accord had divided the natural resources of the Sahara between the parties:

[I]n 1978 the Spanish press revealed that secret agreements on minerals and fisheries had been signed on November 14, 1975. One gave ‘joint recognition by Morocco and Mauritania to fishing rights in the waters of the Sahara benefitting eight hundred Spanish boats, for a duration of twenty years ...’ Another ... provided that Spanish capital ‘would have the right in principle to 35 percent of the equity’ in joint-venture companies for the exploration and exploitation of minerals in Western Sahara.<sup>32</sup>

In late 1975 Spain began to withdraw its armed forces and small civilian administration from the territory. On November 28, 1975 the Djemaa convened for the purpose of dissolving itself. It declared that it wanted “no use by Spanish colonialism of

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<sup>29</sup> *Ibid.* at 223. “The accords’ real meaning was clear enough. Thousands of Moroccan troops poured across the northern border, while a smaller number of Mauritanian troops arrived from the south.” *Id.* at 224.

<sup>30</sup> The Accord is reprinted in *Revue générale de Droit International Public* 80 (1976): 380. The basic text of the Accord simply provides for a tri-partite administration of the territory until Spain’s withdrawal in February 1976, with decolonization to proceed under an interim administration of Morocco, Mauritania and the Djemaa. See also UN GA Resolution 1541 (XV), “Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter.” (December 14, 1960) (accessed 15 September 2009); available from <http://www.un.org/documents/ga/res/15/ares15.htm>

<sup>31</sup> A “Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania” (19 November 1975) can be found at UN Doc. S.1180. The Madrid Accord is explained by Virginia Thompson and Richard Adloff in *The Western Saharans* (Totowa, New Jersey: Barnes & Noble Books, 1980). “The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer on any of the signatories the status of an administering power – a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the territory to Morocco and Mauritania in 1975, did not affect the international status of Western Sahara as Non-Self-Governing Territory.” Hans Corell, “Letter from the Under-Secretary-General for Legal Affairs to the President of the Security Council” (29 January 2002), UN Doc. S/2002/161 at para. 6.

<sup>32</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 224 (footnotes omitted.) See also Toby Shelley, *Endgame in the Western Sahara: What Future for Africa’s Last Colony?* (London: Zed Books, 2004) at 73 ff. The Spanish-Moroccan agreements do not appear to have been made public, although the Moroccan academic and one-time law of the sea advisor Driss Dahak has written: “... diplomatic negotiations were done as part of the Madrid Accord of November 14, 1975, providing that ‘The experts of the two countries will meet before 31 December 1975 for the purpose of charting a median line [maritime boundary] between the coasts of the two countries’ and that the Spanish government would present its concerns about petroleum exploration permits issued by Morocco in 1971 in areas between the Moroccan coast and the Canary Islands considered by Spain as having exceeded the equidistance line between the coasts of the two countries.” [Footnotes omitted.] *Les Etats Arabes et le Droit de la Mer* (Paris: Les Editions Maghrébines, 1986) at 239.



this puppet institution ...”<sup>33</sup> The General Assembly responded to the events of November in two resolutions. One directed Spain as the territory’s administering power to ensure a free exercise of the right of self-determination. The second resolution requested the three parties to the Madrid Accord, as the interim administration in Spanish Sahara, to “take all necessary steps” to realize the right.<sup>34</sup> The two resolutions were inconsistent and the second one gave legitimacy to Moroccan and Mauritanian occupation of the territory.

### **Occupation and a desert exodus**

With Western Sahara occupied by Morocco and Mauritania, and the United Nations unwilling to intervene, the Sahrawi population was displaced. It fled in substantial numbers to eventually encamp at Tindouf inside Algeria. Polisario began a sophisticated and determined campaign to drive Morocco and Mauritania from Western Sahara, roaming freely throughout the Saharan interior and at times into occupied towns along the coast. Fighting was heavy during the first months of 1976.<sup>35</sup> However, both Morocco and Mauritania were able to consolidate their hold on the territory, albeit with a large number of troops and at great cost. Two formalities remained to make permanent their occupation. The first came with Spain’s announcement of a final date for its withdrawal, February 28. In the event, it took place two days earlier while the Djemaa, illegitimately brought together by Morocco, met to ratify the handing-over of the territory to its occupiers.<sup>36</sup> The other was the division of the territory between Morocco and Mauritania on April 14, with Western Sahara carved in two. Morocco took for itself the richer, more developed part north of a frontier drawn diagonally north-west from the 23<sup>rd</sup> parallel of north latitude to the 24<sup>th</sup> parallel where it met the coast.<sup>37</sup> Mauritania would, for a time, be left with the southern part of the now-

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<sup>33</sup> “Full text of the historic document of El Guelta (Western Sahara) signed on 28 November 1975 by 67 members of the Saharan General Assembly, three Saharan members of the Cortes (Spanish parliament), the representatives of the other members of the Yema’a and more than 60 sheikhs and notables of the Saharan tribes”, annex to Letter of the representative of Algeria to the Secretary-General (9 December 1975), UN Doc. S/11902.

<sup>34</sup> General Assembly Resolution 3458A (10 December 1975) and GA Res. 3458B (10 December 1975), both at UN Doc. A/5438. “The opportunity to hold Spain accountable to the United Nations for arranging a regular self-determination plebiscite as envisaged by Part A was vitiated by Part B which, in effect, recognized the new tripartite status created in the Sahara by the Madrid Accords.” Thomas M. Franck, “The Stealing of the Sahara,” *American Journal of International Law* 70 (1976): 694 at 717.

<sup>35</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 229 ff. “Nomadism, which had gradually died away during the last decade of Spanish rule, now became entirely extinct. Most of the remaining nomads made their way to the Polisario camps in Tindouf by the spring of 1976, and any others found by the Moroccan forces were forcibly relocated to the towns and encouraged to build fixed homes there.” *Id.* at 281.

<sup>36</sup> *Ibid.* at 237. A majority of the members of the formerly self-dissolved Djemaa were not present, and the meeting has been considered illegitimate. The United Nations had been invited to attend, but its representative could not be present due to a last minute schedule change by Spain.

<sup>37</sup> *Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco* (14 April 1976), 1977 UNTS 117. The treaty also divided the continental shelf seaward from the Saharan coast.

former Spanish Sahara. In response to February's events the Polisario Front met and proclaimed the creation of the Saharawi Arab Democratic Republic.<sup>38</sup>

Mauritania's hold on its part of Western Sahara – the former Río de Oro province – would not last. By 1978, its weak government had been driven to bankruptcy by the conflict. The battle for liberation waged by the Polisario forces was impressive in its élan and the losses (and loss of prestige) sustained by Mauritania were growing. A coup occurred in the capital, Nouakchott, in July 1978. During the months that followed, Polisario's supporter, Algeria, was able to broker an agreement for Mauritania's withdrawal. It is notable that the agreement was a bilateral one, done directly between the Polisario Front and the authorities in Nouakchott. Mauritania committed to “withdraw definitively from the unjust Western Sahara war ...”<sup>39</sup> Had the United Nations been engaged in the matter, it is possible an attempt to hand over the ceded Río de Oro to the Polisario might have been pursued. But it was not to be. The Moroccan armed forces, with fighting strength superior to both Polisario and Mauritanian forces, consolidated by now in large numbers on the Saharan coast, moved easily to occupy all of Western Sahara.<sup>40</sup> Morocco's complete control over the coast and central areas of the territory allowed it in later years to build a defensive sand wall or “berm” that physically partitioned Western Sahara along a 2,000 km line.<sup>41</sup> Where Polisario had been effective in its military campaign during the end of the 1970s by hit-and-run attacks inside the territory, it would now see itself confined to the unsettled, hostile desert along Western Sahara's frontiers with Algeria and Mauritania.

Despite Morocco's occupation and enormous military presence in Western Sahara, the diplomatic dénouement it acquired for itself would continue over the next four decades. Morocco remained isolated over the question of Western Sahara during the 1980s even as it enjoyed the tacit support of the United States during the years of the Reagan administration.<sup>42</sup> Within days of the Polisario's declaration of an independent Saharawi Republic, recognition by other States began. By 1980, the Organization of African Unity was actively considering the conflict and had begun efforts to broker a resolution. Morocco rebuffed these attempts. King Hassan refused to engage the Polisario directly in discussions over a 1981 OAU peace

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<sup>38</sup> With effect from February 26, 1976. The matter is discussed below.

<sup>39</sup> *Mauritano-Sahraoui agreement*, signed at Algiers (10 August 1979), annex to “Letter from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General” (18 August 1979), U.N. Doc. A/34/427.

<sup>40</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 276.

<sup>41</sup> The berm was built from 1981 to 1986 and was intended to protect the so-called “Useful Triangle” of Smara, El-Ayoune (Laayoune) and Bou Craa. 10 feet high, it is mined and fitted with observation posts. “To man the defences, Morocco doubled its military presence in the territory again, to 160,000 men.” *Endgame in the Western Sahara*, *supra* note 32 at 192. There has been little international comment, including by the UN, on the subject of the berm including after the ICJ's 2004 *Palestine Wall advisory opinion*, *supra* note 26.

<sup>42</sup> [It was Morocco's] King Hassan who looked the most poorly placed to survive a long war of attrition, as economic difficulties, exacerbated by the war, and popular discontent mounted in Morocco. US military aid therefore served to prolong the war without much chance of altering its final outcome.” *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 365. See also “The Stealing of the Sahara”, *supra* note 34.

plan, an obduracy that would prove costly.<sup>43</sup> In 1982, at the apparent instigation of Algeria, the OAU considered the possibility of admitting the SADR into its membership. The affair derailed planned (and rescheduled) Organization summits in 1982 and 1983.<sup>44</sup> Finally, at its November 1984 summit the OAU admitted the SADR as a member State. Morocco immediately quit the Organization and remains the only African country not a member of the OAU's successor, the African Union.<sup>45</sup>

As with East Timor, the United Nations was unable to resolve the question of Western Sahara during the 1980s. Although the General Assembly's Fourth Committee on Decolonization annually considered the conflict there were few meaningful efforts to overcome the impasse.<sup>46</sup> The General Assembly resolutions of the era reflect the frustration of member States:

The General Assembly [...] reaffirms the inalienable right of the people of Western Sahara to self-determination and independence in accordance with the Charter of the United Nations, the charter of the Organization for African Unity, and the objectives of General Assembly resolution 1514 (XV) ... deeply deplores the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco [and] urges Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara."<sup>47</sup>

Similar to the case of South West Africa, the United Nations recognized the Polisario Front as the representative of the people of Western Sahara, declaring the Front "should

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<sup>43</sup> See OAU AHG Res. 104 (XIX) June 1983 (accessed 24 September 2009); available from: <http://www.africa-union.org/root/au/Documents/Decisions/hog/sHoGAssembly1983.pdf>

<sup>44</sup> *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 at 32.

<sup>45</sup> The AU's current position is to support UN resolution of the conflict. "[The AU hopes the] two parties will seize the opportunity of the planned fifth round of talks to make progress towards a solution consistent with international legality, in particular the principles enshrined in the Charter of the United Nations, as well as in the Constitutive Act of the African Union." "Report of the Commission on Conflict and Post-Conflict Situations in Africa" (Peace and Security Council) (29 June 2008), AU Doc. PSC/HSG/2 (CXXXVIII) at para. 124 (accessed 2 October 2009); available from: [http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC\\_2008\\_2009/PSC%202008%20\(105-\)/138/Report/2008\\_138\\_RE.pdf](http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2008_2009/PSC%202008%20(105-)/138/Report/2008_138_RE.pdf) The AU also maintains a liaison-administrative office co-located with MINURSO in El-Ayoum.

<sup>46</sup> UN Secretary-General Perez de Cuellar did arrange for indirect talks between Polisario and Morocco in April-May 1986. Saudi efforts at mediation were also pursued. See *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 at 34. Although Morocco and Algeria resumed diplomatic relations in 1988 the decade closed without substantial progress.

<sup>47</sup> "Question of Western Sahara", *supra* note 7. See also GA Res. 39/40 (5 December 1984). But cf. General Assembly resolutions on East Timor, e.g. "Question of East Timor" GA Res. 3730 (23 November 1982) requesting the Secretary-General to consult with directly concerned parties "with a view to exploring avenues to achieve a comprehensive resolution of the problem ..." Cf. also "The Question of Palestine" GA Res. 39/49 (11 December 1984). The General Assembly resolutions on Western Sahara's decolonization were among a handful of others declaring a right of self-determination and independence. See e.g. GA Res. 63/165 (18 December 2008) on Palestine (noting a right to self-determination and independence).

participate fully in any search for a just, lasting and definitive political situation of the question of Western Sahara ...”<sup>48</sup> The UN would continue in that position while the SADR itself came to be increasingly recognized by States, 75 by the end of the decade.<sup>49</sup>

### **The continued impasse of the 1990s**

1990 brought the hope of change on the United Nations diplomatic front, setting in motion the complex steps to resolve the question of Western Sahara over the next two decades, steps that have failed. The peace-making efforts of the United Nations’ including through its ability to conduct direct negotiations between Morocco and Polisario, has been more successful. This owes much to then Secretary-General Perez de Cuellar who arranged matters for the Security Council to ratify a peace plan first presented in 1990.<sup>50</sup> That was followed in 1991 by creation of the UN Mission for the Referendum in Western Sahara, MINURSO, with its mandate to monitor the parties’ cease-fire agreement and conduct a self-determination referendum.<sup>51</sup> The presence of MINURSO should have proven a real advance in a resolution of the Western Sahara conflict underscoring as it did the UN’s determination to ensure an orderly exercise of self-determination.<sup>52</sup> With any progress toward a self-determination referendum stalled and Polisario’ diminishing capacity to resume an armed campaign for liberation of the territory (or least render Morocco’s current position on the territory untenable) MINURSO now mainly serves humanitarian roles of peace monitoring, “confidence building measures” to establish rapport between the parties, provision of limited medical care, and a presence that perhaps, if minimally, moderates human rights violations.<sup>53</sup>

The impasse in the Sahara has resulted from that which the 1990 peace plan, the later Baker plan and framework agreements, and negotiations after 2004 were unable to resolve: the conduct of a credible referendum to decide for the Sahrawi people the question of self-

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<sup>48</sup> *Ibid.*

<sup>49</sup> See “Country Recognitions of the SADR” at the website of the Saharawi Arab Democratic Republic (accessed 12 October 2009); available from: <http://www.arso.org/03-2.htm> The number of state recognitions declined after 2000. The issue is discussed below.

<sup>50</sup> See Report of the Secretary-General (18 June 1990), UN Doc. S/23160 and Report of the Secretary-General (19 April 1991), UN Doc. S/22464. “The essential aim of the proposals ... is to enable the people of the Territory of Western Sahara to exercise their right of self-determination ...” UN Doc. S/23160 at para. 4.

<sup>51</sup> See generally the MINURSO website (accessed 28 September 2009); available from: <http://www.un.org/en/peacekeeping/missions/minurso/>

<sup>52</sup> An advantage not enjoyed in the case of East Timor or most of non-self governing post-colonial territories, except the UNRWA in Palestine.

<sup>53</sup> See Report of the Secretary-General on the situation concerning Western Sahara (13 April 2009), UN Doc. S/2009/200 (accessed 1 October 2009); available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/290/58/IMG/N0929058.pdf?OpenElement> See also *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 at 118: “... by halting hostilities, [the 1990 peace plan] let Western Sahara slip beneath the horizon of international awareness and made a solution seem less imperative.”

determination.<sup>54</sup> It is two issues in the referendum process that have been most in dispute between the Polisario Front and Morocco. The first is the identification of Sahrawis entitled to vote. The second is whether they would be permitted to have before them the choice of independence among options for self-determination. The position of the parties in respect of them has been intractable. Morocco will consent to a referendum so long as independence is not on offer. The Polisario Front will agree to move forward only if a referendum includes such an option for the Sahrawi people. The circumstances are recounted by Erik Jensen as follows:

[T]he two main ingredients of the impasse were Morocco's decision of April 2004 not to accept any referendum with independence as an option, and the Security Council's unwavering view that there must be a consensual solution to the question of Western Sahara ...

This led to my conclusion that there were only two options: indefinite prolongation of the current impasse, or direct negotiations between the parties. Such negotiations would need to be embarked upon without preconditions, and I admitted it was only realistic to predict that, with Morocco in the possession of most of the territory and the Security Council unwilling to put pressure on it, the outcome would fall short of an independent Western Sahara.<sup>55</sup>

Christopher Ross, the Secretary-General's current envoy to the Western Sahara, holds the same opinion, reporting recently that "the positions of the parties [have] not changed ... and [remain] far apart on ways to achieve a just, lasting and mutually acceptable political solution that will provide for the self-determination of the people of Western Sahara ..."<sup>56</sup> 35 years on, the right to self-determination for the Sahrawi people remains denied as much as that of East Timor in the years after 1975 and as irresolvable as the "question" of occupied Palestine. The recent case of Kosovo's bid for self-determination including a 2008 unilateral declaration of independence suggests the right of self-determination in post-colonial, non self-governing cases is extinct.<sup>57</sup> It seems a right now all but impossible to realize, save only in cases of government collapse in the (re-) colonizing State (as with East Timor) or the resolve of the UN Security Council to force a result. Neither is an immediate prospect for the people of Western Sahara.

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<sup>54</sup> On the work of the Secretary-General's personal envoy, James A. Baker III, from 1997 to 2004, see *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 and *Endgame in the Western Sahara*, *supra* note 32.

<sup>55</sup> Peter van Walsum, "Sahara's long and troubled conflict," *El Pais*, 28 August 2008. van Walsum was the personal envoy of the Secretary-General for Western Sahara from 2005 until August 2008. "[T]here is a growing awareness that Polisario's insistence on full independence for Western Sahara has the unintended effect of deepening the impasse and perpetuating the status quo." *Ibid.*

<sup>56</sup> "Report of the Secretary-General on the situation concerning Western Sahara", *supra* note 53 at para. 12.

<sup>57</sup> See Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (New York: Oxford University Press, 2009) and Henry H. Perritt, *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan* (Cambridge, UK: Cambridge University Press, 2009).

## Post-colonial self-determination: Defining the law

Before leaving the issue of self-determination for the Sahrawi people, the nature of the right within international law should be recalled. It is a right, after all, that is clear and universally binding on all states to respect, if not support. The right of self-determination in post-colonial settings may summarily be recalled. While Articles 1(2), 55 and 73 of the *UN Charter* suggest self-determination to be the norm for non-self governing territories, the principles expressed in those articles are general.<sup>58</sup> They do not lend the right much substance, even in clear cases of post-colonial self-determination. The right traces its working form to General Assembly Resolution 1514, the *Declaration of the Granting of Independence to Colonial Countries and Peoples*.<sup>59</sup> The Declaration is starkly relevant in the Western Sahara case, including a call for restraint in subjugating peoples to alien domination (article 1), underscoring the right to self-determination (article 2), the prohibition against “armed action” together with a requirement to respect territorial integrity (articles 4 and 7), and the exhortation to take “immediate steps ... to transfer all powers to the peoples of those territories ... in order to enable them to enjoy complete independence and freedom” (article 5).<sup>60</sup> The dual aspect of Resolution 1514 as defining the right while contributing to the politics of decolonization was recognized by the ICJ in the *Western Sahara Advisory Opinion*, the Court noting the Resolution serves as the “basis for the for the process of decolonization.”<sup>61</sup>

The development of the right of self-determination for non-self governing territories in the post-colonial era was refined as the 1960s progressed. The *International Covenant on Civil and Political Rights* declared the right of self-determination in universal terms which, while a useful aspiration for humanity and the community of states to respect, perhaps obscured the particular requirement for proper self-determination to be exercised by colonized peoples.<sup>62</sup> The companion to Resolution 1514 was more useful. Resolution 1451, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, offers more substance.<sup>63</sup> Its principle VI details the options on offer in cases of post-colonial self-determination, namely “emergence as a sovereign independent State”, “free association with an independent

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<sup>58</sup> *Supra* note 3. Article 21(3) of The Universal Declaration of Human Rights should be recalled: “The will of the people shall be the basis of authority of the government ...” (accessed 2 October 2009); available from: <http://www.hrweb.org/legal/udhr.html>

<sup>59</sup> *Supra* note 6.

<sup>60</sup> *Ibid.* at Articles 1 – 7.

<sup>61</sup> *Supra* note 5 at 32.

<sup>62</sup> *International Covenant on Civil and Political Rights* (16 December 1966), UN GA Resolution 2200A (XXI) (entered into force 23 March 1976) (accessed 28 September 2009); available from: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>

<sup>63</sup> UN GA Resolution 1541 (XV) (15 December 1960) (accessed 28 September 2009); available from: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/153/15/IMG/NR015315.pdf?OpenElement>

State”, or “integration with an independent State.”<sup>64</sup> However, Resolution 1541 did not offer particulars on what conditions would suffice for the first of these, the emergence of sufficient international personality so as to constitute statehood for a non-self governing territory. In contrast, the resolution did qualify the necessary conditions for the second and third self-determination options. As such, it would be left to a slowly developing jurisprudence and the occasional direction of the General Assembly to complete the needed details. In the five decades since Resolutions 1514 and 1541, the UN has tolerated wide-ranging modes of the exercise of self-determination with a generally legitimate (or at least tolerated) emergence into statehood in every case. The obscure example of Brunei serves to make the point. The British Crown protectorate had been on the UN decolonization agenda from the outset of Resolution 1514 and the United Kingdom itself had acknowledged an obligation of self-determination. Annual General Assembly resolutions through the mid-1970s called for Brunei’s self-determination under UN supervised elections and the lifting of a ban on political activity dating from a 1962 political rebellion.<sup>65</sup> These requirements were disregarded when the United Kingdom settled arrangements for Brunei’s eventual independence in 1984.<sup>66</sup> Brunei’s absolute monarchy and status of having the weakest civil and political rights in South East Asia continues.<sup>67</sup>

The 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* issued by the General Assembly added again to the then widely accepted norm of self-determination for non-self governing States.<sup>68</sup> The duty to act in conformance with the principles of the *UN Charter* in cases of self-determination was reiterated, together with the prohibition against violating territorial integrity. However, the 1970 Declaration also contained something of a restriction against secession in non-post-colonial settings, stating that “the territorial integrity and political independence of the State are inviolable”.<sup>69</sup> The ICJ affirmed such a norm in its 1975 *Western Sahara Advisory Opinion*, when it noted that “these resolutions, including resolution 3292 (XXIX), were drawn up in the general context of the policies of the General Assembly regarding the

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<sup>64</sup> *Ibid.*

<sup>65</sup> UN GA Res., “Question of Brunei,” 3227 (XXXII) (28 November 1977) (accessed 2 October 2009); available from: <http://www.un.org/documents/ga/res/32/ares32r27.pdf> 2009)

<sup>66</sup> *Exchange of notes constituting an agreement terminating the special treaty relations between the United Kingdom and the State of Brunei* (7 January 1979), 1985 UNTS 250.

<sup>67</sup> See *Constitution of Brunei Darussalam*, Constitutional Documents Negara Brunei Darussalam, Laws of Brunei (accessed 28 October 2009); available from: [http://www.agc.gov.bn:81/images/LOB/cons\\_doc/dokumen-dokumen\\_perlembagaan\\_2008.pdf](http://www.agc.gov.bn:81/images/LOB/cons_doc/dokumen-dokumen_perlembagaan_2008.pdf) and see “Freedom in the World – Brunei (2007)”, Freedom House (accessed 26 October 2009); available from: [http://www.freedomhouse.org/inc/content/pubs/fiw/inc\\_country\\_detaiol.cfm?year=2007&country=7143&pf](http://www.freedomhouse.org/inc/content/pubs/fiw/inc_country_detaiol.cfm?year=2007&country=7143&pf)

<sup>68</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*,” GA Res. 2625 (XXV) (24 October 1970) (accessed 2 October 2009); available from: <http://www.un-documents.net/a25r2625.htm> On the Declaration “opening up the possibility of lawful breakups”, see Steven R. Ratner, “Ethnic Conflict in Territorial Claims,” *International Law and Ethnic Conflict* (Ithaca, NY: Cornell University Press, 1998) 112 at 121.

<sup>69</sup> *Ibid.*

decolonization of non-self-governing territories.”<sup>70</sup> The superintending role of the General Assembly was highlighted by the Court even if the later “difficult cases” of East Timor and Palestine were fell to the Security Council for resolution:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory.<sup>71</sup>

It is evident that by 1970 whatever the “forms and procedures” available to the General Assembly in cases of colonial self-determination, the norm had aggregated to the extent of properly being regarded as a right.<sup>72</sup> In the case of Western Sahara, the General Assembly has continually held to that view, reaffirming the right of the Sahrawi people under Resolution 1514 to their “self-determination and independence” in its annual “question of Western Sahara” resolutions.<sup>73</sup>

While the Court continued to uphold a right of self-determination it has been careful to limit its application to post-colonial (*i.e.* non-self governing) cases. In its 1986 *Frontier Dispute (Burkina Faso/Mali)* decision, the Court found that “the essential requirement of stability ... has induced African States ... to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of the self-determination of peoples.”<sup>74</sup> The Court had such limitations in mind in its 1995 *East Timor* decision when concluding the right in a post-colonial setting was universally binding, with an *erga omnes* character: “The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ... it is one of the essential principles of contemporary international law.”<sup>75</sup> <sup>76</sup> Most recently, the Court reaffirmed the settled nature

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<sup>70</sup> *Western Sahara Advisory Opinion*, *supra* note 5 at para. 53.

<sup>71</sup> *Ibid.* at para. 55.

<sup>72</sup> *Ibid.* at para. 71. Judge Dillard noted in his Separate Opinion, *idem* at page 123 that “it may be suggested that self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it.”

<sup>73</sup> See e.g. “Question of Western Sahara,” UN GA Res. 60/114 (18 January 2006) (accessed 2 October 2009); available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/494/44/PDF/N0549444.pdf?OpenElement>  
Recent resolutions have lost some of the emphatic tone of the 1970s and 1980s, Resolution 114/60, for example, “underlining” the Security Council’s support for the then Baker peace plan “as an optimum political solution on the basis of agreement between the two parties”. *Idem* at para. 2.

<sup>74</sup> ICJ Rep. 1986, 554 at 567. The Court’s concern over conflict between the doctrine of the stability of colonially established frontiers (*uti posseditis*) and self determination in situations of seceding or dissolving States is discussed by Jan Klabbers and René Lefeber in “Africa: Lost between Self-Determination and *Uti Posseditis*,” Catherine Brölmann, René Lefeber and Marjoleine Zieck, eds. *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1993) 37.

<sup>75</sup> *Case Concerning East Timor (Portugal v. Australia)*, *supra* note 1 at para. 29.

<sup>76</sup> “[A]ll States can be held to have a legal interest in the protection of ... obligations *erga omnes*.” *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, ICJ Rep. 1970, 3 at para. 33.



of the right in its 2004 advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it adopted its *erga omnes* finding in the *East Timor* case.<sup>77</sup> One of the most discursive statements about the right to self-determination was given by Judge *ad hoc* Thomas Franck in a separate opinion on an application by the Philippines to intervene in the ICJ case *Sovereignty over Pulau Ligitan and Pulau Sipadan by the Philippines for Permission to Intervene (Indonesia/Malaysia)*. The Philippines had sought to join the dispute in a territory and boundary proceeding between Malaysia and Indonesia that was before the Court. The area in contention was the northeast coast of Borneo, south of the Sulu archipelago of the Philippines. In seeking to intervene, the Philippines implicitly sought a review of decolonization carried out in the former British Crown colony of North Borneo (now the Malaysian state of Sabah). Judge Franck rejected any impropriety in the colony's 1963 self-determination and was dismissive that any claim of historic sovereignty of the Sultanate of Sulu to the territory could be contemplated in the face of such an act. He noted that post-colonial self-determination was "a legal principle firmly established in modern texts, judicial decisions and State practice." Had his reasoning been available in the Western Sahara advisory case, the conclusions of the Court might have then been more persuasive:

Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines' claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the *bona fides* of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.<sup>78</sup>

For all the norm-setting and clarity associated with the right of peoples to self-determination in colonial settings, two shortcomings are apparent, especially when the analogs of secessionist claims to self-determination and irredentist acquisition of territory under cover of right of integration are considered.<sup>79</sup> The first is that the process requirements for the exercise of self-determination are vague. No single formula can have a uniform application and thus international law provides only the most general *indicia* of legitimacy. The practice in many successful cases suggests that a "free determination of political status" should include a referendum-like consultation conducted peacefully and without duress. It should be a process that is open to international scrutiny (if not oversight) and both the administering power of the territory concerned and the UN having a joint and

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<sup>77</sup> *Supra* note 26 at para. 88.

<sup>78</sup> *Ibid.* at para. 15. Judge Franck had previously rejected territorial claims in cases of post-colonial determination. "[The Western Sahara case] has shown many nations, including the United States, are willing to tolerate the use of force to effect a restoration of historic title even in disregard of the wishes of inhabitants." "The Stealing of the Sahara", *supra* note 34 at 720.

<sup>79</sup> The case of Kosovo a current example of the former and South Ossetia of the latter.

leading involvement.<sup>80</sup> The greater shortcoming is the absence of enforceability: a weakness here as elsewhere in resolving conflicts under the consensual system that is international law. The right of post-colonial self-determination is therefore weak, notably when the response of states to attempts at secession in sub-state entities, and in cases of the aggression acquisition of a state or territory, are considered.<sup>81</sup> The long and tragic case of East Timor is, next to that of Western Sahara, surely the exemplar of such a lack of enforceability and the consequences which flow from that. The central cause of the problem is the ineffectiveness of the administering power – the colonial State – to guard against the predation by states in the neighborhood of a territory to undergo self-determination by its people.

If Spain took reluctant and incomplete steps to prepare Spanish Sahara for self-determination before to 1975, Portugal's interest in Timor can, to the time of its forcible invasion on December 7, 1975, be described as benign to a point of neglect. It was after the annexation of both by neighboring States that the interests of the colonial powers reversed. Portugal increasingly expressed its concerns on the question of Timor during the 1980s and, among other things, brought the Timor Gap case to the ICJ in 1991.<sup>82</sup> History vindicated Portugal's role in exercising its responsibilities as the colonial power through its negotiations with Indonesia leading to an agreement in May 1999 establishing conditions for the consultative self-determination referendum held later the same year.<sup>83</sup> Spain, for its part, abandoned Western Sahara *de jure* through the Madrid Accord and *de facto* when it withdrew entirely from the territory in February 1976. Several reasons explain this stance, not least of which was Spain's fragile democracy in the time after Francisco Franco and the "facts on the ground" of an apparently irreversible Moroccan occupation. There is hardly any suggestion that Spain could usefully resume a role as the administering power for the Western Sahara. Nor has Spain been a party to multilateral negotiations about the territory.<sup>84</sup> Spain's position has been clear since it quit the territory:

Spain considers itself henceforth exempt from any responsibility of an international nature in connexion with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory [and]

The decolonization of Western Sahara will reach its climax when the views of the

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<sup>80</sup> Malcolm N. Shaw, *International Law*, 5<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003) at 231. The procedural requirements to validate association or integration of post-colonial territories under the principles expressed in General Assembly Resolution 1541 should be recalled.

<sup>81</sup> *E.g.* Kuwait in 1990, Kosovo in 1999.

<sup>82</sup> *Supra* note 1.

<sup>83</sup> "Agreement between the Republic of Indonesia and the Portuguese Republic on the question of Timor" (5 May 1999) (accessed 2 October 2009); available from: <http://www.eastimorlawjournal.org/UN/indonesiaportugalquestionofeasttimor.html> The good offices and referendum support role of the UN should be recalled. See *e.g.* UN Security Council Resolution S/1236 (7 May 1999).

<sup>84</sup> Spanish civil society has become outspoken on the Western Sahara. See *e.g.* "Saharalibre.es" (accessed 5 October 2009); available from: <http://www.saharalibre.es/>

Saharan population have been validly expressed.<sup>85</sup>

As much as post-colonial self-determination should turn on the effective, concerted action of the administering power coupled a responsive United Nations – and in many instances it has – where a territory has been occupied by a neighboring State the interest of States will wane or having competing objectives and so the United Nations will inevitably find itself alone in resolving the matter. It must necessarily do so in the context of a Security Council concerned with the maintenance of peace and security. Given this reality, what can be relied on to ensure a successful taking of a non-self-determined territory is permanent (and large scale) settlement by the occupying power, more so when its civilians can be employed in the task. Morocco's 1975 Green March into Western Sahara and subsequent admission of foreign exploitation of the territory's fisheries and phosphate reserves fulfilled the formula.<sup>86</sup> Defined thus, the formula would also appear to be succeeding in the occupied West Bank of Palestine.

### **Impasse over the exercise of a singular right**

The impasse over Western Sahara owes much to the singular normative view that it has been a case exclusively within the law and diplomatic requirements of post-colonial self-determination. It should not be surprising that it would have lead to the polarity of positions between the Polisario Front and Morocco. Insistence on anything approaching a proper exercise or application of the right would have as its reciprocal corollary an absolute denial. Were Morocco the legitimate and original administering colonial power over the Western Sahara, the resulting impasse could approach a conceivable acceptance. But Morocco, it should be recalled, acquired and retains the Saharan territory by armed force, in a manner that would meet the emerging norm of aggression as an international crime. The right of the Sahrawi people to exercise the right of self-determination has been subsumed within an apparently irreversible territorial conquest. This is the core of the conflict.<sup>87</sup> Absent a supervening force (or compulsion) upon one or both of Polisario and Morocco the conflict is intractable. The implicit aim of the Madrid Accord has been achieved. The formal commitment of the parties to respect “the views of the Saharan population, expressed through the Djemaa” has proven wholly unenforceable.<sup>88</sup>

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<sup>85</sup> “Letter from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General” (26 February 1976), U.N. Doc. S/11997 (accessed 5 October 2009); available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N76/043/97/PDF/N7604397.pdf?OpenElement> The temporary administration was that provided for by the Madrid Accords.

<sup>86</sup> See Jeffrey J. Smith, “The maritime jurisdiction of the Western Sahara and the duty of states to preserve Saharan fisheries resources pending self-determination” (October 2002) (unpublished – paper on file with the author). See also Hans Corell, “The legality of exploring and exploiting natural resources in Western Sahara,” *Conference on Multilateralism and International Law with Western Sahara as a Case Study*, Pretoria (5 December 2008) (accessed 22 September 2009); available from: <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>

<sup>87</sup> “Thus the [Western Sahara Advisory Opinion] case can best be characterized as a latent conflict between territorial integrity and self-determination.” Michelle L. Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Boston: Martinus Nijhoff Publishers, 2009) at 205.

<sup>88</sup> *Supra* note 31 at Article 3.

## A determined statehood

In the decades the question of Western Sahara has existed there has been little consideration about whether the Sahrawi people, together with their territory, exists as a state. An analog can be seen, once again, in the case of East Timor, which formed a putative post-colonial government that declared independence on November 28, 1975, scant days before its forcible annexation by Indonesia. But the comparison is a limited one, as the SADR appears to enjoy many more elements of statehood. What can be said about the parallel case of East Timor (or Palestine, or in a different context, Kosovo) is that the organized international community has proven reluctant to accept the creation of new states without some decolonization-like process, including the imprimatur of the United Nations. However, the considerable evidence of Saharawi statehood is undeniable. The classic tests or *indicia* of an independent legal personality, together with an effective (if limited) operation of the mechanisms of state, have been present for 35 years. That the case of Western Sahara may have been obscure in world events or its people relatively few in numbers cannot limit the comparison with a state-in-waiting such as Palestine or a state-in-all-but-formal declaration such as Taiwan. Approaching the question of Western Sahara as one of a state acquiring the territory of another by force may yield some specific lessons for the stalled process of decolonization and has a general utility in the consideration of norms preventing aggression and territorial conquest. In other words, the case changes when the issue becomes one of the extent to which Western Sahara has evolved to a self-governing, independent state.

To undertake the analysis of statehood in such circumstances one must first contend with an issue of legitimacy. The Sahrawi people may not have been able to constitute themselves as a state in the absence of a legitimate act of self-determination. That seems an acceptable conclusion, if the precedents of decolonization practice are accepted. If the organized international community (if not international law) itself has a strong presumption against the creation of new States through dissolution and secession then, correspondingly, it would seem that a high standard in the exercise of self-determination is needed for the acceptance of statehood emerging from the colonial condition. Notwithstanding the absence of standards under international law as to what makes for a consultative and therefore credible post-colonial self-determination process, such a standard has been accepted as necessary in recent cases, history suggests a wide range of processes will be acceptable, as has been demonstrated formally in the 1999 case of East Timor and with very little in the case of much of Africa's decolonization.<sup>89</sup> The requirement for some legitimacy, however, in the emergence of a new post-colonial state can be seen in the cases in which credibility was absent, most clearly in unilateral declarations of independence by illegitimate regimes, the 1965 case of Rhodesia being an example. The long impasse over the terms and operative conditions for a self-determination referendum in Western Sahara makes out the perceptual custom. If nothing else, the singular requirement for a credible act of self-determination has ensured the easy success of the territorial dynamic in Western Sahara.<sup>90</sup>

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<sup>89</sup> The pending post-colonial devolution case of New Caledonia falls somewhere between these extremes. See the summary "Noumea Accord," *Australian Indigenous Law Reporter*, 7 (2002): 17 at 88.

<sup>90</sup> "It could be said that every avenue had been explored. No stone was left unturned to further the identification process with the voluntary cooperation of both parties ... It shocked some members when [the Secretary-General, Boutros-Ghali, reporting to the Security Council in November 1995] went on to concede that although he had hoped to see identification completed, he had no really expected the referendum as envisioned [in the 1990] settlement plan to prove possible. His hope had

The assessment of Sahrawi statehood must necessarily avoid the problem of being an *a priori* remedial exercise. There is attractiveness to move to a different ordering norm in the conflict. This is as much as response to a frustrated situation as would be restorative given the wrongfulness of Morocco's continuing annexation of the territory. That said, the conflict over Western Sahara in its legal and political-diplomatic dimensions will not be resolved by the teleological step of bypassing its basis as a self-determination problem. Discerning statehood is useful only for what it arrives at and how it might inform resolution of the conflict. It is a less helpful exercise when intended for substitutional use.<sup>91</sup> The concern over an improper or unduly remedial assertion of Sahrawi statehood can be placed within a proper context, however, when it is appreciated that many of the incidents of that statehood have long been present and that what remains is a broader recognition of such fact.

The classic legal test of statehood is broad. At one end of a continuum of criteria is the notion that "[n]o rule of international law ... requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."<sup>92</sup> The other extreme is embodied by the requirement for external recognition of the new state, a matter which should arguably be the question for the ICJ in its deliberations about Kosovo's 2008 unilateral declaration of independence.<sup>93</sup> The generally or "most widely" accepted criteria of the legal existence of a State has its basis in the 1933 *Montevideo Convention on Rights and Duties of States*, at Article 1:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>94</sup>

The *Montevideo Convention* criteria reflect the underlying condition for the existence of a state, which might be called "geographic sovereignty." Relative to other states, the test is one

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been that faced with the figures emerging from identification, the parties would start direct negotiations." [Footnote omitted.] *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 at 83.

<sup>91</sup> Cf. the case of Kosovo. "Kosovo does appear to be the first case of 'remedial self-determination' ... the will of the people, unambiguously expressed, may increasingly guide international action in dramatic and, admittedly, exceptional circumstances of this kind." *Contested Statehood: Kosovo's Struggle for Independence*, *supra* note 57 at 239. Query whether the self-determinations of East Pakistan or Palestine have been any less remedial.

<sup>92</sup> *Western Sahara Advisory Opinion*, *supra* note 5 at page 43. "Morocco's request [for the ICJ to take into account the "special structure of the Sherifian State"] is therefore justified. At the same time, where sovereignty over territory is claimed, the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty."

<sup>93</sup> *Supra* note 26. In December 2009 the Court heard argument on the reference question; "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

<sup>94</sup> Malcolm Shaw notes that Article 1 is "the most widely accepted formulation of the criteria for statehood in international law ..." *International Law*, *supra* note 80 at 178. *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States* (the "*Montevideo Convention*") (26 December 1933), 165 LNTS 19.

of defining the relative physical presence of the state. This can be seen in the doctrine of *uti posseditis* as applied for the stability of national territories in the Latin American and African post-colonial order. However irregularly or unjustly arrived at, a stable regime of boundaries and therefore defined territories is vital to ensure the existence of a new state and a stable international order. The Organization of African Unity (as it then was) recognized the utility of the doctrine and its implications for Africa in its 1964 Resolution on Border Disputes Among African States: “Member States pledge themselves to respect the borders existing on their achievement of national independence.”<sup>95</sup> The International Court of Justice has described *uti posseditis* as necessary “to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power.”<sup>96</sup>

Criteria similar to those of the *Montevideo Convention* have been suggested from time to time. They are uncontroversial when considered in the operative sense of state control (*i.e.* governance) over a defined territory. The test proposed in 1947 by Hersch Lauterpacht is an example: “[T]he conditions which give rise to a legitimate claim of statehood [are] the existence of an independent government exercising effective authority within a defined area.”<sup>97</sup> A number of new states were created in later decades and thus a recently proposed criterion is attractive, namely “a certain measure of stability [for the new entity to be] viable and able to discharge its international obligations effectively.”<sup>98</sup> James Crawford categorizes such operative tests as “general criteria based on effectiveness.”<sup>99</sup> They maintain the distinction between physical presence in a territorial area together with an internally directed ordering mechanism from those manifesting an externally oriented capacity and a resulting standing among other states. Both broad categories are not without problems in an exercise of defining Sahrawi statehood, although the evidence (and comparison to other post-colonial states) suggests they have been fulfilled in the present case.

### **The Saharawi State**

The Saharawi Arab Democratic Republic (the “SADR”) was proclaimed by the Provisional Saharawi National Council on February 27, 1976 in order “to avoid a juridical *fait accompli* being created by the Spanish withdrawal and Moroccan-Mauritanian occupation of the

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<sup>95</sup> OAU Doc. AHG/Res. 16(I). See also Article III of the *Charter of the Organization of African Unity* concerning respect for the territorial integrity of other States.

<sup>96</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*, *supra* note 74 at para. 21.

<sup>97</sup> *Recognition in International Law* (Cambridge, UK: Cambridge University Press, 1947) at 26. “These [conditions] coincide with the conditions which permit a State to recognize a seceding community without committing an illegality in relation to the parent State.” *Ibid.*

<sup>98</sup> P.K. Menon, *The law of recognition in international law: basic principles* (Lewiston, NY: Edwin Mellen Press, 1994) at 39. Menon posits tests of stability including the peaceful and orderly transfer of power from the mother country and internal stability. Both arguably fall within a category of internal governance.

<sup>99</sup> James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 2006) at 46.

towns” of the territory.<sup>100</sup> Over the following days the SADR’s machinery of government was created, a constitution adopted, and civil leadership positions announced.<sup>101</sup> Foreign government recognition of the SADR began immediately. Madagascar’s recognition, together with those of Burundi and Algeria, was given in the first week of the putative new republic. The formalities, at least, were in place even if not arrived at by an internationally (or traditionally) accepted act of self-determination. In later years, the SADR has convened democratically chosen and operating congresses of its people for the purpose of popular elections and governmental review, including constitutional amendments. The Saharawi state is not without frailties. The extent of a “national economy” is quite limited in the context of a displaced population. While the government of the SADR may provide services for education, healthcare, and justice, to name a few, there are constraints to them in the context of the Tindouf camps. What is remarkable about the Saharawi state is the cohesion and continuity of its internal governance, together with its popular support, and the long and widespread acceptance of its political arm, the Polisario Front, in other capitals.

### **A continuing population**

Application of the first two Montevideo criteria to the case of Western Sahara should not be controversial. The territory was found to have had a “permanent population” in the *Western Sahara Advisory Opinion*.<sup>102</sup> But for changes resulting from Moroccan settlement and the exodus of most Sahrawis to Tindouf such a present population would otherwise have fulfilled the criterion. However, the Court’s finding in answer to the first of the reference questions from the General Assembly was that the Saharan territory had been occupied at the point of colonial conquest in the 19<sup>th</sup> century. It was not a finding in the strict sense of the presence of a permanent population for the purposes of statehood. But that is overstating the distinction, because a permanent – and identifiably distinct ethnic population – was present in the territory at the critical date of Spain’s withdrawal as the colonial power in 1975. The Western Sahara was neither *terra nullius* at the time of its colonial acquisition or when it was abandoned. And so the issue, as a matter of finding a Saharawi statehood, would appear to be settled. If there remains any doubt that such a population was present, and remained distinct, the assessment of its composition can be done with regard to the periods in the conflict: (i) the critical date of Spanish abandonment in November 1975 or in the alternative on the proclamation of the Saharawi state in February 1976; (ii) during changes in settlement and the refugee exodus in the years following and; (iii) the present. The issue, in other words, is a matter of when the population necessary to define the presence of a state has been present. Two responses particular to the question of Western Sahara are needed, the first that displacement of a population by forcible annexation of territory does not abrogate the requirement of meeting the criterion. East Timor and the West Bank of occupied Palestine are broadly similar examples in this regard. The second view, that of continuity, recognizes

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<sup>100</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 238. Arguably, there were a sufficient number of displaced Sahrawi present to have rendered the proclamation legitimate. A report of there being 25,000 Sahrawis under arms in 1983 supports a finding of popular consent to creation of the SADR. *Idem* at 291. The text of the proclamation, including a call for recognition of the SADR (accessed 5 October 2009) is available from: <http://www.arso.org/03-1.htm>

<sup>101</sup> A current version in French, adopted at a Sahrawi national congress in 1999, can be viewed on-line (accessed 2 October 2009); available from: <http://www.arso.org/03-const.99.htm>

<sup>102</sup> *Supra* note 5.

the presence of remaining Sahrawis and the continual (and continually accepted claim) of the Sahrawi people to return to the territory under established conditions for self-determination. The weight of evidence, including the SADR's independence proclamation, a Sahrawi population continuing in the territory, the illegality of Morocco's ongoing annexation, and the legitimacy of right to the territory following the ICJ's 1975 advisory opinion all point to the legally supportable effective date of creation of the Saharawi state being February 1976.

It might be reasoned that, the Sahrawi people having evacuated parts of Western Sahara after November 1975, the territory was not populated sufficiently for the SADR to exist. The facts of the time refute this. The 1974 Spanish colonial census proved sufficiently accurate and credible such that no serious dispute was made when its results were applied 20 years later during the UN voter registration process of the 1990s. Further, save for Morocco's annexation of the territory the Sahrawi population would not have been displaced. Additionally, Sahrawis remained in both towns and encampments, notably in the eastern part of the territory, including after Morocco's construction of a defensive sand wall in the 1980s. Finally, the 125,000 Sahrawis living since 1976 in four camps at Tindouf just inside Algeria are obviously refugees and have been clear in their desire to return to Western Sahara.<sup>103</sup> The part absence of a population over so many years, as a direct result of the armed annexation of Western Sahara, is not a bar to fulfillment of the legal requirement that a territory be populated for a state to have legal personality.

The origin and nationality of peoples now residing in the Western Sahara presents a different problem. While not a relevant to the issue of statehood, the issue of Moroccan settlers having been present in Western Sahara for almost 35 years offers animates all considerations of which state is to govern the territory in future years, and how it would do so. A majority of the present population within Western Sahara (leaving aside Morocco's large military presence) are people who originated from Morocco. This was the intention of the Green March and it has succeeded, although at considerable financial cost to the government of Morocco. Evidence of that population's numbers and settlement patterns is difficult to obtain, although the failed voting registration process of the 1990s offers a useful indication of the numbers of Moroccan settlers. A related issue is that status of the large number of Moroccan armed forces personnel in the territory. It is difficult to conceive of many of them remaining should a Saharawi state come into territorial control, but some might claim a connection, by kinship for example, to the territory. The issue of settlers remaining in a territorially restored Saharawi state would be a significant, even overriding practical issue. However, the question of the legal existence of the Saharawi state is not one of nationality or citizenship. The question of the rights of remaining Moroccan settlers should the SADR be restored to its entire territory could be acceptably answered. The pledges of Kosovo's administration about the rights of minority groups, notably Serbs in the northern part of that territory, if independence results are a current example of what can be done. The presence of a minority group (or one possibly even numerically in the majority) need not at this stage enter the equation of statehood under international law.

States [are required] to have a permanent population: it is not a rule relating to the nationality of that population. It appears that the grant of nationality is a matter that

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<sup>103</sup> See generally Human Rights Watch, *Human Rights in Western Sahara and in the Tindouf Refugee Camps* (New York: Human Rights Watch, 2008) (accessed 2 October 2009); available from: <http://www.hrw.org/sites/default/files/reports/wsahara1208web.pdf>



only States by their municipal law (or by way of treaty) can perform.

[I]n the absence of agreement to the contrary, persons habitually resident in the territory of the new State automatically acquire nationality of that State, for all international purposes, and lose their former nationality, but this is subject to a right in the new State to delimit more particularly who it will regard as its nationals.<sup>104</sup>

### **A defined territory**

To consider the second test prescribed by the *Montevideo Convention*. It, too, is easily fulfilled, for the Saharan territory is certain in its physical extent as a result of clear colonial boundary arrangements. That history may be briefly recalled. In 1884 Spain's presence in the along the Saharan coast from Cape Bojador in the north to Cape Blanc at the entrance to the Bay of Levrier was made formal through the signing of "Acts of Adhesion" by tribal chieftains of the Oulad Bou Sbaa in the presence of a Señor Bonelli.<sup>105</sup> The French interests on the Mauritanian coast and farther south into Senegal necessitated additional steps to divide European colonial interests. Accordingly, Spain and France agreed on October 26, 1886 to divide the Cape Blanc peninsula down its centre.<sup>106</sup> The geography of the peninsula had left unresolved the inland, east-west running border to the north, Spain admitting that "during the course of negotiations in 1891 ... the [southern] limit of its [Río de Oro territory to the north of the peninsula] was the parallel 21° 20' North [latitude]."<sup>107</sup> France's intention to acquire fishing rights in the Bay of Levrier (in present day Mauritania) and the salt pans inland at Idjil was realized in the boundary treaty of June 27, 1900, the *Convention pour la délimitation des possessions françaises et espagnoles dans l'Afrique occidentale, sur la côte du Sahara et sur la côte du Golfe du Guinée*.<sup>108</sup> "It was during this period Spain accepted the division of Cape Blanc, leaving all of the Bay of Levrier to France, a matter made clear by the treaty..."<sup>109</sup> As such, the territory's southern frontier was defined:

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<sup>104</sup> *The Creation of States in International Law*, *supra* note 99 at 52. Kosovo's 2008 declaration of independence offered the promise of protection for minority rights groups in the territory.

<sup>105</sup> See the "Spanish Notification" of January 9, 1885 reproduced in English in *African Boundaries*, *supra* note 10 at 438. See also the *Western Sahara Advisory Opinion Documents*, Volume II, *supra* note 5 at 230. Controlled directly from Spain in 1885, the territory was transferred by decree to the administration of the Governor-General of the Canary Islands in April 1887. The same instrument extended Spanish control some 150 miles inland from the Río de Oro coast.

<sup>106</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 45.

<sup>107</sup> See *Western Sahara Advisory Opinion Documents*, *supra* note 5 at Volume III (translation from French). The parties failed to agree upon an extreme eastern inland boundary during 13 meetings from 1886 to 1900. *Ibid.* Volume I at 290 ff.

<sup>108</sup> 92 BFSP 1014 (also known as the *Convention between France and Spain for the Delimitation of their Possessions in West Africa*) (hereinafter the "1900 Convention"). See *African Boundaries*, *supra* note 10 at 439. See also the *Western Sahara Advisory Opinion Documents*, Volume II, *supra* note 5 at 157.

<sup>109</sup> Translation from French. *Western Sahara Advisory Opinion Documents*, *supra* note 5, Volume III at 20.

On the coast of Sahara, the limit between French and Spanish possessions follows a line which, from a point [at Cape Blanc] follows the middle of the said peninsula, dividing it equally as the terrain permits [and] continuing to the north until it meets parallel 21° 20' North. The frontier will continue to the east along [such parallel] until intersecting the median of longitude 15° 20' west of Paris (13° west of Greenwich).<sup>110</sup> [Translation from French.]

The course and marking of Western Sahara's southern frontier was the subject of a 1956 agreement between Spain and France which provided for a more accurate delineation of its inland course notably west of Mauritania's salt pans at Idjil and valuable iron ore deposits at Zouerate.<sup>111</sup>

Western Sahara's northern frontier came to be established in a somewhat less certain and more political fashion. By the late 1800s, Spain was already in possession of its fishing enclave on the African coast directly east of the Canary Islands, at Sidi Ifni. Competing European colonial interests in Morocco led to Spain and France secretly agreeing to divide their areas of influence.<sup>112</sup> However, although agreement was reached in 1902, Spain withheld ratification for a time, over concerns about the strength of a possible English reaction. By 1904 France's presence in Morocco was stronger as a result of the mutual settlement with England of colonial interests following the 1895 Anglo-Moroccan Agreement. The resulting *Convention between France and Spain respecting Morocco*, ratified in October 1904, clarified the extent of Spain's control along the northern Saharan coast. Spain's holding was demarcated, to start from an inland point, proceed east along the 26° meridian and turn north to follow the valley of the Draa and before turning finally to the coast south of Agadir. The line drawn encompassed Spain's Sidi Ifni enclave.

In order to complete the delimitation set out in Article I of the Convention of 27 June 1900, it is understood that the demarcation between the French and Spanish spheres of influence shall start from the intersection of the meridian 14° 20' west of Paris [12° W. of Greenwich] with 26° north latitude, then follow [a line] east to the meridian 11° west of Paris [8° 40' W. of Greenwich]. The demarcation shall then proceed north along such meridian until it reaches the [basin of the] Oued Draa, the thalweg of which it will follow until the meridian 10° west of Paris [7° 40' W. of Greenwich], finally the meridian 10° west of Paris until it reaches a line drawn between the basins [or watersheds] of the Oued Draa and the Oued Sous, and following it, in a westerly direction, [the same] line drawn between the basins of the Oued Draa and the Oued Sous, and then between the lines of the coastal basins of the Oued Mesa and the Oued

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<sup>110</sup> *1900 Convention*, Article 1, *supra* note 10. Article 2 of the Treaty provided that Spanish fishing activities, including landing for processing and vessel repair, could continue "as before" in a narrow channel south of Cape Blanc.

<sup>111</sup> *Franco-Spanish Agreement delimiting the Mauritania-Spanish Sahara boundary*, 19 December 1956, I.B.S. No. 149 at 2. See also *African Boundaries*, *supra* note 10 at 443: "The Convention of 1900 resulted in fairly adequate demarcation of the south and north-east of Spanish Sahara. However, prior to the Agreement of 1956, the concave sector in the south-east remained undemarcated and even indefinite in principle to some degree ... The 1956 Agreement appears to be the formal outcome of a delimitation agreed upon in diplomatic exchanges in 1945."

<sup>112</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 47.

Draa until the nearest point of the source of the Oued Tazeroualt.<sup>113</sup> [Translation from French.]

Importantly, the *1904 Convention* accorded Spain a “full liberty of action” in the coastal strip between 26° and 27° 40’ North, as far west to the above-described demarcation 11° west of the Paris meridian, all of which was said to be “outside Moroccan territory”.<sup>114</sup> The present territory of the Western Sahara was thus defined, comprised of the Río de Oro region and, in the north, the Sequiet el Hamra (Saguia el-Hamra) region. Further north yet was the “Spanish Southern Zone” in Morocco, known together with Sidi Ifni as the Tekna Zone.

Spain’s “full liberty of action” in Saguia el-Hamra was confirmed eight years later, on November 12, 1912, by the final convention demarcating the French and Spanish zones in Morocco and the Sahara ... [T]he Spanish protectorate zone in northern Morocco was reduced to a small strip of coastline and a portion of the Rif Mountains, while in the south Spain had to give up its previous hopes of acquiring some of the Anti-Atlas range and accept a small protectorate zone sandwiched between the Draa and parallel 27° 40’. Known later as Spanish Southern Morocco, this was divided by French-ruled territory from Spanish Ifni, a tiny enclave of about 580 square miles. **To the south of parallel 27° 40’, the 1912 convention ratified Article Six of the 1904 convention, thus confirming that Saguia el-Hamra was “outside Moroccan territory” and could become an outright Spanish colony rather than part of Spain’s protectorate zone in Morocco.**<sup>115</sup> [Emphasis added in bold. Footnote omitted.]

It was thus in 1912 that Western Sahara acquired its present land frontier with Morocco. Although the inland parts of the boundary with Algeria and Mauritania would not be demarcated for 50 years, Spanish colonial sovereignty within them had been established.<sup>116</sup> As noted above, Spain would eventually return its protectorate areas north of the territory to Morocco when its presence was no longer viable.<sup>117</sup>

Events after Morocco’s 1975 occupation of Western Sahara confirmed the physical extent of the territory. They include the April 1976 agreement of Morocco and Mauritania to demarcate their areas of occupation in the territory. The territory’s exterior boundaries

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<sup>113</sup> Article V, *Convention between France and Spain respecting Morocco*, 3 October 1904, 102 B.F.S.P. 432 (the “1904 Convention”). See *African Boundaries*, *supra* note 10 at 151. Cf. the English translation at the *Western Sahara Advisory Opinion Documents*, Volume II at 231, *supra* note 5.

<sup>114</sup> *Ibid.* at Article VI. The Convention provided that Spain was to cede its northern Moroccan enclaves of Fez and Taza, and that Tangiers would become an international zone. Under Article IV, Sidi Ifni was recognized as existing from 1860 as a Spanish enclave.

<sup>115</sup> *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 48. *Treaty between France and Spain regarding Morocco*, 27 November 1912, (1913) 7 *AJIL* (Supplement) at 81, for which see the French language text at *Western Sahara Advisory Opinion Documents*, Volume II, *supra* note 5 at 208.

<sup>116</sup> Spain did not move inland and occupy the interior of the territory until 1934.

<sup>117</sup> See the *Spanish-Moroccan declaration* of 7 April 1956 at the *Western Sahara Advisory Opinion Documents*, Vol. 1, *supra* note 5 at 310.

remained intact under that agreement even after Mauritania evacuated its area as a result of an August 1979 peace agreement with the Polisario Front.<sup>118</sup> In later years Morocco (and the United Nations) acknowledged what are at least administrative boundaries for the territory for purposes of voter identification and MINURSO's operation. As well, the process of voter identification during the 1990s for a referendum on self-determination was carried out on the basis of family or national ties to the territory, including those 100,000 persons claimed on behalf of Morocco who had not resided in the territory during the 1974 Spanish census.<sup>119</sup> The territory has also been excluded from bilateral treaties such as the United-States Morocco Free Trade Agreement of 2004.<sup>120</sup> Importantly, the settled nature of the territory's frontiers and the Saharawi state's title to it has been recognized by the African Union.

Morocco's construction of a defensive sand wall (or berm) in Western Sahara is something of a factor in defining Saharan territory for purposes of statehood. The berm, which preserves for Morocco the western two-thirds of the territory, is effectively a partition of the entire territory.<sup>121</sup> It is a defensive structure built to prevent attack upon the Bou Craa phosphate mine southeast of El-Ayoun and key towns, such as Smara in the north. The area east of the berm has been left to Sahrawi occupation in places such as Tifariti and Bir Lahlou. The presence of the berm as a feature aligned with the territory's eastern and southern boundaries emphasizes the fact that Western Sahara is both occupied by armed force and that its colonially established boundaries are implicitly recognized by Morocco.

No assessment of Western Saharan territory would be complete without noting the SADR's recent enactment of legislation to claim ocean jurisdiction seaward of its Atlantic coast. The step was taken in January 2009 in response to concerns over the illegal exploitation of the territory's maritime resources, notably a rich fishery.<sup>122</sup> Among other things, the legislation declares a 200 nautical mile exclusive economic zone with the extent of such an area soon to be publicized on maps. This act of the Saharawi government was noted by the Secretary-General in a periodic report to the UN Security Council and has been the subject of continued calls to restrict foreign flag fishing under Moroccan license in the waters off the territory.<sup>123</sup> Morocco chose not to comment on such claim of ocean

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<sup>118</sup> *Supra* note 39 and accompanying text.

<sup>119</sup> See *Western Sahara: Anatomy of a Stalemate*, *supra* note 8 at 59 ff.

<sup>120</sup> In effect January 2006. See Letter of Robert B. Zoellick (Executive Office of the President, United States Trade Representative) to the Honorable Joseph R. Pitts July 20, 2004 (on file with the author). "The FTA ... will not include Western Sahara." Controversially, the maritime area off the territory has not been excluded from Moroccan fisheries agreements with the European Union and Russia.

<sup>121</sup> See "Map of the Western Sahara" (MINURSO – Revised January 2004) (accessed 25 September 2009); available from: <http://www.un.org/Cartographic/map/dpko/minurso.pdf>

<sup>122</sup> See *Law No. 03/2009 of 21 January 2009 Establishing the Maritime Zones of the Saharawi Arab Democratic Republic* (accessed 15 September 2009); available from: <http://www.arso.org/03-0.htm> See also Jeffrey J. Smith, "The maritime jurisdiction of the Saharan Arab Democratic Republic" (25 July 2003) (unpublished – on file with the author).

<sup>123</sup> Report of the Secretary-General on the situation concerning Western Sahara (13 April 2009), U.N. Doc. S/2009/200 (accessed 2 October 2009); available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/290/58/IMG/N0929058.pdf?OpenElement>

jurisdiction. In February 2010, the European Union admitted that its participation in fishing Saharan waters under a 2007 *Fisheries Partnership Agreement* with Morocco had been illegal.<sup>124</sup> The claiming of ocean jurisdiction – unprecedented in decolonization cases or, apparently, in states occupied by others – is evidence of the SADR’s determination to assert a continuing claim as the party properly entitled to Saharan territory.

### **The Sahrawi capacity for government**

It is the two remaining *Montevideo Convention* criteria that are more subjective, with a purpose, at least in part, to define the external legitimacy of a would-be State. The criteria of government and capacity to enter relations with other States are less amenable to quantification and more the subject of assessment, if not something approaching outright positive approval, by other states. Both criteria are useful or even necessary as the basis on which to assess the capacity to engage other states (and the organized community of States generally). As such, their acceptance is an important aspect of what is essentially a fifth criterion for the existence of a state, recognition. In the post-colonial setting there may be no better exemplar of the application of the final two Montevideo criteria to such result than the case of Western Sahara.

There is no doubt that the displaced people of the Western Sahara possess a viable government. They have had a continuous and democratic government, if limited in the services it can provide and governance it might undertake, since 1976. While the SADR may be organized and have functioned through a single political entity, the Polisario Front, government for purposes of international law exists. That government has control over the polity of the Sahrawi people together with that part of Saharan territory not occupied by Morocco. That a functioning and legitimate government can exist and be accepted for the purposes of inter-state relations draws from the example of governments-in-exile during World War II, including those of Holland, Poland and Norway and, more recently, Kuwait. However, the precedent should not be extended artificially. The government-in-exile cases are distinguishable from that of the SADR, the former having enjoyed popular sovereignty, widespread (if not universal) recognition and complete territorial control before being displaced.<sup>125</sup>

The manifestations of a functioning government are present in the SADR. For the Saharawi state the task of government is, in some ways, straightforward, concerned as it is with the security of its people displaced into Algeria. There are, for example, few land-related issues to be dealt with. For purposes of a sovereign controlling government under international law, the more substantive *indicia* of an existing and competent include the maintenance of social order and civil society in the refugee camps at Tindouf albeit with

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<sup>124</sup> Schoo, Johann. “Letter - Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco - Declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara - Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara” (European Union/Commission Legal Service Opinion), 13 July 2009 (unpublished – letter on file with the author). The letter was released publicly on February 23, 2010.

<sup>125</sup> Consider East Timor’s unilateral declaration of independence on November 28, 1975 in the face of imminent invasion by Indonesia. No state recognized the declaration and no effective (or recognized) government-in-exile was established.

substantial externally delivered humanitarian relief. There is also the uninterrupted governance in those areas of Western Sahara proper under the SADR's control. The Saharawi state has also proven its capacity for the meta-institutions of government, including legislative power, foreign affairs, the functioning of courts, a putative defence force and an increasing accountability in the observance of human rights and international humanitarian law in recent years.<sup>126</sup> As for the state's competency to conduct foreign affairs (leaving aside for the present the issue of state recognitions of the SADR after 1976) the acceptance of the Polisario Front acting as a government in self-determination negotiations must be recalled. However, application of the third Montevideo criterion demands not so much a capacity or relative competency as it does governmental control or sovereignty within a defined geographic area:

The point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority ... The following conclusions suggest themselves. First, to be a State, an entity must possess a government or system of government in general control of its territory, to the exclusion of other entities not claiming through or under it.

Second, international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of the maintenance of law and order and the establishment of basic institutions.

Third, in applying the general principle to specific cases, the following must be considered:

- (1) whether the statehood of the entity is opposed under title of international law: if so, the requirement of effectiveness is likely to be more strictly applied;
- (2) whether the government claiming authority, if it does not effectively control the territory in question, has obtained authority by consent of the previous sovereign and exercises a certain degree of control;
- (3) there is a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other. In the former situation, the criterion of effective government may be applied more strictly. [Footnotes omitted.]<sup>127</sup>

It is control to territory, therefore, which matters and so presents a problem in the case of Western Sahara. The question of governing (or "controlling") legitimacy is bound up in the circumstances of the SADR's creation. Just as the issue of self-determination must properly be realized through consultation of the people involved, so a transfer of sovereign power and its continued exercise must similarly be arrived at. International law can allow that the government of the SADR is not in entire sovereign control of the territory of the Western Sahara. The central issue, however, becomes one of the legitimacy of governing authority, viewed externally. The issue must be examined on its merits. But the frailty or shortcomings

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<sup>126</sup> *Human Rights in Western Sahara and in the Tindouf Refugee Camps*, *supra* note 103.

<sup>127</sup> *The Creation of States in International Law*, *supra* note 99 at 57-59.

in the SADR's governmental control should not be confused that of Morocco in the territory. One aspires to be or is presumptively legitimate. The other is undeniably contrary to international law. Morocco's presence in Western Sahara would not in any event satisfy a test of being popularly arrived at. If competing sovereignties must be examined, the better comparator may be Spain, in its capacity as the former colonial administering power. But Spain has relinquished that role and duty. It is these circumstances that leaves the case of Western Sahara, there being no current example of a governing or administering authority acting within international law. Even Namibia, after a fashion, had the formality of the United Nations Council for South West Africa.<sup>128</sup> The circumstances suggest the *lacunae* of governmental capacity and control is appropriately filled by the SADR. To a certain extent, the United Nations has recognized this, although not for the purposes of governance or of demonstrating statehood, by according equal party status to the Polisario Front in negotiations with Morocco over the past 20 years.

The legitimacy of the SADR's governing capacity results from the events of 1975-76, together with a continuing popular and democratic support of its governing institutions, as well as the stated commitment of Polisario to pursue a multi-party state after restoral of the territory:

The Frente POLISARIO does not prejudice the decision to which the Saharawi people are legitimately entitled by the UN [*sic*] to take with regard to their future, by choosing between being an independent nation and a territory integrated into Morocco. Nevertheless, the unwavering position of the Frente Polisario is that the Saharawi people must be consulted about their future in a free and transparent manner and the range of options (independence, integration or free association) contained in UNGA resolutions 1514 (XV) and 1541 (XV) must be respected.<sup>129</sup>

As such, what could be called "defining consent" is sufficiently in place for a Saharawi government to be recognized as for purposes of international law.<sup>130</sup> It is again recalled that

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<sup>128</sup> See generally John Dugard, *The South West Africa/Namibia dispute: documents and scholarly writings on the controversy between South Africa and the United Nation* (Los Angeles: University of California Press, 1973).

<sup>129</sup> "Memorandum by the Frente Polisario on Western Sahara Peace Process," *supra* note 16 at 6.

"Jusqu'au parachèvement de la souveraineté nationale, le Front POLISARIO demeure le cadre politique qui regroupe et mobilise politiquement les Sahraouis, pour exprimer leurs aspirations et leur droit légitime à l'autodétermination et à l'indépendance ..." *SADR Constitution, supra* note 101 at Article 31.

See especially *Proposal of the Frente Polisario for a mutually acceptable political solution that provides for the self-determination of the people of Western Sahara*, 10 April 2007, UN Doc. S/2007/210 (accessed 8 October 2009); available from: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/MINURSO%20S2007210.pdf> (hereinafter "Polisario's 2007 Proposal".)

<sup>130</sup> The limits of what international law requires - although up in the issue of recognition - are clear. A regime does not have to be popularly arrived at or supported (or particularly functional) for the threshold of governance to be met. There may be a tendency to confuse an understandable hesitancy to recognize legitimacy of secessionist movements and groups with the *sui generis* nature of the matter for Western Sahara.

the UN's May 1975 Visiting Mission found overwhelming support for the Polisario and for independence.<sup>131</sup> The Djemaa's November 1975 act of dissolution lends credibility to that finding, as did the continuing social cohesion of Sahrawis following Moroccan occupation and their flight into the desert. The course of time may, however, have rendered these events frail. They tend to support legitimacy, but they do little to make out an effective continuing governmental sovereignty. And, it should be said, the organized international community has proven historically reluctant to recognize national liberation movements and, within this, their ability to form governments.<sup>132</sup>

However, the facts of the past four decades speak for themselves. That the SADR has exercised governance over the Saharawi people in exile, and over a part of Saharan territory has never been questioned. Algeria has been content to allow the presence of some 100,000 Sahrawis around Tindouf without interference. Moreover, the Polisario Front, as the political manifestation of the government of the SADR has been widely recognized, including by the United Nations and Morocco, as the legitimate representative of the Sahrawi people and as an equal for purposes of negotiating self-determination.<sup>133</sup>

The success of Saharan refugee camps is also evidence that the Western Sahara would be a viable political entity. The Sahrawi refugee camps have been described as the "most democratic, unified and well-functioning political system that exists in Africa today." The SADR, Polisario, and its relief organization, the Sahrawi Red Crescent, operate within the Sahrawi camps without restriction, for the Algerian government has temporarily cede jurisdiction of the camps to the SADR until settlement of the conflict has been reached. [Footnotes omitted.]<sup>134</sup>

The question of government and therefore its capacity to exercise sovereignty in the case of Western Sahara is therefore inextricably a part of the question of the territory itself. The question must not be defined as one of competing or greater legitimacy than that of the occupying power, Morocco. The situation of the former Yugoslavia offers a useful comparison. Although not entirely in control (*i.e.* manifesting sovereign government) over their territories, Croatia and Bosnia-Herzegovina were recognized in 1992 by some member States of the European Community and later admitted to membership in the United Nations.<sup>135</sup> Government is made manifest for purposes of international law as a matter of the

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<sup>131</sup> *Supra* note 21 and accompanying text. See also *Western Sahara: The Roots of a Desert War*, *supra* note 8 at 337 ff.

<sup>132</sup> The South West Africa People's Organization (SWAPO) and Palestine Liberation Organization after 1993 being notable exceptions. Further, the PLO was granted observer status in the UN General Assembly in 1974, SWAPO in 1976.

<sup>133</sup> See GA Resolution *Question of Western Sahara*, *supra* note 7. See also Security Council Resolution S/Res/1871 (30 April 2009) (accessed 10 October 2009); available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/320/16/PDF/N0932016.pdf?OpenElement>

<sup>134</sup> Beth A. Payne, "The Western Sahara: International Legal Issues," in *International Dimensions of the Western Sahara Conflict*, *supra* note 8, 127 at 135.

<sup>135</sup> *International Law*, *supra* note 80 at 180. Such recognition was made easier by a combination of there being no overt claims to territorial changes among former member states of Yugoslavia, an



existence of the legal personality of the presumptive state. That territory has been denied the Sahrawi people in no way derogates from their chosen governance or from what sovereign control can be exercised in the circumstances, including the important undertaking of foreign relations with other states.<sup>136</sup>

### **Sahrawi foreign relations**

The fourth of the *Montevideo Convention* criteria, that of a capacity to engage in relations with other states, puts the question of state legitimacy entirely into the realm of foreign affairs. There are two aspects to the criterion. One is easily achieved. And that is the basic competency and institutions to participate generally in the organized community of states. It might be called a threshold competency, and it is not particularly removed from governmental function and capacity. The second aspect is more subtle, and goes to distance to a nexus with the requirement or doctrine of recognition in the accepted legal personality of states. This second aspect of the capacity to engage in foreign relations entails a necessarily reciprocal engagement between the would-be state and those to affirmatively conduct diplomacy and to treat with it as a matter of international law. Invariably, the problem in realizing such reciprocity, or a responding acknowledgement of legal personality by the state sought to be engaged, is the presence or position of a third party, namely the colonial administering power (e.g. South Africa in the case of South West Africa) or the occupying power (e.g. Indonesia in the case of East Timor). In other words, the capacity for foreign affairs requirement touches closest on the state as an accepted or recognized entity that for the SADR is the most difficult factor to assess. That the SADR possesses administrative competence to enter into relations with other States hardly needs emphasis. The SADR has a greater and more continuous competency at international relations than do some African states. The SADR has been a member state of the African Union (as it now is) for 25 years. It has been accorded recognition by an unprecedented number of states and has exchanged diplomatic missions with several of them, most notably with South Africa. Permanent representatives are stationed in Brussels and Washington, D.C. Moreover, the SADR has long had a treaty-making ability, exemplified in early days by its 1979 peace agreement with Mauritania as well as accessions to later United Nations referendum plans for the Sahrawi people.

If the test of international relations is practically one of reciprocity, it is also a matter of the SADR's ability to be recognized as able to meet its obligations, and specifically by conducting itself, its trade arrangements and treaty obligations within the generally accepted international rule of law. For the SADR, the issue of *de facto* territorial sovereignty is the overriding constraint to realize this. For territory confers a legitimated sovereignty and the economic basis to ensure performance of international obligations. Both have been stolen from the Sahrawi people. And the continuing occupation of the Saharan territory leaves the status of its people (and therefore its government, if not the SADR) seemingly encircled by

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independence referendum in Croatia and the EC's "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," 16 December 1991, 92 *Int'l Law Reports* 178.

<sup>136</sup> The experience of the Palestinian Liberation Organization is instructive. When the PLO declared Palestine a state in November 1988 it had no effective control over any of its (occupied) territories and a domestic legitimacy less than that enjoyed by the Polisario Front. See generally *International Law*, supra note 8 at 220 ff.

the exclusive requirements for self-determination. It need not be so. For too long the question of Western Sahara has been exclusively consider as one of the right to self-determination. This suggests the legitimation of sovereignty before territorial rights can ensue. The unique circumstances of the present case are again recalled. The Sahrawi people have accepted for themselves, or created more accurately, a governmental sovereignty, which no other state purports to displace. Whether on not in control of the entire Saharan territory, the collectivity of the Saharawi people as a state exists independent of Morocco as the occupying sovereign.

The essence of such capacity [for foreign relations] is independence. This is crucial to statehood and amounts to a conclusion of law in the light of particular circumstances. It is a formal statement that the state is subject to no other sovereignty and is unaffected either by factual dependence upon other states or by submission to the rules of international law.<sup>137</sup>

The circular reasoning in assessing the SADR's capacity for international relations is obvious. If independence can only result from a valid exercise of self-determination and such a right is unable to be achieved despite the accepted status of the Polisario Front as the legitimate representative of the people entitled to that right then the question of Western Sahara will remain one of self-determination. Such a conclusion is untenable for three reasons, namely, the illegality of continuing occupation that is the effective cause of the denial of the right; the independence held by the General Assembly as due to the Sahrawi people; and the precedent of other States in formation, notably Kosovo and Palestine.<sup>138</sup> What is clear is that a legitimate and sovereign authority exists with control over a part of Western Sahara and is an authority capable of acting internationally that has been recognized as such. The reasoning of Judge Dillard in the *Western Sahara Advisory Opinion* is usefully recalled:

[T]he cardinal restraint which the legal right of self-determination imposes ... may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient 'legal ties' ... while they may influence some of the procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.<sup>139</sup>

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<sup>137</sup> *International Law*, *supra* note 80 at 181.

<sup>138</sup> GA Resolution 3734, "Question of Western Sahara," *supra* note 7. The circumstances of the General Assembly's recognition of a unilateral declaration of independence by Guinea-Bissau in September 1973 after Portugal's loss of control in the colony should be recalled. The General Assembly accepted the declaration and therefore the independent status of Guinea-Bissau notwithstanding the governing entity being only partly in control of the territory. See General Assembly Resolution 3061, *Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic*, 2 November 1973 (accessed 4 October 2009); available from: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/33/IMG/NR028133.pdf?OpenElement>

<sup>139</sup> *Supra* note 5. Separate Decision of Judge Dillard at 122.

The phrase “ancient legal ties” might be replaced in the case of Western Sahara with “continuing occupation.”

## Recognition

International law has for much of the past century contended with the additional requirement of recognition by other countries as necessary condition of statehood. Recognition has been called “an essential condition” in the creation of a state.<sup>140</sup> And yet the act of recognition has been, and remains, a political decision taken as a matter of international relations. That has meant the doctrine varied widely in its application, Kosovo, Palestine and South Ossetia being current examples. And the loss of recognition rarely entails the same result as an original non-recognition, that is, the withholding of the act of acceptance of a new state’s legal personality. Moreover, the act of recognition has come to acquire a collective aspect, in which multiple states and, ideally, the United Nations, are needed to accept (or confirm) the legal personality of the new state. Further, the geopolitical ranking or influence of the recognizing state is instrumental, as the part-recognition cases of Kosovo and Palestine demonstrate. Obtain the recognition of the more “senior states” or at least an initial few with demonstrated influence in the international order, the reasoning goes, and the speed of “substantial” or “effective” recognition will be the faster.<sup>141</sup>

Assessing the role and prospects for recognition is vital in the case of Saharawi statehood. That is because it is the only tenable or remaining condition, given the fulfillment of the *Montevideo Convention* criteria, for the collective international community to deny the SADR’s legal status. Moreover, the considerable number of recognitions accorded the SADR together with an unrealized process of recognition in European/western countries, is a factor requiring assessment.<sup>142</sup> It should be recalled that recognition was conceptualized as a means to address the dissolution and secession of a sub-state entity “detached from the parent State.”<sup>143</sup> Two normative rationales came to

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<sup>140</sup> *Recognition in International Law*, *supra* note 97 at 26.

<sup>141</sup> Edward McWhinney refers to the utility of regional recognition of an emerging state in *Self-determination of peoples and plural-ethnic states: secession and state succession and the alternative, federal option* (Boston: Martinus Nijhoff, 2002), available on-line at: [http://nijhoffonline.nl/extract?id=er294\\_er294\\_167-263-32](http://nijhoffonline.nl/extract?id=er294_er294_167-263-32)

“With the trend to supra-national political and economic integration and trans-national association on a regional basis continuing and being accentuated, individual states’ actions on recognition will tend to be made in coordination with such regional associations and their members, as to the decision itself and its timing, (whether in a political-military or a political economic regional body or sometimes in a combination of both).” *Id.* at 92.

<sup>142</sup> A Swedish political party has adopted the position that, if elected in national elections scheduled for 2010, it would accord that country’s recognition of the SADR. “Sweden may recognize Western Sahara,” *afrol News*, 2 November 2009 (accessed 15 December 2009); available at: <http://www.afrol.com/articles/34581> Consider also France’s recent suggestion of recognizing the Palestinian state. “Kouchner: ‘Vite un etat Palestinien’,” *le Journal du Dimanche*, 19 February 2010 (accessed 22 February 2010); available at: <http://www.lejdd.fr/International/Actualite/Kouchner-Vite-un-Etat-palestinien-173756/>

<sup>143</sup> *Recognition in International Law*, *supra* note 97 at 27.

define recognition. The first, “the constitutive view”, held that recognition was a necessary precursor to relations between states and so permitted “membership of the international community [or] full international personality.”<sup>144</sup> Expressed in this way, we might now consider the doctrine as paternalistic or a gate-keeping device to control entry into the ranks of like-minded states. In the post-colonial era after World War II, when the emergence of States was more a matter of right and done within the norms established by the *UN Charter* (and the work of the General Assembly), this view of recognition exhausted its utility.<sup>145</sup> “[S]ince 1945 there has developed through admission to the United Nations and in other ways process of certification that has fulfilled the function of certification, without the attribute of a priori certainty that constitutive theorists vainly seek.”<sup>146</sup>

The second view of recognition is one that has been borne out in practice. It holds to a more passive or accommodating stance that the recognizing state will at its option acknowledge the factual existence of the new state and of the potential for a relationship between the two. A more nuanced expression is that “recognition signifies the acceptance of the new State as a member of the international community.”<sup>147</sup> Even this has a limit, with Taiwan serving as an example. The existence of Taiwan, and notably that of its government, has considerable acceptance in the organized international community but the island territory is generally considered not to be a State. And so recognition in its case together with all of the instrumentalities in international relations that result is heavily qualified on the basis that Taiwan “still has not unequivocally asserted its separation from China.”<sup>148</sup>

It might be hoped that the ICJ’s present Kosovo advisory opinion case will develop the law of recognition beyond some middle way between these two schools of recognition.<sup>149</sup> Several approaches could be taken. It must be recalled that the doctrine has resisted being elevated to a legal norm, or a principle commensurate with the decidedly more objective Montevideo requirements. A question of recognition (or more usefully, *non-recognition*) is at most a question of will result in law will result from a recognizing act. Within this, the primary concern is not so much rights and obligations triggered under a bilateral relationship with the new state arrangements as it is matter of duties, presumed or existing, between the

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<sup>144</sup> *Ibid.* at 38.

<sup>145</sup> “[T]he constitutive act creative of statehood is an act of unfettered political will divorced from binding considerations of principle.” *Ibid.* at 41.

<sup>146</sup> *The Creation of States in International Law*, *supra* note 99 at 98.

<sup>147</sup> *Recognition in International Law*, *supra* note 97 at 42.

<sup>148</sup> *Ibid.* at 219. Taiwan has avoided applying for membership or observer status in the United Nations. Cf. Lung-chu Chen, ed., *Membership for Taiwan in the United Nations: Achieving Justice and Universality* (New York: New Century Institute Press, 2007).

<sup>149</sup> *Supra* note 26. “Actual practice leads to a middle position between these two perceptions [declaratory and constitutive.]” *International Law*, *supra* note 80 at 369.

recognizing state and an affected third state.<sup>150</sup> In the past, a theory of recognition turned on that duty considered owing to the parent state in cases of secession. Kosovo will be instructive on the point:

In this context it must be stressed that international law *has* an institution with the function of determining claims to statehood. That institution is recognition by other States, leading in due course to diplomatic relations and admission to international organizations. A substantial measure of recognition is strong evidence of statehood, just as its absence is virtually conclusive the other way. In this context, general recognition can also have a curative effect as regards deficiencies in the manner in which a new State came into existence.<sup>151</sup> [Emphasis in italics in original.]

As such, recognition might therefore be usefully shaped to account for the end of the post-colonial era. The threshold for recognition *simpliciter* – acceptance into the membership of the community of States and, formally, by entry into the United Nations – was usefully lowered during that era. Legitimacy norms were more flexible in the decolonization exercise and, it must be admitted, the substantial majority of cases were remote from significant state actors in the international community. Such a broad approach, or ready conferral, also correlated with the developing *jus cogens* of self-determination following the ICJ’s South-West Africa and Western Sahara cases and in response to the thwarting of self-determination in East Timor, Western Sahara and South West Africa after 1975.<sup>152</sup> As much as the regime of states may be settled - and no serious contention along those lines can be asserted - recognition and the threshold at which it is invoked will change. The change in the doctrine will be one that accounts for the realities of the creation of new states, primarily those dissolving or fragmenting as a result of political changes, including large-scale state failures and those instances of actual secession. In the latter case, recognition (or, again, non-recognition as a positive act) will necessarily turn on the nature of the secession. Recognition of a widely perceived “necessary” secession might still obtain, but stability (if not the sovereign equality of States) compels it be reserved to the most obvious of cases.

I have argued that groups should be accorded the right to secede under international law only if secession is **a last resort for three types of grave injustices**: (1) unjust taking of the territory of a legitimate state, (2) large-scale and persistent violations of the human rights of members of the seceding group, or (3) major and persisting violations of intrastate autonomy agreements by the state, when a suitable formal international legal inquiry has determined that the state is responsible for the violations and when secession is the remedy of last resort. [Emphasis added.]<sup>153</sup>

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<sup>150</sup> Expressed as such, the same reasoning applies to the reluctance or failure of states to act in a positive manner to ensure the *erga omnes* right of the Sahrawi people to self-determination. That reluctance takes the form of deferring to the United Nations in resolution of the question of Western Sahara.

<sup>151</sup> Oral submissions of the United Kingdom *per* Professor James Crawford, *Kosovo advisory opinion* case, *supra* note 26, CR 2009/32, 10 December 2009 at paragraph 7.

<sup>152</sup> Palestine falls into this category of interrupted cases, with its status compromised by Israel’s security wall and the continuing building of settlements in the West Bank.

<sup>153</sup> Allen E. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003) at 244. “Kosovo does appear to be the first case of

Recognition accorded by individual States in such circumstances will be made easier when there is substantial international involvement with, if not in, the seceding entity (*i.e.* that of the United Nations or of a highly competent regional organization which the European Union exclusively seems to be regarded at present) together with the expressed willingness of the aspirant state to perform under guarantees of proper conduct in matters of peaceful relations with the former parent State, democratic development, and the protection of various species of human, civil and political rights, especially those of minority groups which remain.<sup>154</sup> If such factors do not lower the historically high bar of recognition in secession cases, they may at least allow most states to leave the hard questions for the United Nations (and the ICJ, as Kosovo demonstrates). What could be an uncertain doctrine of recognition, or uncertainty of its application, may usefully become a more ordered norm arrived at by generally objective group determination.

By analogy, some aspects of an evolving doctrine of recognition in non-colonial situations are useful in the case of Western Sahara. A conclusion that the issue of Western Sahara has become so egregious, consistent with the “grave injustices” described above, could serve as the basis for remedial statehood. The suggestion is contentious. The “question” of Western Sahara has remained firmly one of self-determination. Greater than a concern over whether statehood should remedy the matter, however, should be a concern over what would result from finding of Saharawi statehood. A new collection of obligations would apply to the parties. The effective adoption of standards for recognition from the remedial self-determination cases might constitute self-imposed criteria for international oversight and tutelage (or capacity building as it is presently phrased) of the Saharawi state. The SADR could agree to be bound in all manner of development, including a commitment to genuine democracy as a result of historic concerns about political stability in the Maghreb region, a credible (if after-the-fact) and internationally supervised exercise of popular consultation as guaranteed by the SADR Constitution, and a demonstrable accommodation of Moroccan nationals remaining in the territory.<sup>155</sup>

Even if recognition in the modern setting operates at a level of law to serve as a criterion for statehood, it must be recalled that it has been substantially accorded to the SADR. While

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‘remedial self-determination’.” *Contested Statehood: Kosovo’s Struggle for Independence*, *supra* note 57 at 239.

<sup>154</sup> “Such coordinated, collective acts of Recognition may be predicated upon the acceptance by any claimed new international entity of certain Imperative legal principles and international acts which now have a *jus cogens* quality; among these, the United Nations Charter; the U.N. General Assembly Declaration of 1970 on Friendly Relations and Cooperation among States; the Helsinki Final Act of 1975; and the renunciation of the Use-of-Force as a solvent for international disputes, particularly disputes over the settlement of international frontiers.” Oral submissions of the United Kingdom in the *Kosovo advisory opinion* case, *supra* note 151 at paragraph 3.

<sup>155</sup> “We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.” *The Kosovo Declaration of Independence*, Article 2 (Assembly of the Republic of Kosovo) (February 17, 2008) (accessed 10 October 2009); available from: <http://www.assembly-kosova.org/?cid=2,128,1635>

no developed state in Europe or North America has offered recognition, a substantial number of states in Africa, Latin America and Asia (that is, among the G77 group of nations) have done so.<sup>156</sup> For some countries, recognition would present diplomatic problems. Spain, for example, might find it difficult to express a position given its colonial involvement, together with its proximity to Morocco and the awkward, if trivial issue of Spanish held enclaves (Ceuta and Melilla) and islands in northern Morocco. Another issue for Spain in the bilateral relationship is the presence of the Canary Islands near the Saharan coast, with commercial operators from the islands benefitting under continuing Moroccan-European Union fishing agreements.<sup>157</sup> Finally, there is Spanish government's continuing part ownership of the Bou Craa phosphate mines, reportedly 35% of an operation producing three million tonnes a year.<sup>158</sup> For its part, the European Union for its part has been content to support the United Nations led process for Western Sahara, a useful position for France as an historic backer of its former Moroccan colony. Other major states can be said to have exclusively supported the UN self-determination process in neutrally-phrased terms. The long running collective if unstated concern for them, in the 1970s as now, is a stable Morocco and Maghreb region.

The defining act of recognition that results in global acceptance into the community of states is membership in the United Nations. In theory, there is no legal bar to Western Sahara obtaining that status. The presence of the SADR in the UN organization and especially as a participating member of the General Assembly would, however, be contentious. It is difficult to predict the support for such a bid. The dramatic example of the SADR being admitted to the Organization of African Unity in 1984 reveals some of the political problems that might be expected. Morocco responded to the admission by quitting the OAU and has not been engaged with it since. In any event, the procedure for UN accession is not easily realized. An applicant state must be recommended by the Security Council for an admission decision of the General Assembly pursuant to Article 4(2) of the *UN Charter*.<sup>159</sup> It can be assumed that a Security Council perennially concerned with the maintenance of international peace and security would be reluctant to make the necessary recommendation. Curiously, the SADR has not sought observer status in the UN General Assembly. This is because the Polisario Front has not wanted to create division in the Assembly over the issue of self-

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<sup>156</sup> See "Country Recognitions of the SADR", *supra* note 49. There was a pattern of several withdrawals of recognition by west African, Latin American and Pacific island States over the period 1996-2000. This seems to have been a response to respect the then Baker settlement process. South Africa was one of the last African States to recognize the SADR, in 2004, with the SADR establishing an embassy there. Among Arab states, only Algeria, Libya and Mauritania recognize the SADR. The African Union, of course, also recognizes the Saharawi state.

<sup>157</sup> See the website of the activist organization Western Sahara Resource Watch (accessed 28 September 2009); available from: <http://www.wswr.org> Morocco has also had an agreement with the Russian federation to fish in the area (agreement on file with the author). See also *supra* note 124 regarding the 2007 EU-Morocco *Fisheries Partnership Agreement*.

<sup>158</sup> The interest was apparently retained by agreement under the 1975 Madrid Accord. See *Endgame in the Western Sahara*, *supra* note 32 at 69-73. Phosphate rock (P<sub>2</sub>O<sub>5</sub>) has traded around \$200/tonne in recent years.

<sup>159</sup> *Supra* note 3. See *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion. ICJ Reports 1948, 57.

determination or otherwise be perceived as undermining the UN sponsored peace process.<sup>160</sup>

Every case of recognition admits of its own peculiarities. There are some certainties in the law and policy of statehood that can be discerned about the doctrine. The first is that it is commonly understood as no longer constituting a test of statehood, in other words, that the emphasis has been on the conditions necessary or justifiable to invoke non-recognition. A second conclusion is that recognition by the United Nations, *de facto* in cases such as East Timor after 1999 and perhaps Kosovo at present and formally through admission to UN membership serves as an acceptable standard for most or all states. Although there is no substantive correlation in the post-Cold War world between membership as a state in the UN and general international recognition the perception that such status in assured or pending has been persuasive. The pronouncements about and presence of the United Nations in states that were coming into being had a salutary effect. The organized international community has an understandable inclination toward recognition when the various requirements of modern-day development and governing standards will be met in newly formed states: democracy, regional stability, respect for minorities, and some capacity for economic and social viability. The commitments offered in Kosovo's 2008 unilateral declaration of independence meet these precisely.<sup>161</sup> The degree to which they will require support and oversight after any actual independence remains to be seen, of course.

Recognition, then, will continue to be accorded along a continuum of checks and privileges accorded to putative states. The experience of Western Sahara, with wide-ranging state (and regional organization) recognition dispels any conclusion that "full status" in international law results from a large number of recognitions. That is not the way matters might ideally be. Once again, secession cases would appear to be more easily accepted, at least when the facts of irreversible secession are plain. For Western Sahara, recognition in the understanding of developed states (Europe, North America) has been no more predicated than the exercise of a right of self-determination in the territory. That is unfortunate. Recognition is little more than a political decision, carrying with it the granting of rights and privileges between states through their bilateral and multilateral relationships. The extensive and continuing number of recognitions accorded to the SADR is evidence of the acceptability of that in its particular case. The matter might usefully serve as a catalyst for thinking about recognition and in particular whether it offers a new perspective on the question of Western Sahara some 35 years on.

### **State of self-determination**

Two pressing and substantial cases of post-colonial self-determination remain in today's world: Palestine and Western Sahara. Not surprisingly, both conflicts originated out of territorial annexations carried out by newly established post-colonial neighboring states, as was somewhat the case with East Timor. The two territories have also seen themselves partitioned; divided by security walls ostensibly constructed for reasons of security. The ability of the peoples of both to elect meaningful self-determination has been thwarted, since 1948 (or at least 1967) in the instance of Palestinians, 1975 in that of the Sahrawis. The right

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<sup>160</sup> Personal communication Mr. Mouloud Said, Washington, D.C. Polisario Representative, November 30, 2009.

<sup>161</sup> *Supra* note 155.



of self-determination for non-self governing post-colonial territories had become a tangible norm of international law during this period, one binding on all states. It has become in these last two significant cases of its application, a right denied.

The law of self-determination with its central purpose of ensuring of a colonized people's right to elect the nature of the legal entity in which they will live has thus far taken a singular course in the case of Western Sahara. The insistence of the principal parties – among them the SADR as represented by the Polisario Front – to maintain that course has not been unreasonable. A credibly achieved self-determination still counts for much in the creation of a new state. And the right to exercise self-determination has a compelling irrefutability, more than that of statehood perceived as arrived at irregularly.

However, the efforts to realize a credible exercise of the right have been exhausted. The facts on the ground, coupled with an intransigence about which persons are to properly be registered for a self-determination referendum, have resulted in impasse. The organized international community, having ceded resolution of the matter to the United Nations, is unable and unwilling to force a result.

There can be little doubt that the Saharawi Arab Democratic Republic has all the attributes of statehood. Again, it has conducted itself as a state in significant and relatively sophisticated ways, for 35 years. And so it would be incorrect to suggest a wholly emergent or globally recognized statehood should result for remedial reasons. While there may be emerging norms within international law to provide for remedial forms of statehood, the substitution of a statehood in place of that of a right to self-determination is neither necessary nor consistent with the facts of the SADR's creation and the present circumstances its people and their territory find themselves in. Statehood should exist as statehood, on the merits and through the weight of meeting normative criteria prescribed by international law. If there is a remedial aspect to more widely perceiving and acting on such a status, it should be confined to informing resolution of the present conflict; the occupation and annexation of one State by another through the use of force. The exemplar for others in a world that appears to be moving from a post-colonial to a secessionary means of creating new states is obvious.

The Saharawi Arab Democratic Republic accordingly exists as a matter of law as a state. While there are problems with the nature of that existence, including a displaced population and the occupation of the SADR's territory, such matters do not essentially derogate from the status of statehood. Other concerns about the initial creation of the Saharawi state including its February 1976 unilateral declaration, the events and maintenance of the state since, as well as a parallel status as a post-colonial territory with a people yet to undergo exercise of the right of self-determination, are neither inconsistent with such status nor contrary to international law. Moreover, the Sahrawi authorities have offered credible assurances that self-determination would be respected in a territory returned to their control as representatives of the Sahrawi people. The issue of Moroccan settlers within a Saharawi state is the only serious matter at large. Here, the "granting of guarantees" by the SADR concerning their status and rights are at least as acceptable as those made by any other party during the history of the conflict.<sup>162</sup>

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<sup>162</sup> The Polisario's 2007 Proposal, *supra* note 129 at paragraph 9.2. For a useful history of settlers introduced into a territory by an illegal occupying regime, see Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes," *British Yearbook of International Law* 79 (2008): 193.

The question of the Western Sahara has for a considerable time been one exclusively of decolonization. That need no longer be the case. A Saharawi state exists in international law sufficiently for it to be accorded universal recognition and the support of other States to resolve a conflict rooted in territorial annexation. The integrity of a system of international law which has as its defining norm the maintenance of peace and stability, together with regard for the rights of peoples in the few remaining instances of post-colonial determination, demands no less.

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