



## The Legal Status of Western Sahara and the Laws of War and Occupation

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The question of Western Sahara has been on the United Nations' agenda for over forty years. The former Spanish colony -- a Colorado-sized chunk of desert just south of Morocco -- is Africa's last non-self-governing territory. While almost all former European colonies have been allowed some measure of self-determination, the native population of Western Sahara has not yet had the chance to vote on their final status. The reason for this long delayed act of self-determination is quite simple. Western Sahara is also the site of one of Africa's longest running conflicts, pitting Moroccan territorial claims against a nationalist independence movement. Nevertheless, Western Sahara's legal status is clear: it is a non-self-governing territory awaiting decolonization through the a referendum on self-determination.

While this juridical characterization fits the historical facts, it is a limited treatment of the applicable international laws. Though the right of self-determination for non-self-governing territories is a fundamental issue in international law, far more is at stake in Western Sahara. The Western Sahara conflict goes to the heart of the basic norms of the Westphalian international order. Morocco's forceful attempt to annex Western Sahara constitutes one of the most egregious violations of the international order codified in the wake of World War Two. The United Nations was founded to prevent the aggressive expansion of territory by force. Yet in Western Sahara, the Security Council has turned a blind eye to Morocco's blatant contravention of the UN Charter.

Since invading Western Sahara in late 1975, Morocco has exerted varying levels

of control over the land. Today Morocco occupies roughly three-fourths of the territory, while the rest falls under the de facto control of the Polisario Front, a nationalist independence movement formed in 1973 to fight Spanish colonialism. Starting in 1884, parts of Western Sahara fell under Spanish control, formalized as a colony in 1912. European rule ended in November 1975 when Spain hastily abandoned Western Sahara to Morocco and Mauritania (the latter withdrew in 1979). No government or body has recognized Moroccan sovereignty over the Territory pending the exercise of the native Western Saharans' right to a free and fair expression of self-determination (i.e., a vote on independence).

Under international law, the outstanding question of Western Sahara can and should be treated under two distinct legal regimes. The first is laws regulating Non-Self-Governing territories and decolonization, which has become the dominant juridical discourse of Western Sahara. The second, however, has been systematically evaded by the international community: laws governing the use of force in international relations (*ius ad bellum*) and laws governing war itself (*ius in bello*), including International Humanitarian Law (IHL). This paper discusses the latter.

## **Western Sahara and the Laws of War**

### *jus ad bellum*

Morocco's military invasion of Spanish/Western Sahara commenced in 30-31 October 1975. At that time, the colony was fully under Spanish control. Mo-

rocco's invasion was motivated by the fact that Madrid was planning a referendum on independence, as called for by the International Court of Justice on 16 October 1975. Days after armed Moroccan forces penetrated Spanish Sahara, thousands of Moroccan civilians -- the 'Green March', with the active encouragement and logistical support of the Moroccan government -- crossed the frontier on 5-6 November, with the expressed intent on marching to the Territory's capital, al-'Ayun. The goal of the Green March was to force Spain to negotiate a hand-over of the Territory to Morocco. Otherwise Spain would have had to repel the thousands of unarmed Moroccan civilian marchers by force. On 6 November 1975, the UN Security Council deplored the Green March and called for its immediate withdrawal (Resolution 380), which Morocco soundly ignored. At that time, the Security Council was unaware of Morocco's military invasion, though Spain brought the Green March to the attention of the Security Council as early as 17 October. At that time, Madrid had called it an invasion. Though the General Assembly took note of the Hispano-Moroccan-Mauritanian agreement, such acknowledgement did not constitute a legal transfer of Spanish administrative authority to Morocco. Thus Western Sahara remains a Spanish administered territory.<sup>i</sup>

Morocco's flagrant disregard of Security Council Resolution 380, its armed invasion, and its use of thousands of civilians to coerce Spain to negotiate, all amounted to a severe violation of the UN Charter's most fundamental constraints against the use of force in international affairs. These violations of *jus*

ad bellum are unambiguous when we consider Article Two of the UN Charter:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Furthermore, the General Assembly's 1974 Definition of Aggression (Resolution 3314) stipulates that only the Security Council can determine whether an act, such as Morocco's invasion of Spanish/Western Sahara, is justified. Such a judgement was not rendered in Western Sahara, so Morocco is guilty of aggression. The only instance where the use of force has broad international backing is in cases of self-defence. Morocco's invasion was not defensive but very offensive in nature. Whether a territory is self-governing or not, the United Nations was established to prevent what Morocco has attempted in Western Sahara: the expansion of territory by force. Morocco's continued presence thus constitutes an occupation, warranting the full application of IHL.

Given this interpretation, one might ask why the UN Security Council, which is tasked with handling such matters, has failed to address this gross violation of international norms. Most Security

Council resolutions on Western Sahara, for example, have come under Chapter VI rather than Chapter VII. Chapter VII deals with 'Threats to the Peace, Breaches of the Peace and Acts of Aggression', which applies to Morocco's actions in Spanish/Western Sahara in 1975 and still do now. Yet Resolution 380 and all Security Council resolutions since 1988 (when the Security Council again became seized of the matter) have come under Chapter VI, 'Pacific Settlements of Disputes'. The reason for this, however, has nothing to do with the letter of the law. The politics in this matter are quite clear: Two of Morocco's strongest Western allies, France and the United States, have historically taken the keenest interest in the United Nations' management of the conflict, much to Morocco's delight. Though Security Council should be commended for withholding recognition of Morocco's attempted annexation, it should be criticised for failing to treat Western Sahara with the seriousness it deserves.

### *jus in bello*

The specific laws regulating the practices of states in war (*jus in bello*) are primarily the 1899 and 1907 Hague Regulations and the 1949 Geneva Conventions. These come into effect during war and/or occupation. There is no doubt that Morocco's presence in Western Sahara constitutes an occupation under IHL, even though Morocco is rarely described as an occupying power, especially by the most relevant authority on such matters, the ICRC. Again, this does not result from an ambiguity of law, but rather from practical and moral considerations of the ICRC. The ICRC has been active in the

Western Sahara conflict, mostly dealing with prisoners of war and civilians who disappeared during the armed Polisario-Morocco fighting (1975-1991). The ICRC is not obligated to take a formal stance on Morocco's status in the Territory under IHL.

Nevertheless, an occupation comes into effect when a hostile foreign force is able to exert control over a territory, regardless of whether or not the invasion was justified. Morocco's control over a section of the Territory is unquestioned. The Moroccan state administers Western Sahara as if it was a part of Morocco proper; for over thirty years, it has attempted to seamlessly integrate Western Sahara socially, economically and governmentally into the rest of the country. Morocco's presence in Western Sahara is therefore an occupation because Morocco is able to competently and fully discharge the duties and obligations of an occupying power.

Like the ICRC, the United Nations' apparent reticence to designate Morocco an occupying power is irrelevant. The ICRC stipulates that

...it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an "invasion", "liberation", "administration" or "occupation".

However, in 1979, the UN General Assembly (Resolution 34/37) deplored what it called Morocco's occupation of Western Sahara. Furthermore, according to Harvard University's International Humanitarian Law Research Initiative,

'The UN has formally agreed that Western Sahara is an occupied territory; therefore all parties would be obligated to follow the mandates of the Geneva Convention IV'.ii

Furthermore, it is worth noting that Morocco has explicitly recognized the applicability of IHL to the Western Sahara conflict. On several occasions, the Moroccan government petitioned the ICRC on the issue of Moroccan POWs held by Polisario past the 1991 cease-fire. On 22 February 2002, the Moroccan Ministry of Foreign Affairs and Cooperation, calling for an urgent end to the plight of the POWs, invoked IHL, specifically 1949 Geneva Conventions.iii

Given that the situation in the Moroccan occupied Western Sahara warrants the application of jus in bello, there are several egregious and ongoing violations of IHL worth noting under this framework. The most noteworthy -- especially with respect to the peace process -- is Morocco's blatant attempt to demographically change the ethnic make-up of Western Sahara, from indigenous Sahrawis to predominantly Arabs and Berbers of Moroccan territorial origin. Under IHL, occupying powers are explicitly forbidden from transferring their own population into the occupied territory (Article 49 of the Fourth Geneva Convention). Population estimates suggest that the Moroccan settler population now outnumbers the indigenous Sahrawi population by as much as two-to-one.

Second, Morocco should, under IHL, allow the ICRC access to all non-Moroccan detainees in its prisons. Morocco is cur-

rently holding a significant number of Sahrawi political prisoners; most of these are being held for simply expressing their views in a peaceful manner. The most notable case is Brahim Sabbar, a former victim of forced 'disappearance' who spent years in a secret Moroccan prison in the 1980s. In recent years, Mr. Sabbar has become a prominent Sahrawi human rights activist. He was arrested last year and imprisoned following dubious criminal proceedings.<sup>iv</sup>

Third, it is worth noting that during the war for Western Sahara (1975-1991), Moroccan forces also committed war crimes. The most notable and documented case was the bombing of civilian encampments of internally displaced Sahrawis during the early phases of the war in late 1975 and early 1976, a clear violation of Hague Article 23. Furthermore, the international community should pursue investigations into other war crimes, including documented cases

of long-term enforced 'disappearance' and allegations of widespread extrajudicial executions. To this day, the Moroccan government has failed to fully account for several hundred Sahrawi civilians that 'disappeared' into Moroccan jails from the 1970s to the 1990s.<sup>v</sup>

## Conclusion

In a world of forgotten conflicts, where genocide and ethnic cleansing regularly go unchallenged, the case of Western Sahara does not seem to warrant special attention. Yet Morocco's occupation of Western Sahara stands out as one of the most blatant attempts by a state to expand its territory by force since the end of World War Two. In this respect, Western Sahara is a unique situation that demands a prompt and just solution. The native Western Saharans' right to self-determination is thus doubly important: for the sake of self-determination and for the sake of international order.

## Notes

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<sup>i</sup>. 'The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an administering Power -- a status which Spain alone could not have unilaterally transferred.' See 'Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council', United Nations Security Council S/2002/161 (12 February 2002), paragraph 6.

<sup>ii</sup>. IHLRI, Electronic Communication with author (5 April 2006).

<sup>iii</sup>. 'La détention prolongée au mépris du droit international humanitaire et des Conventions de Genève de 1949 de 1362 détenus marocains sur le territoire algérien et ce depuis plus de 20 ans constitue une source de préoccupation extrême pour le Royaume du Maroc et une atteinte à la conscience universelle.' Government of Morocco, Communiqué du Ministère des Affaires Etrangères et de la Coopération (Rabat, 22 February 2002): electronic document, <http://www.maec.gov.ma/en/f-com.asp?num=1102&typ=COM>, last retrieved 3 March 2006.

<sup>iv</sup>. Amnesty International, 'Morocco/Western Sahara', World Report 2007 (London: Amnesty International).

<sup>v</sup>. Human Rights Watch, *Morocco: Human Rights at a Crossroads* 16/6E (New York: Human Rights Watch, October 2004), chapter three.