

Moroccan Entry to the African Union and the Revival of the Western Sahara Dispute

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I. INTRODUCTION

Thirty-three years after its withdrawal from the Organization for African Unity, the predecessor of the African Union (AU), Morocco was readmitted as a member state of the pan-African regional body on January 30th, 2017. At the 28th AU Summit held in Addis Ababa, 39 members of the AU voted in favor of Moroccan entry, thereby making it the AU's 55th member. Moroccan entry into the AU, however, has met resistance from certain major AU members, particularly Algeria and South Africa, due to Morocco's involvement in the existing dispute in Western Sahara.¹ In this context, this piece seeks to analyze the impact of Moroccan entry to the AU on the dispute regarding the statehood of the Sahrawi Arab Democratic Republic (SADR), the contested territory in Western Sahara. It explores the key question of whether admission to the AU, which includes the SADR as a member, amounts to recognition of the SADR as a state and creates obligations on Morocco under international law.

Before discussing the impact of Moroccan entry to the AU on its obligations to SADR and its statehood, a short factual primer may be useful. Since the de-colonization of Western Sahara with the Spanish withdrawal in 1975, Morocco has claimed territorial sovereignty and been involved in an armed conflict with the Polisario Front, a political organization formed in furtherance of Western Sahara's independence movement against colonial Spain. Upon the request of the United Nations (UN) General Assembly in 1974, the ICJ exercised its advisory jurisdiction to evaluate the Moroccan claim over Western Sahara and the self-determination of the Sahrawi people. Despite the ICJ concluding in favor of a referendum supporting self-determination, Morocco initiated a citizens' march

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¹ Ed Crop, *Chad's foreign minister secures top post at African Union*, REUTERS (Jan. 30, 2017), available at <http://in.reuters.com/article/africa-summit/chads-foreign-minister-secures-top-post-at-african-union-idINKBN15E0UD>.

across the border into Western Sahara followed by the consolidation of armed forces in the territory. In the Madrid Accords of November 1975, Spain ceded administrative authority of Western Sahara to Morocco and Mauritania, in response to which the Polisario Front declared Western Sahara to be an independent state known as the Sahrawi Arab Democratic Republic (SADR). The armed conflict that followed finally ended only in 1992, when the UN brokered a ceasefire and created a Settlement Plan towards a referendum. While the referendum and several other elements of the plan are yet to be implemented, the ceasefire has been respected until this date.

II. EXPLORING DOCTRINES OF STATEHOOD IN INTERNATIONAL LAW

The primary point of contention in the Morocco–Western Sahara conflict is the statehood of the SADR and its recognition under international law. Eighty-four states across the world initially recognized the SADR as a state.² While several states subsequently withdrew or froze their recognition, such withdrawals are in violation of international law for those states that are party to the Montevideo Convention of 1933, which states that “recognition is unconditional and irrevocable.”³ While the UN has classified Western Sahara as a Non-Self-Governing Territory under Chapter XI of the UN Charter,⁴ it has been well established and acknowledged by the UN itself that it is not the appropriate authority to recognize states under international law.⁵ Further, the doctrinal debate on state recognition in international law is itself inconclusive and provides two divergent theoretical positions. The declarative theory of state recognition interprets statehood as a ‘fact’ without regard to recognition by other states. This position is best embodied in the Montevideo Convention. As per the declarative theory, an entity that fulfils certain factual criteria has a claim to statehood, and subsequent recognition by the international community is merely an acknowledgement of an *already existing* fact. Therefore, under this normative framework, Moroccan admission to the AU has little effect on the statehood of SADR, which would instead be determined by the Montevideo

² SADR Recognitions, UNIVERSITY OF SANTIAGO DE COMPOSTELA, *available at* http://www.usc.es/en/institutos/ceso/RASD_Reconocimientos.html (last visited, Jul. 18, 2017).

³ Montevideo Convention on the Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

⁴ Report of the Committee on Information from Non-Self-Governing Territories, U.N. General Assembly on its Eighteenth Session, U.N. G.A.O.R. Supplement No. 14 (A/5514); U.N. Charter, Arts. 73–74.

⁵ See U.N. Secretary-General, *Letter dated 8th Mar. 1950 from the Secretary-General to the President of the Security Council transmitting a memorandum on the legal aspects of the problem of representation in the U.N.*, U.N. Doc. S/1466 (Mar. 19, 1950).

qualifications: a permanent population, a defined territory, government, and a capacity to enter into relations with other states.⁶

The constitutive theory, on the other hand, maintains that it is the recognition by other states that *creates* a new state and endows it with legal personality. New states are established in the international community as subjects of international law by the will and consent of other pre-existing states. In this light, one may be tempted to interpret Moroccan entry into the AU as implicit recognition of the SADR. However, this approach is perhaps flawed for several reasons. First, recognition is not normally inferred from the fact that both parties are members of a multilateral treaty such as the UN Charter or the African Union Constitutive Act. Practice reveals that many member-states of the UN are not recognized by other member-states. For example, while Israel and several Arab countries were UN member-states, this did not defeat Arab non-recognition of Israel.⁷ Second, there is nothing to specifically suggest that the African Union Constitutive Act supports this doctrine of recognition of states. In the absence of any particular direction provided by the AU under its Constitutive Act, applying the doctrine of implied recognition would perhaps be incorrect. Recognition is predominantly viewed as a key political instrument in the hands of states, and hence the scope of implied recognition must be interpreted narrowly in the context of surrounding circumstances that illustrate an intention to extend recognition.⁸ In this context, Morocco's explicit denial of SADR recognition—despite entry into the AU⁹—is sufficient to elucidate the concerns of applying the theory of implied recognition, as Morocco has displayed a clear intent of non-recognition. Due to these inconsistencies, the theories of state recognition in international law are insufficient for providing any conclusion on the impact of Moroccan entry to the AU on the statehood of the SADR.

III. INTERNATIONAL OBLIGATIONS NOTWITHSTANDING STATE RECOGNITION

While international law fails to provide us with a conclusive determination of SADR statehood, this does not mean that Moroccan entry to the AU does not alter the normative status quo. It is true that Moroccan entry does not result in state recognition. However, as the 55th Member of the AU, Morocco has obligations under the African Union

⁶ Montevideo Convention, *supra* note 3, at Art. 1.

⁷ See MALCOLM N. SHAW, INTERNATIONAL LAW 464 (6th ed. 2008).

⁸ See *id.*

⁹ See Youssef Igrouane, *Morocco Will not Recognize Self-Proclaimed SADR Despite Return to AU*, MOROCCO WORLD NEWS (Feb. 15, 2017), available at <https://www.moroccoworldnews.com/2017/02/208366/morocco-will-not-recognize-self-proclaimed-sadr-despite-return-to-au/>.

Constitutive Act that it owes to each and every member of the multilateral agreement. In other words, after admission to the AU, all obligations under the Constitutive Act are applicable in relations between the new member (Morocco) and each of the existing members (including the SADR), *independent of their mutual recognition as states in international law*. Thus, at a normative level we see the creation of obligations between Morocco and SADR, as mutual members to the AU, where previously no such obligation existed. It is important to remember that Morocco cannot validly deny its legal obligations to one particular member-state of a multilateral agreement in the absence of specific reservations to the Constitutive Act. Neither can Morocco selectively decide for itself which obligations enumerated in the Act it is bound to discharge, and which it may ignore. Accession to the AU therefore means that Morocco is hereinafter bound by all of the AU principles in its relations with each of the AU members, without prejudice to state recognition.

What is the substantive content of these obligations and principles that are now binding upon Morocco? The answer to this question highlights the true impact of Moroccan entry to the AU. Article 4 of the Constitutive Act enshrines several principles, including sovereign equality, respect for borders of members of the Union, peaceful settlement of conflict amongst members, prohibition of the use or threat of use of force, non-interference in internal affairs, and respect for democratic principles and human rights.¹⁰ Morocco has repeatedly ignored UN resolutions in favor of self-determination and referendum in Western Sahara,¹¹ and has occupied the territory with clear disregard for democratic principles. Morocco's relationship with Western Sahara is a classic case of modern day colonialism. Western Sahara holds some of the largest phosphate reserves in the world, provides access to rich fishing waters, and contains vast offshore oil and gas resources. Systematic exploitation of these resources has been the underlying reason behind the Moroccan occupation, which thrives off of their export. In December 2016, the European Court of Justice held that EU–Morocco trade agreements did not extend to resources taken from the SADR.¹² While such efforts are welcome in the broader context of the dispute, they do not impose substantive obligations on Morocco and its exploitation of SADR resources. However, now having joined the AU, Morocco is severely constrained at a normative level, as its economic exploitation, military presence,

¹⁰ Constitutive Act of the African Union, Art. 4, May 26, 2001, OAU Doc. CAB/LEG/23.15.

¹¹ G.A. Res. A/Res./34/37, Question of Western Sahara (Nov. 21, 1979).

¹² See Dominic Dudley, *European Court Dismisses Morocco's Claim to Western Sahara, Throwing EU Trade Deal into Doubt*, FORBES (Dec. 21, 2016), available at <https://www.forbes.com/sites/dominicdudley/2016/12/21/european-court-dismisses-moroccos-claim-to-western-sahara-throwing-eu-trade-deal-into-doubt/#355642e54493>.

and refusal to accept a referendum in the SADR all breach its new obligations under the Constitutive Act.

IV. CONCLUSIONS

While Moroccan entry to the AU may not reflect recognition of the SADR in light of the inconclusive doctrinal position of international law on state recognition, it imposes a framework of legal obligations under the Constitutive Act that prohibits much of Morocco's present activities in Western Sahara. In this manner, Moroccan entry to the AU significantly alters the normative status quo in the Western Sahara, and has important legal consequences on the regional conflict.