1985

Putting Meaning into the Treaty Exception to the Act of State Doctrine

Dennis G. Terez

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol17/iss1/5

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
NOTE

Legal Aspects of Membership In The Organization of African Unity: The Case of The Western Sahara

by Anthony G. Pazzanita*

I. INTRODUCTION

The North African territory known as the Western Sahara seems, at first glance, an unlikely place for a conflict that has severely tested the structure and even the existence of a major regional international organization. However, since the Western Sahara was freed of its European colonizer, Spain, in 1976, (and to a greater degree for international legal purposes, since about 1981) the Western Sahara issue has immersed the African continent in controversy. The issue concerns the granting of membership status in the Organization of African Unity (OAU) to a purportedly independent Western Sahara, represented by a political and military group claiming to speak for the inhabitants of the territory. What makes the dispute more interesting—and severe—is that portions of Western Sahara are still occupied by a neighboring state and OAU member, the Kingdom of Morocco, which has a competing claim to the entire country. The issue has on several occasions threatened to paralyze totally the OAU and quite possibly to splinter it completely along political, ideological, and even regional lines. The admission of the Saharan Arab Democratic Republic (SADR), as the independent Western Sahara calls itself, to the OAU has caused the gravest crisis in the OAU's 20-year history. A protest boycott led by Morocco and joined by other sympathetic states has, at times, threatened the whole organization with

* J.D. Candidate, Case Western Reserve University (1985); B.A., Franklin and Marshall College (1981).


2 Id. at 85-86.


4 T. Hodges, supra note 1, at 238.
collapse.\textsuperscript{5}

Despite the problems the Western Sahara dispute has caused the OAU, it is by no means solely a legal, political, or diplomatic concern; those issues have grown out of (and contributed to) one of Africa's most persistent military contests. Since 1976, Morocco and the forces seeking to oust it from Western Sahara have fought with increasing intensity and with weapons of steadily increasing sophistication.\textsuperscript{6} This military situation has also involved several other OAU member states and has indirectly involved outside powers.

The Western Sahara conflict, including the OAU membership issue, is primarily political in nature and has created fairly sharp divisions among the Organization's member states.\textsuperscript{7} The following article will not address these issues in any significant sense. Rather it will explore the legal aspects and problems of the SADR membership dispute, especially those found from a reading of the OAU Charter itself.\textsuperscript{8} The legal questions relate to sovereignty, statehood, recognition, and decolonization of territories in the face of competing claims. The analysis below will examine generally recognized principles of international law, concerns peculiar to Africa and to the OAU Charter, other appropriate constituent documents of international organizations, factual information, and the behavior of other actors on the international legal scene. When possible, and appropriate, the article will examine prior instances of similar situations on the African continent relating either to OAU membership or other international legal concepts of importance in the affairs of Africa.

The overarching purposes of this study need to be kept firmly in mind. The factual and historical-political information concerning the Western Sahara which bears on the legal issues, the treatment of those issues and the legal arguments which follow them, is developed with two objectives in mind: The first is to attempt, by means of international law, to carry the Western Sahara dispute beyond the level of political maneuvering by African and other states and beyond the ideological factionalism and military and political influence exercised by outside powers. This analysis will carry with it at least the seeds of the eventual resolution of the conflict through the use of international law. Second, in order to put the dispute onto a different plane, the legal perspective will be as broad as possible. It will encompass most, if not all, of the relevant OAU Charter provisions, the policies which those provisions express, and the

\textsuperscript{5} N.Y. Times, Mar. 14, 1982, at 8, col. 1.
\textsuperscript{7} Id., Mar. 14, 1982, at 8, col. 1.
\textsuperscript{8} See Organization of African Unity Charter arts. 2(1)(c), 2(1)(d), 3(3), 3(6), 4, 28, reprinted in Basic Documents in International Law 77-78, 83 (I. Brownlie ed. 1983) [hereinafter cited as OAU Charter].
accompanying commentary on those provisions. It is precisely the use of multiple provisions of the OAU Charter and related outside sources that has been lacking in the previous literature on the subject. The following analysis is crucial to a thorough coverage of the conflict, and will greatly illuminate some general principles of international law. Most importantly, it will provide a necessary glimpse into international legal problems pertaining to Africa and into the workings and policies of Africa’s primary international organization.

II. Historical and Legal Background

A. History and Recent Events

The Western Sahara is a territory about as large as Great Britain and is one of the most remote areas on Earth. It covers about 102,700 square miles, most of which is flat, monotonous gravel desert. It is situated along the Atlantic coast of north-west Africa (it has a 660-mile seacoast) and borders three other states, two of which either have or have had claims to the territory: Morocco, Mauritania, and Algeria. These boundaries are mostly undemarcated, although no segment of the border seems to be the subject of any legal or political dispute.

Western Sahara has only two major known natural resources. One is phosphates, most of which are found (and were mined until the conflict terminated operations) in the northern third of the country, especially in the vicinity of Bou-Craa, a small desert outpost about 50 miles from the Mauritanian border. The second is fisheries, which are considered extremely abundant. However, they are largely unexploited at present, due to a variety of factors: 1) the conflict itself; 2) strong ocean currents off the coast that make shipping dangerous; and 3) the lack of adequate transportation.

The population of the territory is the subject of much dispute. When proposals are made by interested parties for a referendum to decide the Western Sahara’s future, the number of indigenous persons to be allowed to vote is a major point of contention. This is complicated by the fact that many inhabitants are in refugee camps, where they fled after the division of the territory between Morocco and Mauritania. Further details can be found in the sources listed at the end of the text.

---

10 T. Hodges, supra note 1, at ii.
11 Id. at 45.
12 Id. at 126-28.
13 Id. at 14.
14 Id. at 312. See also N.Y. Times, June 27, 1981, at 5, col 1.; id., July 7, 1981, at A3, col. 5.
thermore, the population is traditionally nomadic, and thus difficult to count, although it appears that most began to abandon this way of life in the early 1970s. A Spanish census conducted in 1974 showed 73,497 native Saharan, but other estimates have ranged from about 200,000 to upwards of 500,000. There are only three towns of consequence in the territory: Smara in the northern interior, Dakhla (formerly Villa Cisneros) and El-Ayoun, both on the coast. The latter had served since 1958 as the administrative “capital” when Western Sahara was under Spanish control.

It appears to be generally accepted—but not by Morocco, which lays claim to the territory—that the inhabitants of the Western Sahara (called Sahrawis) constitute a distinct and identifiable ethnic and national group; a fact obviously of critical importance. The population comprises various tribal groupings whose attachments to the land are of long standing, easily predating the arrival of Spanish colonizers in the late 19th century. However, due to the undemarcated and uncontrolled borders, the traditional nomadism of the inhabitants, and the proximity of other states such as Mauritania, the Sahrawis often closely resemble their Mauritanian and other Saharan counterparts in appearance, customs, and the like.

Western Sahara, a former Spanish colony, was one of Spain’s few possessions in Africa. Various commercial and governmental interests spearheaded the occupation of the coastal towns in the mid-1880s. It was not until the 1930s that Spain extended its control to the interior of the territory, with the assistance of the French armed forces who were then engaged in quelling a rebellion in adjacent Morocco, then under French control. Given the lateness of this chain of events, it is stated that “the Sahrawis were among the last African peoples to submit to colonial domination.” The boundaries of the territory had been final-

---

16 T. Hodges, supra note 1, at 131.
17 Id. at 131-32. See also Iseman, The War in the Sahara, Harper's, Sept. 1980, at 54.
18 T. Hodges, supra note 1, at 139.
19 For discussion see, V. Thompson & R. Adloff, The Western Saharans: Background to Conflict 115-16 (1980).
20 Historically, the largest and most organized tribal group in the Western Sahara is the Reguibat “Confederation.” “No matter which government eventually wins control of the Western Sahara, it will have to deal with the Reguibat as the strongest indigenous force in the area.” Id. at 315.
21 Id. at 116.
22 G. Freeman-Grenville, A Modern Atlas of African History 46-50 (1976). Spain’s only other African possessions were Equitorial Guinea (Fernando Po and Río Muni) and small portions of northern Morocco (including the enclaves of Ceuta and Melilla, which Spain continues to occupy). Id.
23 T. Hodges, supra note 1, at 55.
24 Id.
ized by treaty in 1900 and once again in 1912.25

As a result of the growing anti-colonial sentiment among peoples after the Second World War, Spain over time came under increasing pressure from the United Nations, the OAU, and others to relinquish control over "Spanish Sahara."26 It finally did so in 1976 amid much activity by most of the concerned parties. A United Nations Visiting Mission was sent to the still-Spanish territory in mid-1975 to ascertain the wishes of the people and found "there was an overwhelming consensus among Saharans within the territory in favour of independence and opposing integration with any neighboring country."27 Unknown at first to most Sahrawis, however, Spain agreed to withdraw from the territory in February 1976. The Western Sahara was divided between Morocco and Mauritania by means of an agreement reached among the three states in late 1975; the northern two-thirds would go to Morocco and the southern one-third would be ceded to Mauritania.28

This division of territory was done in spite of the issuance shortly beforehand of an Advisory Opinion by the International Court of Justice.29 The opinion held that claims to the Western Sahara by Morocco and Mauritania were not persuasive and did not override the rights of the native inhabitants to self-determination and independence.30 In addition to this factor, the agreement struck between the three states made no reference to the organization which came to represent, by many accounts,31 the opinions and aspirations of most Sahrawis; that is, the

---

25 Id. at 45-48.
28 Franck, The Stealing of the Sahara, 70 Am. J. Int'l L. 694, 715 (1976). The exact division of territory was not agreed upon until April 14, 1976. For a detailed description, see T. Hodges, supra note 1, at 237. In the time since the agreement, the conflict and the legal and diplomatic activities involved have combined to make the "Madrid Accord" progressively less important as a matter of international law. In December, 1984, Spain voted in favor of a U.N. General Assembly Resolution urging Morocco and the Frente POLISARIO to engage in direct negotiations with a view towards cessation of hostilities. Although the precise meaning of this action is not entirely clear at this writing, it is said by one source that "Spain's vote... was interpreted as a repudiation of the 'tripartite agreement' (Spain, Morocco, Mauritania) of 1975 which handed the former Spanish territory over to Morocco." Africa, Jan. 1985, at 26.
30 1975 I.C.J. at 68.
31 Regarding the popularity of the Frente POLISARIO as seen by Spanish observers and the 1975 U.N. Visiting Mission, see T. Hodges, supra note 1, at 197-99; V. Thompson & R. Adloff, supra note 19, at 17-18.
Frente POLISARIO. This group was founded in 1973 to combat the Spanish presence, but later shifted its attention to Morocco and Mauritania once the intentions of the two claimant states became apparent. Pursuant to the agreement, Spain gradually withdrew from the territory, finally departing completely on February 26, 1976, and its place was taken by the armed forces of the claimant states in their respective allotted zones. The Frente POLISARIO responded on the following day by formally declaring and asserting, within the Western Saharan territory, independence as a sovereign state. It was to be known henceforth as the Saharan Arab Democratic Republic, or SADR.

Since that time, many changes have occurred, but a brief summary of important events will suffice. Mauritania, its fragile economy devastated by POLISARIO attacks, signed a peace treaty with the Saharan organization in Algiers in 1979, in which it agreed to renounce its claim to the Western Sahara. The Frente POLISARIO has continued its military activities against Morocco, now claiming to control about 80 percent of the territory. Morocco has annexed the country and calls it its "Saharan provinces." It has consolidated its position only in the northern one-sixth of the territory and that has been by constructing fortifications in the form of a 400 mile-long gravel wall or "berm," which contains the phosphate mines and two of the three principal Western Saharan towns. The Frente POLISARIO which controls most of the remainder of the territory has, in addition to its military campaign, pressed a legal, political, and diplomatic offensive against Morocco and its allies. These efforts have been quite successful, as will become immediately apparent after other relevant international legal factors are addressed.

B. The I.C.J. Western Sahara Advisory Opinion of 1975

After the Western Sahara decolonization issue had risen to promi-

---

33 T. Hodges, supra note 1, at 161, 182.
34 Id. at 229-32 for detailed discussion of this phase in the conflict.
35 Vance, Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara, 7 Yale J. World Pub. Order 45, 59-60 (1980). For a description of the event at which independence was asserted, see T. Hodges, supra note 1, at 238. The SADR's first government was formed on March 4, 1976. Id.
36 N.Y. Times, Aug. 6, 1979, at A5, col. 1.
37 Regarding these claims, see T. Hodges, supra note 1, at 290 (reporter for French newspaper Le Monde stated that during the 1200-mile journey across Western Sahara, no Moroccan presence could be detected anywhere). See also, 19 U.N. Monthly Chron. 54 (Nov. 1982).
38 Concerning areas of POLISARIO and Moroccan control, see West Africa, March 29, 1982, at 861-62; id., May 7, 1984, at 970. For a map illustrating the approximate extent of Moroccan defenses, see id., May 7, 1984, at 970.
nence, but before the formal takeover of the territory by the two claimant states and the declaration of independence by the Frente POLISARIO, the International Court of Justice rendered an Advisory Opinion on the status of the country. This opinion was given in response to a request by the United Nations General Assembly, embodied in Resolution 3292(XXIX) of December 13, 1974. The request was made to clarify legal issues relating to the territory, especially in view of the fact that Spain had earlier rejected contentious proceedings before the I.C.J. against Morocco and Mauritania. The request itself comprised two questions: First, at the time of colonization by Spain (that is, in about 1884), was the Western Sahara a territory belonging to no one (terra nullius)? If not, the second question posed was whether there existed, and what were the nature of the legal ties between the Western Sahara and Morocco and between the territory and what is now the Islamic Republic of Mauritania.

In its opinion, handed down in October 1975, the I.C.J. answered the first question negatively: Western Sahara was not terra nullius in 1884. To reach this conclusion, it made use of the customary international legal means of acquiring authority over territories at the time of colonization—in the case at hand, in the late 19th century. At that time, acquisition of sovereignty could be by one of two means: by occupation of an empty land (terra nullius) or by means of agreements with the indigenous inhabitants of the territory. If the land was inhabited by peoples having social and political organization, it could not be terra nullius and the consent of those peoples had to be obtained in order for colonization and sovereignty to be valid. After considering the evidence supplied by the parties, the Court concluded that at the time of colonization, Western Sahara was inhabited by peoples who were, albeit nomadic, “socially and politically organized in tribes and under chiefs competent to represent them.” Therefore, their consent was needed for Spain to validly assert its sovereign claim to the Western Sahara.

---

41 1975 I.C.J. at 37.
42 Id. at 38-39.
43 Id. at 39.
44 The Court summarized the applicable international law partly as follows:
'The State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius . . . the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of terra nullius by original title but through agreements concluded with local rulers [they] were regarded as derivative roots of title, and not original titles obtained by occupation . . . .

Id.
45 Id.
obtained the needed consent, and in so doing, further established that the territory did not “belong to no one.” As the Court interpreted Spain’s pattern of conduct,

[I]t did not proceed on the basis that it was establishing its sovereignty over terra nullius. In its Royal Order of 26 December 1884 . . . Spain proclaimed that the King was taking [Western Sahara] under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes . . . .

Having used the customary international law as it existed in 1884 to decide this threshold question, the Court then considered the existence, extent, and nature of any legal ties between the inhabitants of the Western Sahara and the Kingdom of Morocco and with Mauritania. This issue was crucial, since both states claimed that extensive ties existed with the Western Saharan tribes at the time of the Spanish colonization. These ties were supposedly of such duration and degree that territorial sovereignty would be proper over Western Sahara by both Morocco and Mauritania. After hearing much evidence, the Court found that such legal ties did exist as to both Morocco and Mauritania. However, these ties were not as strong as the two claimant states argued. In the words of the Court: “Those ties did not involve territorial sovereignty or co-sovereignty or territorial inclusion in a legal entity . . . the materials and information presented to [the Court] do not establish any tie of territorial sovereignty between . . . Western Sahara and the Kingdom of Morocco or [Mauritania].” The I.C.J. thus explicitly rejected any claims of sovereignty over the Western Sahara by both states. Furthermore, since the Court was mindful that the matter involved the decolonization of a dependent territory, it concluded:

The Court has not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of the 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 . . . .

46 Id.

47 For extended and detailed discussion of the “legal ties” (which took the form of ties of allegiance between Sahrawi tribal chiefs and the Sultan of Morocco and the Mauritanian authorities, treaties, tax collections, etc.), see id. at 42-63.

48 The materials and information presented to the Court . . . show the existence . . . of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in . . . Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between [Mauritania] and the territory of Western Sahara.

Id. at 68.

49 Id. at 67-68.

50 Id. at 68.
As the subsequent conduct of the claimant states discloses, the I.C.J. Advisory Opinion was essentially disregarded. Morocco and Mauritania, pursuant to their agreement with Spain, marched into the territory in February 1976 and occupied their respective portions of the Western Sahara. Somewhat interestingly, Morocco claimed that the Advisory Opinion had vindicated its claim to the land by allegedly emphasizing "legal ties" to the exclusion of other factors, such as the principle of self-determination. The Frente POLISARIO, itself claiming vindication by the main judicial body of the United Nations, began struggling to expel the occupiers from what it considered to be its state: the SADR.

C. The Organization of African Unity

1. Formation, Charter, and Policies

After a series of meetings among many newly independent African States in the early 1960's, the OAU was founded at a full assembly comprised of 31 African heads of state and foreign ministers in Addis Ababa, Ethiopia on May 25, 1963. The OAU holds assemblies and periodic summit meetings among African heads of state. It also has specialized commissions dealing with a wide variety of social, political, and economic matters relating to Africa, including health, nutrition, education, scientific and technical, and defense concerns. In addition, the OAU attempts to unify the legal and policy positions of African countries through the commissions. In their international relations, particularly regarding colonial dependency situations such as the Western Sahara and southern Africa, there is also an attempt to achieve unity. The number of states who are members of the OAU has grown, by virtue of the post-war decolonization process, from the original 31 states (including Morocco) to 51 at the present time (if the SADR is counted). Because of the near universality of its membership, the OAU is considered to be one of the most important international organizations in the world; it is regularly compared with the United Nations (U.N.) and the Organization of

51 See supra note 28 and accompanying text.
53 T. Elias, Africa and the Development of International Law 121-23 (1972).
54 OAU Charter, supra note 8, at art. 20. Distinct from the Specialized Commissions named in Article 20 are the principal institutions of the OAU named in Article 7 of the Charter: the Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat, and the Commission on Mediation, Arbitration, and Conciliation. See T. Elias, supra note 53, at 132.
55 The OAU After Twenty Years 365 (Y. El-Ayouty & I. Zartman eds. 1984) [hereinafter cited as El-Ayouty & Zartman].
American States (OAS). Also, because of the number and diversity of its members, the OAU is a respected voice in all matters concerning the African continent.

As will be seen below, the Charter of the OAU contains many provisions which, taken in some cases with outside commentary, are relevant to substantive, as well as procedural, legal arguments to be made regarding OAU membership status for the SADR. In addition, the Charter reflects the concerns, aspirations, and priorities of the Organization and its member states. This is made obvious by the fact that at both the preliminary meetings concerning an African international organization as well as at the 1963 Addis Ababa summit, which resulted in the signing of the present Charter, explicit views on the problems of Africa were articulated at length.

These views first found their final expression in the Preamble of the Charter, where the basic principles (or "fundamental postulates") of the Organization are enunciated. So important is this preambular language considered that, according to one who was present, "almost half the time spent on considering the Charter as a whole had been devoted to (the) Preamble alone." In addition to several general statements reflecting a desire for African unity and progress, the Preamble contains language which is more significant for its specificity. These sections refer to what the Organization considers "the inalienable right of all people to control their own destiny," its determination "to safeguard and consolidate the hard-won independence [and] the sovereignty and territorial integrity of [African] States." Also expressed is an explicit adherence to the Charter of the United Nations, which the states considered to be a "solid foundation" to facilitate "peaceful and positive cooperation among States." Says Elias: "All this may seem mere pious sentiment, but only those who participated in or were present . . . could testify to the sincerity and earnestness of purpose that prompted the particular formulation

56 For comparison of respective structures of the OAU, U.N., and OAS, see T. ELIAS, supra note 53, at 123, 130-33.
57 The author states that he was "concerned in Addis Ababa in the drafting of the revised Charter." Id. at 123.
58 Id. at 124-25.
59 The Preamble to the Charter of the OAU reads, in relevant part, as follows:

*Convinced* that it is the inalienable right of all people to control their own destiny;

*Determined* to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our States.

*Persuaded* that the Charter of the United Nations and the Universal Declaration of Human Rights, the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among states;

OAU CHARTER, supra note 8, at 76.

60 Id.
61 Id.
of these objectives."

Turning to the substantive statements of the purposes and principles of the OAU in the body of the Charter, it is apparent due to the frequency of their mention that the same postulates stated in the Preamble receive added weight. The purposes of the Organization are set forth in article 2: they state, inter alia, that the OAU as an international organization shall defend the sovereignty, territorial integrity, and independence of African States, to eliminate all forms of colonialism from Africa, and to promote international cooperation, with "due regard" for the U.N. Charter and the Universal Declaration of Human Rights.

For present purposes, it is important to note that the U.N. Charter includes a provision establishing the International Court of Justice (which rendered an Advisory Opinion on the Western Sahara situation, as discussed above). By extension, this could well mean there exists at least some small degree of OAU connection to the Statute of the I.C.J., since article 1 of the Statute refers to the Charter as establishing the Court as the principal U.N. judicial organ. This possible nexus between the U.N. and OAU Charters will be important in regard to the principles expressed in both the OAU and U.N. Charters and, of course, to the significance of the Western Sahara Advisory Opinion.

Briefly, the principles governing member states set out in article 3, include: non-interference in the internal affairs of states (article 3(2)), respect for the sovereignty and territorial integrity of each state and for their inalienable right to independent existence (article 3(3)), and a strongly-worded commitment to the "total emancipation of the African territories which are still dependent" (article 3(6)). In addition, article 6 of the Charter binds all member states (which have, per article 5, equal rights and duties) to "observe scrupulously" the principles contained in article 3. This language in article 6 exemplifies the extreme importance

62 T. ELIAS, supra note 53, at 124.
63 Article 2 of the OAU Charter reads in relevant part:
1. The Organization shall have the following purposes:
   . . . .
   (c) To defend their sovereignty, their territorial integrity and independence;
   (d) To eradicate all forms of colonialism from the continent of Africa; and
   (e) To promote international co-operation, having due regard to the Charter of the

OAU CHARTER, supra note 8, at 77.
64 U.N. CHARTER arts. 92-96.
66 STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 1, reprinted in F. KIRGIS, supra note 40, at 944.
67 For a more detailed discussion of the relationship between the U.N. and the OAU, see F. OKOYE, INTERNATIONAL LAW AND THE NEW AFRICAN STATES 154-65 (1972).
68 OAU CHARTER, supra note 8, at 77-78.
69 Articles 3, 5, and 6 of the OAU Charter read in relevant part:
the framers of the Charter placed on the principles in article 3: "[I]t might have been thought sufficient that these principles have been embodied in the Charter, by which member States are already bound. But it was finally agreed that these principles should be embodied in Article 6 . . . ."  

Admission to membership in the OAU is a relatively simple matter, although the Western Sahara membership has been plagued by procedural problems at various times. Article 4 of the Charter states that "each independent sovereign African State shall be entitled to become a Member of the Organization."  

Any such state may at any time notify the Secretary-General of the OAU of its intention to become a member and, thus, "to adhere or accede to [the] Charter." When this is done, the Secretary-General communicates this notice to all the member states, a majority of whom shall decide whether or not to admit the applicant. Upon receipt of the required number of assents (26 in the present case, there being 50 OAU members not counting the SADR), the Secretary-General will notify the applicant state of this decision. Full membership status then commences.

In the words of one observer: "[I]t is thought that this procedure is simple enough to achieve speedy admission without the necessity of making the candidate wait until the next meeting either of the Council of Ministers or of the Assembly of Heads of State and Government."  

---

_article 3_

The Member States, in pursuit of the purpose stated in Article 2, solemnly affirm and declare their adherence to the following principles:  
1. The sovereign equality of all Member States;  
2. Non-interference in the internal affairs of States;  
3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;  
4. Peaceful settlement of disputes by negotiation, mediation, conciliation, or arbitration;  
5. . . .  
6. Absolute dedication to the total emancipation of the African territories which are still dependent;  

_article 5_

All Member States shall enjoy equal rights and have equal duties

_article 6_

The Member States pledge themselves to observe scrupulously the principles enumerated in Article 3 of the present Charter.

_id._

70 T. ELIAS, supra note 53, at 129.  
71 OAU CHARTER, supra note 8, at 78.  
72 Id. at 83 (quoting article 28(1) of the OAU Charter).  
73 Id. at art. 28(2).  
74 Id.  
75 T. ELIAS, supra note 53, at 131.
deed, in the case of the Western Sahara, the invitation to the SADR to join the delegation of members was made at a meeting of the Council of Ministers in February, 1982, by then Secretary-General of the OAU, Edem Kodjo. Kodjo has claimed in his memorandum concerning SADR admission that article 28 of the Charter "stipulates provisions 'characterized by an automaticity that require[s] no political considerations on the part of the Secretary-General.'" Kodjo contends he was performing a purely ministerial duty of notification to the various parties, a role which indeed seems dictated by the nondiscretionary language in Article 28(2)).

Leaving procedural questions of membership aside, certain concepts, purposes, and principles are expressed repeatedly in the OAU Charter. Among these are the concepts relating to the principle of self-determination for all African peoples and the maintenance of the territorial integrity of all states on the African continent. This is evidence of the critical importance of these ideas to the member states. They have acquired wide currency both inside and outside Africa; not only in the OAU itself, but among international legal scholars and commentators as well as others. For these reasons, it is necessary to discuss these concepts separately in turn. This discussion will assume much added relevance when legal arguments regarding membership in the OAU for the SADR are presented.

2. Self-Determination

The right of colonial and other formerly dependent peoples to self-determination is a well-established norm of international law. Self-determination has been defined as "the right of a nation to constitute an independent State and to determine its own government for itself." The International Court of Justice, in its Western Sahara Advisory Opinion,

---

78 Article 28 of the OAU Charter reads:

Article 28

1. Any independent sovereign African State may at any time notify the Administrative Secretary-General of its intention to adhere or accede to this Charter.
2. The Administrative Secretary-General shall, on receipt of such notification, communicate a copy of it to all the Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Administrative Secretary-General, who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.

OAU CHARTER, supra note 8, at 83.
defined self-determination as a need to require "a free and genuine expression of the will of the peoples concerned." 80 The Court also took note of the relevant provisions of the U.N. Charter regarding this principle, in particular, article 1, paragraph 2. 81 In the United Nations itself, the principle has received a more explicit definition in the General Assembly's famous Resolution 1514(XV) of 1960. 82 It states, inter alia, that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." 83 Using the above definition, the OAU Charter stresses self-determination in the Charter Preamble as well as in articles 2(1)(d) and 3(6); 84 they speak of the Organization's commitment to the elimination of colonialism and other forms of alien control from Africa. Also, the provisions allude to the rights of those formerly dependent peoples to attain independent status and conduct their own affairs as sovereign states. In this connection, it is helpful to recall the adherence by the OAU to the U.N. Charter, expressed in the preambular language as well as in article 2(1)(e). 85 An example of the interaction between the U.N. and OAU Charters in the present problem is provided by a General Assembly Resolution passed in 1980. It called upon Morocco to withdraw from the Western Sahara, recognized the right of the inhabitants of the territory to self-determination and independence, and reaffirmed the principles of the U.N. and OAU Charters. 86

3. Territorial Integrity

As seen earlier, the preservation of territorial integrity in African States finds repeated expression in the OAU Charter. 87 This issue is of prime importance in the Western Sahara situation, and therefore, it should be appreciated that concern for the adherence to this principle is one of the most important and overriding preoccupations on the African legal scene. The origin of this concern is evident from an examination of the historical background. As one writer explains:

No one who looks at the map of contemporary Africa can fail to note the extent to which the continent is fragmented into national units, some of them with suspiciously straight-line boundaries. The slightest
acquaintance with African history over the past century will tell us the
apparent reason for this . . . artificiality of frontiers; the so-called
'scramble for Africa' which developed . . . when the European colo-
nial powers competed with each other to acquire territory in Africa
. . . .

The European powers have departed, but the boundaries drawn by them
still remain. Often these boundaries have little or no relation to the ra-
cial, religious, or ethno-linguistic composition of the various territorial
units. Despite the fact that some newly independent states pointed out
the "absurdity and lack of legal authority of colonial boundaries [in] Af-
rica," the states almost universally agreed that the boundaries should
not be tampered with after independence.

The multiple OAU Charter provisions regarding the preservation of
the frontiers inherited from the colonial powers reflect a near complete
consensus that an attempt to redraw the borders would lead to "a new
scramble for Africa"; it was evident, to use Franck's words, that "to at-
tempt a wholesale redrawing of the map of Africa on the basis of ancient
claims or tribal links could only lead to chaos, war, and the unraveling of
the continent's State system." Franck also states that although the re-
spect given to colonially-drawn boundaries could lead to injustices, "es-
tablished boundaries and fixed populations, however unjustly or
serendipitously arrived at, soon develop a cohesive logic of their own that
should not be lightly overridden."

Helping tip the scales in favor of Charter provisions supporting the
retention of existing boundaries were additional pragmatic concerns. Ev-
ident at the time of the drafting of the OAU Charter were the concerns of
"a few small African States about the intentions of one or two of their
larger neighbors . . . in matters concerning frontier disputes." In
short, these states feared the assertion of historic or other claims to their
territories by their more powerful counterparts, which would result in
pressures all the more difficult to resist in the absence of specific Charter
provisions.

The commitment by the OAU to the principle of territorial integrity

---

88 Allot, Boundaries in Africa: A Legal and Historical Survey, in African International
Legal History 69 (A. Mensah-Brown ed. 1975)
89 Id. at 83.
90 See supra note 87.
91 Franck, supra note 28, at 698. See also the statement by the Foreign Minister of Ethiopia at
the 1963 Summit Conference in Addis Ababa which led to the OAU's formation:
[If we are to redraw the map of Africa on the basis of religion, race, and language, I fear
that many States will cease to exist. It is in the interest of all Africans today to respect the
frontiers drawn on the maps, even though they were drawn by the former colonizers.
92 Franck, supra note 28, at 698.
93 T. Elias, supra note 53, at 126.
was further strengthened in 1964, one year after the ratification of the Charter, when an OAU Summit Conference in Cairo passed a resolution reaffirming the Organization’s advocacy of established African borders. The resolution itself referred to article 3(3) of the Charter and said “the borders existing on [African States’] achievement of national independence” are to be respected by all member states.94 Taking both the Charter and the 1964 Cairo Resolution into account, it can be concluded that they “marked the acceptance by Africa of a new and definite territorial régime, one based on the legal validity of the colonially-drawn frontiers.”95

The Western Sahara’s Frente POLISARIO has taken a similar position using some of the same arguments. In a speech before the United Nations in 1976, a representative of the POLISARIO stated:

To try to reestablish former empires or former states or even to restore the unity of nationalities overlapping several frontiers would constitute a source of conflicts and innumerable wars between states . . . . It was in order to hold back these demons that the OAU proclaimed the principle of respect for the frontiers of colonialism and elevated it to the status of a dogma.96

Such a view seems entirely consistent with the previous commentary and with the Charter of the OAU, expressing widely held and deeply felt convictions in this area.

To summarize, self-determination is the right of all African peoples, but that right is modified by being confined exclusively within boundaries as they existed during the colonial period and at the time of independence, no matter how arbitrarily those borders were originally drawn. Anything of a separatist, irredentist, or revanchist character is by direct

94 The 1964 Cairo Resolution reads in relevant part:

The Assembly of Heads of State and Government Considering that border problems constitute a grave and permanent factor of discension (sic),

Conscious of the existence of extra-African maneuvers aimed at dividing African States,

Considering further that the borders of African States, on the day of their independence, constitute a tangible reality,

. . . .

Recalling further, that all Members have pledged, under Article VI of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of the Charter of the Organization of African Unity,

(i) Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

(ii) Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.

Allot, supra note 88, at 84.

95 Shaw, supra note 91, at 164.

96 T. Hodges, supra note 1, at 320 n.1.
implication severely discouraged. The principle of territorial integrity is in fact often mentioned as the OAU’s “holiest,” absolutely necessary for the continued cohesiveness and further development of African states and the continent as a whole. How this policy of the Organization (as expressed in legal terms) relates to OAU membership for the “state” of Western Sahara will shortly become apparent.

D. Western Sahara: Recognition and Statehood

1. Recognition of the SADR.

It appears recognition by other states in the international legal community is not necessary for a state to exist, since criteria for statehood are generally analyzed independently and make no mention of recognition. However, recognition contributes to the legitimacy of a state once it is said to exist using generally accepted standards. This is especially so if the state has been recognized by other members of an international organization the state seeks to enter, as is the case with the Saharan Arab Democratic Republic. In this regard, the SADR has been diplomatically recognized as of early 1985, by 30 African States, all of them OAU members. Of course, all have acted in their sovereign capacities. Worldwide, the SADR has also fared quite well: at least 28 Asian, Latin American and other states have already recognized it formally. There is also the prospect of additions to the list as hopes for an early resolution to the dispute fade. The 30 African States constitute the simple majority needed to admit the SADR to OAU membership, per article 28(2) of the Charter.

Beyond individual recognition by other states and the OAU itself, general recognition provides many tangible and intangible benefits to the

---

97 Practice has reaffirmed this position. The OAU has shown that it is firmly opposed to irredentism . . . the OAU has similarly set its face against recognizing a right of secession in the case of independent States . . . . Resolutions that have been adopted by the OAU have stressed the principles of national unity and territorial integrity. Shaw, supra note 91, at 164. See also discussion regarding Biafra, infra notes 192-98 and accompanying text.


99 T. HODGES, supra note 1, at 308. Mauritania—one of the original claimants to the Western Sahara—recognized the SADR in early 1984, as did Burkina Faso (formerly Upper Volta). W. AFRICA, March 12, 1984, at 540. Most recently, Nigeria recognized the Saharan state in November 1984, just prior to the annual OAU Summit Conference. N.Y. Times, Nov. 12, 1984, at A5, col. 4.

100 “In mid-November 1983, Ecuador became the 55th country around the globe to recognize the Sawrawi State. Other Latin American countries are also reported to be close to recognizing the SADR, with Argentina perhaps next in line.” W. AFRICA, Dec. 12, 1983, at 2862. In what appears to be a major diplomatic milestone for the SADR, the Saharan state was formally recognized by Yugoslavia in late 1984; it became the first European country to do so. In addition: “Observers think that Austria and Sweden . . . may soon follow suit.” AFRICA, Jan. 1985, at 26. Yugoslavia would be the 59th state to recognize the SADR.
newly established state. Among these are the "ability to enter into treaty relations with third States, access to foreign courts, diplomatic privileges and immunities . . . opportunities for participation in institutes and conferences, status as an International Person, [and] enhancement of international respect."\textsuperscript{101}

As important as the above benefits may be, recognition of a state by others may have added significance when viewed in the context of the Western Sahara and the self-proclaimed SADR; recognition is a means of clarifying the legitimacy of a claim over a disputed territory where competing claims exist. Crawford, in discussing territorial disputes between an occupying state and a newly constituted state regarding the same piece of territory, quotes from Professor Jennings (after calling his conclusion "seemingly inevitable"):

"[I]f the new State . . . is established with the disputed territory as its sole territory, and its Statehood is recognized, it would seem that another claim to sovereignty over the territory is defeated . . . . A sufficient number of recognitions of the new State clearly implying recognition of its title to the disputed territory would presumably destroy the claim.\textsuperscript{102}"

Therefore, in the case of Western Sahara, recognition of the SADR by a large number of other states (especially African states) would strongly tend to invalidate Morocco's claim to the territory. This is in addition to the similar effect of the I.C.J.'s Western Sahara Advisory Opinion. Finally, the recognitions would favor the legitimacy of the state itself—the SADR.

2. The Criteria for Statehood

Given the language in articles 4 and 28 of the OAU Charter, it is clear that membership in the Organization cannot be granted unless the applicant constitutes an "independent sovereign African State." Therefore, it is necessary to inquire whether the Western Sahara constitutes a "state" within the generally accepted sense of that term, assuming—as seems proper—that the drafters of the Charter intended the word "state" to be interpreted in its legal sense.\textsuperscript{103} A widely used and well-known definition of statehood is contained in article 1 of the Montevideo Convention on the Rights and Duties of States; the qualifications listed are: "(a) a permanent population; (b) a defined territory; (c) government; and

\textsuperscript{101} Vance, supra note 79, at 73.


\textsuperscript{103} See T. Elias, supra note 53, at 129. For recognition of the fact that no definition of statehood is set forth in the OAU Charter itself, see W. Africa, May 23, 1983, at 1230.
(d) capacity to enter into relations with other States.\textsuperscript{104} A similar definition is given by section 4 of the Restatement (Second) of Foreign Relations Law of the United States; an entity is considered a state if it "has a defined territory and population under the control of a government and [the entity] engages in foreign relations."\textsuperscript{105} Given these criteria, it is obvious that any inquiry into whether or not a "state" exists must be factual in nature.\textsuperscript{106} In applying each of these standards in turn to the Western Sahara and the SADR, each has been at least substantially satisfied; that is, a persuasive case exists for terming the Western Sahara/SADR a state, and thus the threshold condition for OAU membership (per OAU Charter articles 4 and 28) is fulfilled.

a.) Defined Territory

The requirement that a state possess a defined territory is the least difficult matter to address. The area called the Western Sahara occupies a well-defined space in northwest Africa and this land corresponds exactly with the boundaries of the former Spanish Sahara. The borders are entirely capable of delimitation despite the fact that most of them are not currently demarcated.\textsuperscript{107} Furthermore, the Western Sahara has been adjudged by the International Court of Justice as legally separate and distinct from Morocco or any other state.\textsuperscript{108} Since the extent of governmental authority exercised within the territory is also important at this juncture,\textsuperscript{109} it bears mention once again that the Frente POLISARIO (which has proclaimed the SADR) controls about 75 to 80 percent of the territory, and only the northern one-sixth presently remains beyond its control.\textsuperscript{110} Close to this area, the POLISARIO established a "provisional capital" where administrative and economic activity has been resumed. Located at the outpost of Haousa, the "capital" until recently had not been attacked by Moroccan forces since 1979.\textsuperscript{111} Taken together, these factors strongly indicate that Western Sahara is a distinct territorial unit, despite the occasional suggestions that respective areas or zones of Moroccan and SADR sovereignty should be


\textsuperscript{105} RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965).

\textsuperscript{106} J. BRIERLY, supra note 98, at 137.

\textsuperscript{107} See T. HODGES, supra note 1, at ii (map), ix, & 55.

\textsuperscript{108} 1975 I.C.J. at 67-68.

\textsuperscript{109} J. CRAWFORD, supra note 102, at 42.

\textsuperscript{110} T. HODGES, supra note 1, at 290.

agreed upon.112

b.) Permanent Population

The second requirement, that the territory possess a permanent population,113 is also relatively uncomplicated, if one looks to the I.C.J.'s Advisory Opinion. In that decision, the Court found no legal ties between Western Sahara and Morocco and Mauritania that would affect the right of self-determination by the native inhabitants, although the Court noted the fact that the populace was traditionally nomadic and the frontiers uncontrolled.114 The clear implication of the Court's findings is that the Sahrawis have distinctive socio-political identity when compared with the persons dwelling in Morocco and Mauritania. In addition, the United Nations has repeatedly taken the position that the Western Saharans are entitled to exercise their right of self-determination.115 In the words of one writer: "If the Sahrawis can constitute a people for the purposes of self-determination, it is inconceivable that they possess no distinct national identity."\textsuperscript{116}

A related problem involves the number of persons who inhabit the Western Sahara. As stated previously, estimates of the territory's total population very widely\textsuperscript{117} and many live in refugee camps (mainly in Algeria), where they retreated after the territory's partition and occupation

---

\textsuperscript{112} Proposals have been made from time to time that the Western Saharan territory be divided between the Frente POLISARIO and Morocco as part of a settlement of the dispute. The new boundaries would be along the "useful triangle" containing the main towns and the phosphate mines in the north. These would go, presumably, to Morocco, with the remainder going to Frente POLISARIO. See W. AFRICA, June 20, 1983, at 1442, 1440 (map); TIME, May 15, 1982, at 42.

Several problems with this proposal make its execution difficult, unlikely, and almost certainly undesirable from an international legal standpoint. First, each side claims the entire Western Saharan territory. Second, the "useful triangle" has no international legal significance because its boundaries essentially comprise the gravel walls or "berms" erected by Morocco, the occupying state, purely as a military expedient. N.Y. Times, Feb. 1, 1984, at A12, col. 1; id., Sept. 17, 1984, at A3, col. 1. As evidence that the Frente POLISARIO does not accept this situation, it has concentrated its military resources towards penetrating the Moroccan defense walls. See W. AFRICA, Nov. 5, 1984, at 2201. See also N.Y. Times, Nov. 18, 1984, at A6, col. 6; id., Nov. 29, 1984, at A4, col. 6. Regarding the situation in the Moroccan-controlled areas, see W. AFRICA, June 20, 1983, at 1440-43. Most importantly, this "partition" proposal, if put into effect, would violate the OAU Charter provisions relevant to the maintenance of territorial integrity, discussed previously. See supra notes 87-97 and accompanying text. The reason for this, of course, is that the Moroccan-Western Saharan border would no longer correspond with the boundary inherited from the Spanish colonial period.

\textsuperscript{113} Supra notes 104-05. One scholar states: "This criterion is intended to be used in association with that of territory, and connotes a stable community." I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 67 (1966).

\textsuperscript{114} 1975 I.C.J. at 68.

\textsuperscript{115} See, e.g., G.A. Res. 2072, 2229, 3292, supra note 26. See also G.A. Res. 35/19, supra note 46.

\textsuperscript{116} Naldi, supra note 76, at 154.

\textsuperscript{117} See T. HODGES, supra note 1, at 131-32.
in 1976. Whatever the exact number of inhabitants, or their present location, these issues are only secondary to the actual right to self-determination; they should not form an insuperable obstacle to the exercise of that right by the Sahrawis. Indeed, the OAU has expended much effort to ascertain the number of Western Saharans, by using various procedures. Specifically, these include the OAU’s Ad Hoc Committee set up in 1978 and its Implementation Committee, established in 1981.118 In the context of a general settlement of the conflict, there appears no reason why these endeavors should not bear fruit.

c.) Government

The third qualification for statehood is that it should have a government with substantial authority over the territory it seeks to represent. Also, the population of the country “is normally required to render habitual obedience to the government.”119 If this is so, the governing authority is considered effective and valid. This requirement is one of the most disputed of all matters pertaining to the Western Sahara because Morocco’s main legal argument against SADR membership in the OAU is that SADR does not constitute an “independent and sovereign State” within the meaning of articles 4 and 28 of the Charter.120 To support this argument, several facts can be adduced: First, full independence has not been attained by the self-proclaimed SADR. Second, although 75 to 80 percent of the Western Sahara is controlled by the Frente POLISARIO, this area, for the most part, is very sparsely inhabited. The Frente POLISARIO controlled area encompasses neither the three main towns (Smara, Dakhla, and El-Ayoun) nor the main economic resources of the territory, including the phosphate mines at Bou-Craa and the port facilities.121 All these “vital” areas are within the Moroccan defense walls and beyond the effective reach of the SADR’s putative administration and control.122 Last, it can be argued that the Frente POLISARIO is purely a “liberation front,” and therefore not a full-fledged governmental structure.

These concerns can be addressed with reference to both the situation existing in the Western Sahara itself and to prevailing international prac-

118 For discussion of these committee activities, including population count, see Naldi, supra note 76, at 159-60. The implementation committee suggested that both the 1974 Spanish census and the information provided by the U.N. High Commissioner for Refugees be used as points of departure. Id. at 160. This is not to say that this task would be a simple one: for a discussion of problems anticipated in holding a referendum in the Western Sahara, see Damis, The OAU and Western Sahara, in El-Ayouty & Zartman, supra note 55, at 282-84.
119 Naldi, supra note 76, at 155.
121 See W. AFRICA, May 7, 1984, at 970 (map).
122 But see supra note 112, and accompanying text.
tice. First, the SADR was declared within the Western Sahara and has operated there since its declaration of statehood in 1976. The lack of SADR/POLISARIO control over the northern portion of the territory appears not to extinguish statehood since there is apparently no “minimum standard” or quantum of administered territory required for statehood.\textsuperscript{123} This fact strongly implies flexibility in applying statehood criteria.

Even in the absence of flexible standards, the cause of the SADR’s lack of total control over the territory is immediately apparent—the occupation of that same territory by Morocco. Again, reference must be made to the I.C.J. Western Sahara Advisory Opinion of 1975, which declared Morocco’s claim to the country invalid by finding no legal ties sufficient to support their claim of sovereignty.\textsuperscript{124} Finally, the Frente POLISARIO has with some success attempted on numerous occasions to penetrate the Moroccan lines with a view towards establishing full control over the Western Sahara.\textsuperscript{125} As one analyst has concluded in the Western Saharan context: “States are not extinguished by an annexation resulting from an illegal use of force and . . . a territory occupied or annexed (illegally by force) must not, prima facie, be denied statehood if . . . it proclaimed its independence, as long as some of the criteria of statehood are capable of fulfillment.”\textsuperscript{126}

With regard to the contention that the Frente POLISARIO is but a “liberation movement” and not the government of a state, it must be conceded that obvious overlaps exist between the putative governing apparatus of the SADR and the political and military functions of the Frente POLISARIO. However, the SADR has a governmental structure similar to those of many other states, including offices of President, Prime Minister, and Foreign Minister. It also has ministries responsible for the full range of military and civil endeavors.\textsuperscript{127} The SADR exists as a putative State partly due to the fact that independence and sovereignty have been formally asserted.\textsuperscript{128}

d.) Ability to Engage in Relations with other States

Another requirement of statehood pertains to the ability of the government to discharge its obligations under international law and engage in relations with other states.\textsuperscript{129} In the present case, this inquiry is simpli-

\textsuperscript{123} J. CRAWFORD, supra note 102, at 36.
\textsuperscript{124} 1975 I.C.J. at 68.
\textsuperscript{125} W. AFRICA, Nov. 5, 1984, at 2201.
\textsuperscript{126} Naldi, supra note 76, at 155. See also J. CRAWFORD, supra note 102, at 417-20.
\textsuperscript{127} For description and charts of the SADR/POLISARIO governmental structure, see T. HODGES, supra note 1, at 339-41.
\textsuperscript{128} See Vance, supra note 79, at 59-60.
\textsuperscript{129} See supra notes 104-05.
fied by the presence of a well-defined SADR governing structure, with foreign relations an integral part of that structure.\textsuperscript{130} The SADR has been active in diplomatic and political areas since its founding in 1976. In addition to the recognition it has received from other states, the SADR has relations at the ambassadorial level with states such as Mexico, Cuba, and Nicaragua.\textsuperscript{131} Also, the SADR has participated in proceedings of various types in both the OAU and the United Nations. This participation can be construed in favor of statehood, an obvious necessity for the SADR to argue its status as an entity worthy of recognition and membership in the OAU.

e.) Independence

A further standard, not set forth in either the Montevideo Convention or the Restatement, but contained within the OAU Charter, is that a state be "independent" in order to obtain membership.\textsuperscript{132} Morocco's legal argument against granting membership to the SADR is based in part on its contention that the Saharan state is not fully sovereign and independent, and that in most cases OAU membership has not been granted prior to full independent status.\textsuperscript{133} Morocco also contends that the SADR does not administer and control the whole territory.\textsuperscript{134} These arguments are not totally devoid of foundation. One commentator realizes this problem and states: "It would initially appear that the SADR fails to satisfy one of the primary requirements of independence, that of exercising exclusive authority in the territory."\textsuperscript{135}

Given the totality of circumstances in the Western Sahara situation, this shortcoming on the part of the SADR is not as harmful to it as might appear. In the first place, the lack of complete SADR/POLISARIO control over the territory is not due to the actions of the SADR but solely due to the actions of Morocco, namely its presence in the territory and its construction of defense walls, resulting in the northern one-sixth of the Western Sahara being beyond the SADR's

\textsuperscript{130} T. Hodges, \textit{supra} note 1, at 340-41.
\textsuperscript{131} Naldi, \textit{supra} note 75, at 156. In addition, the SADR's ambassador to Zimbabwe was formally accredited in September 1984. \textit{AFRICA}, Nov. 1984, at 14.
\textsuperscript{132} OAU Charter, \textit{supra} note 8, at arts. 4, 28(1).
\textsuperscript{133} \textit{But see} discussion regarding the former Portuguese colony of Guinea-Bissau, \textit{infra} notes 182-91 and accompanying text.
\textsuperscript{134} \textit{See supra} notes 109-12 and accompanying text.
\textsuperscript{135} Naldi, \textit{supra} note 76, at 156.
To remedy this situation, the Frente POLISARIO is currently engaged in military and political activities so they may bring the whole country under its effective administration. Moreover, the I.C.J. in its Western Sahara Advisory Opinion declared Morocco's claim on the territory invalid as a matter of international law. Therefore, the lack of complete SADR control over the territory cannot be laid to any shortcomings on the part of the SADR itself.

Given the admitted inability of the SADR to fulfill the literal requirements of "sovereign independence," reference should be made to the I.C.J. Opinion, the recognition by other states, and appreciation of the rights of the Sahrawis to self-determination and independence, especially by the United Nations and the OAU. These factors can be used to argue at least substantial compliance with the "independence" standard. In sum: "[G]iven that the SADR is a newly emergent state consequent to the exercise of . . . self-determination, it may be that the criterion of independence may not be construed stringently."

The factual assertion that the OAU has not granted membership to states until full independence from the occupying power has been achieved, has some validity. But in the case of Guinea-Bissau (discussed below), OAU membership was granted prior to full independence. Also, membership was extended in the absence of complete control over the entire territory by the organization claiming to represent the native inhabitants. This action by the OAU may have been done for reasons related to the substantive provisions and aspects of the OAU Charter, analogous provisions of which are important in the present case. It is upon these Charter sections and their underlying meaning that legal arguments regarding OAU membership for the SADR are based. It is to this matter which this study now turns.

III. THE LEGAL FOUNDATIONS OF OAU MEMBERSHIP

A. General Comments

In dealing with the Organization of African Unity (or any other international organization), reference will always necessarily be made to the primary governing or constituent document(s) of the organization—in the OAU's case, the Charter. As Kirgis states: "The constituent in-

---

136 Supra notes 111-12 and accompanying text.
137 Id.
138 See 1975 I.C.J. at 68.
139 Naldi, supra note 76, at 156.
140 For a brief discussion on whether the Sahrawis have indeed exercised the right of self-determination, see id. at 156 n.21.
141 See infra, notes 182-91 and accompanying text.
142 Infra notes 186-89 and accompanying text.
strument of an intergovernmental organization provides the 'constitutional law' of the organization and thus speaks to the organization as such . . . " Also, member states of the organization are bound by the provisions of the governing document(s) simply by virtue of their membership. For example, article 6 of the OAU Charter refers to the principles of the Organization in article 3, and says that all members "pledge themselves to observe [those principles] scrupulously."

In this connection, Kirgis also asserts that "since many of the organization's decisions will be made by its organs consisting . . . of member states, the constitutional law speaks indirectly as well to those states in the sense that it is designed to guide them as they participate in the decision-making process."

Continuing along these lines, the OAU Charter is binding on all member states and is supreme over all acts of the Organization. Also, it is supreme over the agencies, commissions, or the like, established by the OAU. Presumably, all actions by the Organization are taken with reference to the pertinent Charter provisions. This assumes particular import in the OAU's case because its Charter, read with even minimal understanding of the background of the Organization and of the African continent, reflects concepts having special application to Africa. These are mainly the maintenance of territorial integrity, self-determination, settlement of disputes, and opposition to colonialism. These concepts may not be found in the constituent documents of other international organizations. In the case of the Western Sahara, assuming the supremacy of these and other Charter provisions (not only purely procedural ones) it is ensured that arguments regarding OAU membership will rest on as solid a foundation as possible. Accepting that the Charter will and should be used as the basis for OAU actions, the legal arguments which follow will attempt to use the substantive language of the Charter to offer multiple justifications favoring membership for the SADR in the OAU.

B. Granting OAU Membership to the SADR Partly to Assist in the Adherence to the Relevant Charter Provisions, Purposes, and Underlying Policies

In the previous discussion concerning recognition of the SADR by other states, various benefits which accrue to that state, as a matter of settled international law, were mentioned. Likewise, benefits would

143 F. Kirgis, supra note 40, at 76. Appropriately, his comments come at the beginning of the section dealing with membership in international organizations.
144 See supra note 69.
145 F. Kirgis, supra note 40, at 76.
146 See supra notes 68-70 and accompanying text.
147 In the case of membership, see OAU CHARTER, supra note 8, at art. 28(2).
148 Vance, supra note 79, at 73.
obviously exist for the SADR as a member of the Organization of African Unity. Inter alia, these include equality with all other OAU members, a guarantee of sovereignty within the Organization and the African continent, non-interference in its affairs by other member states, and a legal assurance that its established frontiers will be respected. In addition, the SADR has the ability to participate and vote in all matters of OAU concern, and has access to the various specialized commissions of the Organization established to further the purposes of the OAU.

As crucial as these benefits are to the SADR, the OAU is much more than this—Charter provisions and policies are involved, and they are no less binding on members. Given this, an inquiry must be made as to what legal benefits the OAU itself, as an international organization, will receive by granting membership to the SADR. How will the Charter, viewed in its broadest sense, including its policies, be protected and furthered in a legal manner by the granting of membership? Do these prospects at least partly justify membership for the SADR? Very importantly, will a grant of membership assist in the resolution of the Western Sahara dispute? Can any prior OAU practice be found to shed light on the above problems and provide whatever precedential value is appropriate in the circumstances?

A recent article has argued that diplomatic recognition of the SADR by other states is an "affirmative step" towards full independence and the decolonization of the territory, with the concomitant exercise of the Sahrawis' right to self-determination. The author states that "recognition of the SADR government-in-exile would . . . serve to sanction Morocco's non-conformity to a peremptory international norm, the right of colonial peoples to self-determination." Thus stated, recognition is seen as a device to enforce well-established general principles of international law and to negatively sanction, by weight of diplomatic action by states, transgressions of these principles.

Extending this reasoning further, by marshalling the available evidence and including the precedents to be covered later in this paper, the argument develops that an analogous rationale to that used to justify recognition by individual states can be applied to legally justify the granting of membership in an international organization such as the OAU. Specifically, admission to OAU membership in the Western Sahara case is justified when it is seen as bearing a definite and reasonable relation to the preservation, execution, and enforcement of the relevant OAU Charter provisions, and the policies which form their foundation; these relate

149 See generally OAU Charter, supra note 8, at arts. 2(2), 3(3), 5, 6.
150 See supra note 54 and accompanying text.
151 Vance, supra note 79.
152 Id. at 63.
to self-determination, territorial integrity, and the resolution of disputes. In a related way, membership can be entertained if the OAU perceives it as being reasonably necessary to carry out and preserve the above Charter provisions and policies. It should be emphasized at once that such a rationale can be put into operation only if other standards, such as statehood and the assent of a simple majority of OAU members, are met. Also, membership will perhaps serve to sanction the offending state(s) and to deter other states (whether or not OAU members themselves) from violating, or attempting to violate, the OAU Charter. Under this rubric, membership receives an additional legal rationale because substantive Charter provisions are involved. These provisions, stated above, are the undisputed "constitutional law" of the OAU and thus dictate and guide acts done, or policies adopted, by the Organization.

The formulation just put forth, when actually used, will extend the "affirmative step" rationale by carrying the effects and legal justifications from individual recognition by OAU members and other states and translating them into making the SADR an integral part of the OAU. This constitutes an event which amounts to considerably more than the sum of individual states' recognition. Regardless of the individual reasons for any state recognizing the SADR, OAU membership provides a reference point relating to specific Charter sections and the policies surrounding them. Quite possibly, these are not found in the governing documents or other legal repertories of individual states. This will, hopefully, further strengthen those provisions and policies and provide a measure of sanction to violators. Due to the "supra-national" legal character of the OAU and the overarching Charter language to which all member states agree to adhere, the Organization becomes, in a legal sense at least, more than simply a collection of sovereign African States.

It does not of course follow that the analysis of this problem is at an end. On the contrary, it will be necessary to briefly restate, further explore, and apply the above to the Western Sahara/SADR situation regarding OAU membership. The following will probe the relationship between the legalities and underlying policies found in the Charter and the facts in the present case. It will transport the SADR membership argument from the theoretical to the practical and in the process further clarify that rationale.

As discussed at length earlier, the right of colonial and dependent

---

153 OAU CHARTER, supra note 8, at arts. 4, 28(2).
154 Supra notes 144-46 and accompanying text.
155 This idea has been carried to an extreme by one scholar who has stated in a different context, that "after all, there is no OAU; there are only members." Zartman, The OAU in the African State System: Interaction and Evaluation in El-Ayouty & Zartman, supra note 55, at 41.
156 Supra notes 79-83 and accompanying text.
peoples to self-determination is firmly embedded in international law. The OAU's adherence to this principle finds expression in the Preamble of the Charter as well as in articles 2(1)(d) and 3(6), which relate to the Organization's commitment to the elimination of colonialism from Africa. The granting of OAU membership to SADR would be one way of attempting to ensure that this right is realized for the indigenous inhabitants of the Western Sahara because of the explicit, strongly worded Charter language and the partitioning of the Sahrawis' territory between Morocco and Mauritania in 1975 by the claimant states and Spain. Morocco still holds the territory keeping the "legacy" of Spanish colonialism in existence. Neither the Sahrawi people nor their apparent representative, the Frente POLISARIO, have been genuinely consulted about their wishes at any point in the entire affair. Also, the fact that the Sahrawis are not generally considered to be Moroccan or Mauritanian in origin should be kept in mind. In the face of acts by Morocco that denigrate the right to self-determination of the Saharan people, OAU membership rests on secure ground if granted to reaffirm this principle and activate the appropriate Charter provisions. This assumes that the criteria for statehood and procedural questions are substantially met.

The relationship between OAU membership used to execute provisions of the Charter and self-determination is bolstered by the expressed adherence by the OAU to the United Nations Charter, and by extension, the activities of the International Court of Justice, the U.N.'s main judicial body. Recall that in 1975, the I.C.J. held in its Advisory Opinion that the Western Sahara, having no legal ties with neighboring states sufficient to modify the inhabitants' right to self-determination, was entitled to independence squarely under this principle. Although the I.C.J. Opinion was rendered before the partition of the territory and the declaration of independence by the Frente POLISARIO, there is every reason to believe that the decision still has persuasive force. The objective conditions which motivated the U.N. General Assembly's request for an Advisory Opinion still exist, only with a different "colonial" occupier—Morocco in place of Spain. These conditions include lack of self-determination by the Sahrawi people and occupation by an outside state, whose territorial claim the I.C.J. specifically declared invalid.

157 OAU CHARTER, supra note 8, at arts. 2(1)(d), 3(6).
158 T. Hodges, supra note 1, at 223-24.
159 Id.
160 Supra notes 19-21 and accompanying text.
161 OAU CHARTER, supra note 8, at preamble, art. 2(1)(e). For an example of the U.N.'s recognition of the OAU and its Charter, see supra note 86.
162 1975 I.C.J. at 68. One commentator has said that although the principle of self-determination was already well established, "the Western Sahara case makes the clearest judicial statement to date with regard to self-determination as a legal right." Shaw, The Western Sahara Case, 1978 BRIT. Y.B. INT'L L. 118, 153 n.3.
The possible deterrent effect of OAU membership for the SADR is immediately apparent. Granting membership to anchor more securely of self-determination for Africans will accomplish at least two things: First, it will place the Organization firmly on record as holding the right of self-determination as fundamental as well as continuing evidence of the OAU's vigorous disapproval of the denial of this right. Secondly, it will indicate to all concerned and to the international legal and political community at large that the OAU continues to be fully alert to the importance of these Charter provisions and policies. Hopefully, this will give pause to those who contemplate violating the Charter and will provide an enhanced foundation for future OAU actions regarding self-determination, if and when they become necessary.

As for the preservation of territorial integrity of African States, the OAU's grant of membership to the SADR is even more compelling if seen as partly executing and strengthening Charter provisions and policies. As emphasized earlier, self-determination under the OAU Charter is subject to one major specific qualification: the borders inherited from the colonial period, however haphazardly drawn from the African point of view, must remain sacrosanct, making self-determination confined to previously-defined physical borders. This principle merits mention in the Charter's preambular language as well as in articles 2(1)(c) and 3(3). It was further operationalized in the resolution passed at the OAU Summit Conference held in Cairo in 1964.

In the Western Sahara, the situation is as follows: a member state of the OAU, the Kingdom of Morocco, has occupied the territory by force of arms and refers to it as its "Saharan Provinces". Its historically-based claim to the country has been found wanting by the I.C.J. after a careful review of the matter. This annexation of the Western Sahara has produced a drastic change in the boundaries of the region. Specifically, the border between Morocco and the ex-Spanish Western Sahara, formerly an international one, has for all intents and purposes been erased from the map by the occupying State. In those territorial areas which Morocco controls, the land's administration and identity are integral with Morocco proper. No attempt is made to maintain that the territory is anything but purely Moroccan.

Given this state of affairs, membership in the OAU for the SADR is justified as a legal step to maintain present frontiers and possibly to pre-

---

163 Supra notes 90-95 and accompanying text.
164 OAU CHARTER, supra note 8, at 77-78.
165 Allott, supra note 88, at 84.
166 See, W. AFRICA, March 12, 1984, at 541.
167 1975 I.C.J. at 68. See also supra notes 41-50 and accompanying text.
168 See V. THOMPSON & R. ADLOFF, supra note 19, at 293-94; T. HODGES, supra note 1, at 279.
vent future "irredentist" claims by Morocco and other African States. OAU membership can be seen not only as an affirmative step in the decolonization process, but as a conscious, legally-grounded interposition against all states in violation of the OAU Charter. More to the point, it will be an interposition not only against the violating state, but in favor of the native inhabitants of the Western Sahara. These people apparently desire independence and their representative, the Frente POLISARIO, has made clear, by words and actions, the existence of a sovereign state. Although this state (the SADR) has not achieved full independence or evicted the occupying state from the entire territory, it stands for the continued preservation of established, present African boundaries, in contrast to Morocco's position.

Moreover, the SADR has done this with a reasonable degree of permanence and has shown evidence of its ability to conduct itself in the international community on a par with most, if not all, other states.169 OAU membership for the SADR will, by activating the appropriate Charter provisions, act as a statement in favor of the continued existence of the Western Sahara as a distinct territorial entity as well as a political/international legal unit.

The possible sanctioning effects of this action should also be mentioned. The granting of membership to the SADR will be a legal riposte against the occupying state, in this case, Morocco. Also, membership will be a concrete expression of the OAU's attitude on the crucial matter of territorial integrity and the inviolability of the frontiers inherited from colonialism. This offers at least some chance of offsetting whatever success the occupying state achieves in the military sphere, or any diplomatic or military support it may receive from outside powers. In fact, the weight of OAU action may serve to dissuade these states from assisting the occupier in its attempts to remain in the Western Sahara.

The use of OAU membership as a sanction acquires special importance when it is realized that nowhere in the Charter are there provisions for formal sanctioning procedures (such as economic, political, or military sanctions) or providing for the expulsion of member states from the Organization.170 Only a voluntary withdrawal provision for members is

---

169 For example, the SADR engages in independent foreign policy initiatives such as the extensive African diplomatic tour by the SADR's president the month before the 20th annual OAU Summit Conference (held November 12-15, 1984 in Addis Ababa). The trip was intended to secure support for the seating of the SADR as an OAU member at the meeting. W. Africa, Nov. 5, 1984, at 2201-02.

170 See generally OAU CHARTER, supra note 8, at 76-84. During the drafting of the Charter in 1963, at least some thought was given to including apparatus for expulsion: "In the Charter debate . . . a Senegalese delegate did raise the question of giving the OAU power to expel a Member State if [it] did not respect its obligations, but the matter was not pursued." Wolfers, The Institutional Evolution of the OAU, in El-Ayouty & Zartman, supra note 55, at 95.
Another persuasive rationale for OAU membership to preserve territorial integrity is provided by the situation in northwest Africa itself. For a variety of political and nationalistic reasons unrelated to international law, Morocco has, with varying degrees of earnestness since its independence from France in 1956, claimed territories outside its recognized frontiers. These include not only the Western Sahara, but all of Mauritania, a large portion of western Algeria, and portions of Mali (which lies far to the southeast). Claiming Mauritania was historically Moroccan, Morocco refused for ten years to extend diplomatic recognition to Mauritania after its independence in 1960. With this in mind, the assiduous maintenance of existing African frontiers by the OAU is furthered by SADR membership in the Organization.

Finally, granting membership in the OAU for the SADR may be justified as an attempt to facilitate the final resolution of the conflict between the parties. Since elevation to membership means equality with other member states, dispute resolution could move to a different plane: for example negotiations among juridical equals rather than between a state and a “liberation movement” or “front.” This desire to clarify the identities of the parties evidently played a part in the OAU’s decision to admit the SADR to membership in early 1982. Faced with Morocco’s continuing contention that “for us the POLISARIO does not exist either legally or internationally,” and that “the Saharan conflict is first and above all [an] Algerian-Moroccan conflict,” the OAU may have felt the need to take strong legal action by granting membership to sharpen the parties’ respective positions. This was done notwithstanding negotiations either attempted or already in progress, using the apparatus set up by the Organization itself, such as the Implementation Committee. In his memorandum on SADR membership, OAU Secretary-General Edem Kodjo stated that “[t]he SADR’s admission was ‘the direct result’ of the failure to name the ‘parties to the conflict’ at the preceding Implementation Committee meeting.” The fact that nego-

---

171 OAU CHARTER, supra note 8, at art. 32.
172 T. Hodges, supra note 1, at 85-91.
173 See map of “Greater Morocco,” id. at 87.
174 Id. at 89-90, 116-17.
175 See OAU CHARTER, supra note 8, at arts. 3(1), 5.
177 W. AF RICA, Dec. 12, 1983, at 2861 (emphasis added). Algeria is the SADR/POLISARIO’s principal outside backer.
178 The Implementation Committee is composed of representatives from seven OAU member states. It is charged with so-far unsuccessful attempts to institute a cease-fire, install a neutral interim peacekeeping force, and hold a referendum in the Western Sahara to ascertain the wishes of the population. Naldi, supra note 76, at 159-60.
179 T. Hodges, supra note 1, at 321 n.31 (opinion of Edem Kodjo).
tiation efforts have been unsuccessful to date should not obscure this additional rationale for membership status.

C. Precedents in the OAU and Africa

The SADR, as stated previously, substantially meets most of the statehood requirements of international law. However the territory is not fully independent, because the administration of the SADR is admittedly not present in the highly populated centers, and no agreement has been reached between the nascent state and the occupying state to facilitate full sovereignty and independence in those areas. In addition, the governing body of the SADR—the Frente POLISARIO—bears an arguable resemblance to a “liberation front” entity.

In spite of these countervailing factors, in a recent instance, Guinea-Bissau, a territory which had neither achieved full independence nor fully ejected the colonial power was not only recognized as a state, but was admitted to full OAU membership. In a second case, that of Biafra, a portion of a recognized OAU member seceded and declared itself an independent state. In both instances, the OAU’s previous behavior supports the rationale for membership for the SADR, since the possible substantive legal justifications grounded in the Charter appear to be significantly related.

1. Guinea-Bissau

Guinea-Bissau, a small West African country, had been a Portuguese colony for centuries. A group known as the PAIGC, claiming to represent the indigenous people of the territory, was founded in 1956. They began guerrilla warfare against the Portuguese in 1963 and, by 1970, “claimed to have liberated a large part of the country.” Over time, Portuguese control was reduced to the capital city of Bissau, its nearby airfield and military base, and a few smaller towns; the PAIGC controlled the remainder. On September 26, 1973, the PAIGC formally declared Guinea-Bissau to be a sovereign state. It was soon diplomatically recognized as such by about 40 states around the world, including the U.S.S.R. and India. Two months later, Guinea-Bissau was admitted to OAU membership at a meeting of the Organization held in Addis Ababa. However, the PAIGC did not reach agreement with Portugal.

---

180 See supra notes 103-06 and accompanying text.
181 See T. Hodges, supra note 1, at 339-41.
182 See G. Freeman-Grenville, supra note 22, at 30-31, 46.
183 Portuguese acronym for the African Independence Party of Guinea and Cape Verde Islands.
185 J. Crawford, supra note 102, at 260.
186 El-Ayouty & Zartman, supra note 55, at 376.
facilitating full independence until August 1974.\textsuperscript{187} Guinea-Bissau finally became independent on September 10, 1974.\textsuperscript{188} Thus: "[T]here was a parallel in the OAU’s history for the admission of a state with . . . partial control over its territory, namely, the entry of Guinea-Bissau into the OAU . . . a year before Portugal’s withdrawal."\textsuperscript{189}

This “premature” grant of membership to Guinea-Bissau had a threefold foundation: (1) fulfillment of the criteria for statehood, (2) the concurrence of a majority of OAU member states, and most importantly, (3) the strong policy set forth in the substance of the Charter, of the desirability and urgency of ridding the African continent of colonialism.\textsuperscript{190} This policy enjoys universal support from OAU members, they themselves being mostly ex-colonies. Admission to full membership most likely was given to accelerate the departure of Portuguese colonialism from Africa; this is evidenced by the fact that Portugal’s other colonies were not given independence until well after Guinea-Bissau achieved that status.\textsuperscript{191} Endowing the PAIGC government with the OAU’s imprimatur activated the relevant Charter language and the anti-colonial policy upon which it is based. This is evidence of the Organization’s “absolute dedication” to the total and permanent removal of the Portuguese presence, and its desire that the people of Guinea-Bissau achieve full self-determination at the earliest possible time.

2. Biafra

The Eastern Region of Nigeria broke away from that country and declared its independence as the “Republic of Biafra” on May 30, 1967. Its “statehood” was terminated, however, by Nigerian military and political means in January 1970.\textsuperscript{192} Very few states recognized Biafra (Crawford says the number is five) and the prevailing view among nations was that Biafra did not meet the essentials of statehood.\textsuperscript{193} From the beginning, “[T]he OAU took a strong [stand] condemning secession in any Member State . . . and a mission was sent to Nigeria to emphasize the desire of the OAU Assembly for the territorial integrity, unity, and peace in Nigeria.”\textsuperscript{194} Furthermore, in September 1969 the sixth OAU Assembly

\textsuperscript{187} J. Crawford, \textit{supra} note 102, at 261.
\textsuperscript{188} L. Henderson, \textit{Angola: Five Centuries of Conflict} 253 n.87 (1979).
\textsuperscript{189} T. Hodges, \textit{supra} note 1, at 321 n.13. In addition, the case of Guinea-Bissau was cited by the president of Mozambique, Samora Machel, as precedent for the SADR’s admission to OAU membership. \textit{W. Africa}, Nov. 19, 1984, at 2304.
\textsuperscript{190} \textit{See}, OAU Charter, \textit{supra} note 8, at arts. 2(1)(d), 3(6).
\textsuperscript{191} Of Portugal’s other colonies, Mozambique became independent on June 25, 1975, the Cape Verde Islands on June 5, 1975, Sao Tome and Principe on July 12, 1975, and finally Angola on November 11, 1975. L. Henderson, \textit{supra} note 188, at 253 n.87.
\textsuperscript{192} Shaw, \textit{supra} note 91, at 157-58.
\textsuperscript{193} J. Crawford, \textit{supra} note 102, at 265.
\textsuperscript{194} Shaw, \textit{supra} note 91, at 157.
bly adopted a resolution exhorting both sides "to agree to preserve in the overriding interests of Africa the unity of Nigeria." Interestingly, when Biafra capitulated to the Federal Nigerian government, both sides referred to that resolution.

The conclusion to be drawn from the OAU's attitude is obvious: its primary motivations were the Charter provisions and policies relating to the preservation of existing African borders. The OAU was seeking, by its actions, to maintain the territorial integrity of Nigeria, to give Nigeria added legitimacy in the eyes of the international community, and deter other states from recognizing Biafra. Lastly, the OAU's behavior was probably intended to dissuade other states, or secessionist groups within states, from asserting similar claims to sovereignty outside the confines of the OAU Charter.

IV. CONCLUSION

In the foregoing analysis, more has been done than simply examine the general character and membership apparatus of a major international organization. While membership questions were constantly alluded to, this paper ventured farther afield into areas of general international law. Inquiry was made into the law of statehood and recognition, the opinion by the I.C.J. (the main judicial organ of the United Nations), and the policies inside and outside the OAU Charter which form the bedrock of that governing document. Together with a grounding in the facts of the Western Sahara situation, arguments relating to the admission of the SADR to OAU membership were made. These contentions, all legally-based, were presented with the conviction that SADR's membership would rest on a solid juridical basis if recourse was had to broader substantive provisions of the OAU Charter.

Prominent among these were Charter provisions pertaining to self-determination, territorial integrity, and the pacific settlement of disputes. In this process, it was necessary to go outside the strict language of the Charter to locate and examine the policies which lie at its foundation. Without an inquiry into these (including commentary by scholars and others), any reasoned legal analysis of the Western Sahara problem

---

195 Id. at 158.
196 Id. For a detailed discussion and analysis of the Biafran situation (much of it quite critical of the OAU's role) see Kouassi, The OAU and International Law, in El-Ayouty & Zartman, supra note 55, at 50-51. See also Zartman, supra note 155, at 39-40. Zartman, however, says the OAU was "eminently successful in defending the principle of State intangibility, giving Nigeria the time, support, and legitimacy to take care of the secessionist threat." Id. at 39.
197 OAU CHARTER, supra note 8, at preamble, arts. 2(1)(o), 3(3), 6.
198 In 1968, "the [OAU] Assembly called on member States of the OAU and the U.N. to refrain from any action detrimental to the peace, unity, and territorial integrity of Nigeria." Shaw, supra note 91, at 158.
would quickly have broken down, leaving the reader no closer to a possible solution to the conflict. Given this line of exploration, and considering the matter as a whole, the writer is of the opinion that the OAU did not act erroneously in granting membership to the SADR in 1982.

At the time of this writing, the Organization seems no longer threatened with disintegration or deadlock over the Western Sahara issue. Representatives of the SADR took their seats at the 20th OAU Summit in Addis Ababa November 12-15, 1984, without substantial opposition. In 1982 and 1983, the SADR had temporarily and voluntarily withdrawn from OAU participation in the interests of unity, a move which was no more than an interim solution. Viewed on the surface then, this analysis can be perceived as retrospective.

The wider context of the issue points in a different direction. Responding to the seating of the SADR as an OAU member, Morocco withdrew from the Organization in protest. Presumably this was done pursuant to Article 32 of the Charter, so that termination of Moroccan membership would be effective in one year's time. Moreover, the military situation shows no sign of abating, and a solution in that regard is no closer to realization. In short, this chain of events means a possibly protracted and even more violent conflict, distracting attention from Africa's other extremely serious problems. Also, the OAU is faced with imminent loss of an important North African member state, with effects on the Organization (and the region) that now can only be speculated upon.

In closing, it should be emphasized that, to assist in the resolution of this dispute, as well as others, international law and the OAU Charter should be as neutral and broad-based as possible in order to find a prominent place in the legal and policy decisions of African states and the OAU itself. The overall objective: to strengthen the Organization and facilitate the joint efforts urgently needed for Africa to finally overcome the effects of its colonial past and realize its present and future aspirations as they are so eloquently set forth in the Charter. Hopefully, then,

---

201 Id., Nov. 13, 1984, at A6, col. 5. Zaire also “suspended” its participation in the OAU as a gesture of support for Morocco.
202 Article 32 of the OAU Charter reads as follows:

Article 32

Any State which desires to renounce its membership shall forward a written notification to the Administrative Security-General. At the end of one year from the date of such notification, if not withdrawn, the Charter shall cease to apply to the renouncing State, which shall thereby cease to belong to the Organization.

OAU CHARTER, supra note 8, at 84. The purpose of the one year provision is “to enable both the renouncing State and the Organization to have time to adjust all outstanding rights and obligations.” T. ELIAS, supra note 53, at 132. Also, the period exists “to allow other States to urge second thoughts on the Member withdrawing.” Wolfers, supra note 170, at 195.
the maximum beneficial degree of development in the legal, material, and human realms will accrue to the continent of Africa.