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Nationality and Statelessness Among Persons of Western Saharan Origin

*Bronwen Manby**

At a glance

The territory of Western Sahara has a highly anomalous position in international law. It is categorised by the United Nations as a 'non-self-governing territory', but, unlike other similar territories, the state in effective control of the territory (Morocco) is not recognised as governing lawfully. The nationality status of those with a connection to the territory is thus complex.

This article concludes that, with exceptions, those people who were habitually resident in the territory at the time of Moroccan occupation and who have remained there, or who have returned to the Moroccan-administered part of the territory, and whom Morocco considers to be nationals, may be recognised as such by other states. Those who did not remain and have not returned cannot be considered to be Moroccan nationals nor required to seek or accept Moroccan nationality. If they have not acquired any other nationality, they must be considered to be stateless persons.

History of the territory of Western Sahara

The status of Western Sahara has been disputed between the Kingdom of Morocco and the Polisario Front independence movement for more than 40 years.¹ While this dispute has remained unresolved, with Morocco in occupation of the territory, tens of thousands of former residents of the territory and their descendants, known as Sahrawis, have lived as refugees in Algeria, while the descendants of those who remained in Western Sahara are now outnumbered four-to-one by people who have moved to the territory from the zone within the internationally recognised borders of Morocco.

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1 The Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Frente POLISARIO), named after the two former Spanish provinces making up the territory.

Spanish colony

Western Sahara is a former Spanish territory on the western edge of North Africa, bordered by Morocco, Algeria and Mauritania.² Historically, it was on the margins of the Berber kingdom in the western Mediterranean that subsequently became a Roman province and was later conquered by Muslim Arab forces. The population was organised into nomadic tribes ruled by sheikhs, some of whom at different times had political ties of allegiance to the Moroccan kingdom or to Mauritania.

In 1884 a Spanish royal order declared the territory to be a Spanish protectorate on the basis of agreements with the leaders of the population. Treaties between Spain and France, which established a French protectorate over the Moroccan kingdom and most of the Mediterranean zone from 1912, recognised Spanish control of that part of the Atlantic coast south of Morocco. In 1958, the territory was integrated into Spain, and the residents of the two provinces were recognised as Spanish nationals. The Spanish government accordingly stated to the UN in 1958 that: 'Spain possesses no non-self-governing territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain.'³

Liberation movement

A liberation movement, the Polisario Front, emerged in the 1960s and 70s and a series of UN resolutions called on Spain to hold a referendum on self-determination for Western Sahara. Only in 1974, in the last year of General Franco's government, did Spain concede the principle of a referendum and begin compiling a census of the population.

King Hassan II of Morocco, however, announced that Morocco would not accept a referendum that included an option for independence, arguing that Western Sahara had historically always been attached to the Moroccan kingdom; Mauritania also claimed the territory. At the request of Morocco and Mauritania, the UN General Assembly referred the situation to the International Court of Justice (ICJ) for an advisory opinion.

ICJ advisory opinion

In October 1975, the ICJ issued its opinion that, although there were ties of allegiance between the Sultan of Morocco and some but not all of the tribes in the territory, 'the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity'; therefore, the principle of self-determination of the territory should be respected.⁴

Moroccan occupation and proclamation of the SADR

Just days after the ICJ ruling, Moroccan armed forces crossed the border and occupied most of the northern part of the Western Sahara territory; followed by a 'green march' of 350,000 Moroccan civilians to 'reclaim' the region for Morocco.

2 For the history see, Tony Hodges, *Western Sahara: The Roots of a Desert War* (L Hill 1983); Tony Hodges, 'The Western Sahara File' (1984) 6 *Third World Quarterly* 74; Khadija Mohsen-Finan, *Sahara occidental: Les enjeux d'un conflit régional* (CNRS Editions 1997); Erik Jensen, *Western Sahara: Anatomy of a Stalemate?* (Lynne Rienner Publishers 2005) ch 2.

3 Quoted in *Western Sahara: Advisory Opinion* (1975) 1975 ICJ Reports 12 (International Court of Justice) [34].

4 *ibid* 162.

In February 1976, Spain signed an agreement in Madrid with Morocco and Mauritania that agreed a temporary tripartite administration of the territory pending determination of its final status. Polisario proclaimed the creation of the Sahrawi Arab Democratic Republic (SADR) on 27 February 1976, following Spain's formal withdrawal from the territory the day before.

In April 1976, Morocco and Mauritania agreed a partition of Western Sahara between their two states. Mauritania, however, renounced its claims to the territory in 1979 and withdrew its forces, following losses in fighting with Polisario. Moroccan forces remain until today in occupation of most of the former Spanish colony, with only a narrow strip in the east under the control of the Polisario/SADR. The territory controlled by Morocco is divided among three administrative regions,⁵ which have the same status as other regions of Morocco. The SADR-controlled zone is demarcated by a 2,700-kilometre sand wall, or 'berm', patrolled by the Moroccan army.

As a result of the Moroccan takeover, around half of the native population fled the territory, mostly to Algeria: by mid-1976 there were 40,000 refugees, growing to 80,000 by the end of 1977.⁶ They remain accommodated in four refugee camps near Tindouf, a historic oasis town in southern Algeria. These settlements are administered by the Polisario, with permission of the Algerian government, rather than by UNHCR or the Algerian authorities.

Proposed referendum to resolve the status of the territory

The Organisation of African Unity (OAU), now the African Union, took the initial lead in proposing a resolution for the status of the territory, putting forward a peace plan adopted by the OAU Assembly of heads of state in 1983. In 1988, the United Nations proposed a 'settlement plan' based on this framework, which was agreed to in principle by the parties and ultimately approved by the UN Security Council in 1991. UN Resolution 690 of 29 April 1991 then established the United Nations Mission for a Referendum in Western Sahara (MINURSO)⁷ with the mandate to implement the settlement plan, including guaranteeing a ceasefire and holding a referendum on the future of the territory. The referendum has never been held, because of difficulties in agreeing who should be eligible to vote: Polisario insisted that the voters' roll should be based on the Spanish census of 1974, while the Moroccan government called for the more comprehensive inclusion of all Saharan tribes linked to the former Spanish Sahara.⁸ In 2007, Morocco put forward its own proposal for an 'autonomy-based political solution', rejected by the Polisario and Algeria. Counter proposals were rejected by Morocco, and MINURSO's mandate extended year on year, with a ceasefire still in place.⁹ The first face-to-face meetings between the two sides in six years took place in Geneva in December 2018 and March 2019.

5 Guelmim-Oued Noun (of which only a small southern zone is in the disputed territory), Laâyoune-Sakia El Hamra (of which a small northern zone is outside of the disputed territory), and Dakhla-Oued Ed-Dahab.

6 Pablo San Martín, 'Nationalism, Identity and Citizenship in the Western Sahara' (2005) 10 *Journal of North African Studies* 565, n 7; Jensen (n 2) 29.

7 Website of the UN Mission for a Referendum in Western Sahara (MINURSO), available at <http://www.un.org/en/peacekeeping/missions/minurso/>.

8 The problems of identification are described in detail in Jensen (n 2).

9 For background on the peace negotiations, see Issaka K Souaré, 'Western Sahara: Is There Light at the End of the Tunnel?' (Institute of Security Studies 2007) ISS Paper 155.

Map of Western Sahara



Map No. 3175 Rev. 4 UNITED NATIONS
October 2012

Department of Field Support
Cartographic Section

Source: <https://www.un.org/Depts/Cartographic/map/profile/wsahara.pdf>

Estimated population affected

As of 2019, the UN estimated the total population affected by the situation to be 567,000.¹⁰ The population in the area under Moroccan control – representing about 80 percent of the territory of the original Spanish Sahara – was given by the Moroccan authorities as around half a million people;¹¹ of whom it is believed around 20 percent may be of Sahrawi origin.¹² According to the Algerian government, it hosts an estimated 165,000 Saharawi refugees, though the number is contested and the UNHCR estimate is of just under 100,000 people.¹³

The right to self-determination and the international legal status of Western Sahara

The right to self-determination is enshrined in art 1 of the UN Charter, listing the purposes of the UN. These purposes include: ‘To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples.’ Common art 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (to both of which the UK is a party), provides that ‘All peoples have the right of self-determination.’ Sub-article 1(3) makes clear that this right creates an obligation especially for states having responsibility for the administration of ‘non-self-governing territories’, which ‘shall promote the realization of the right of self-determination.’

Chapter XI of the UN Charter, the ‘Declaration regarding Non-Self-Governing Territories’, elaborates that states with responsibility for the administration of these territories ‘accept as a sacred trust’ the obligation to assist in the ‘progressive development of their free political institutions’.¹⁴ In 1960, as a large number of former colonial territories gained independence, the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples called for immediate steps ‘to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.’¹⁵

10 ‘Western Sahara’, from database of the Statistics Division of the United Nations Department of Economic and Social Affairs <http://data.un.org/en/iso/eh.html>, see also information on Non-Self-Governing Territories at <https://www.un.org/en/decolonization/nonselfgovterritories.shtml>.

11 The census figures for the population of the two Moroccan regions that make up almost all of the territory is just over 485,000 people. ‘Le Maroc en Chiffres 2018’, Haut Commissariat au Plan, Rabat, available at https://www.hcp.ma/downloads/Maroc-en-chiffres_t13053.html.

12 Human Rights Watch, ‘Human Rights in Western Sahara and in the Tindouf Refugee Camps’ (2008) 23; Carmen Gómez Martín, ‘Rethinking the Concept of a “Durable Solution”: Sahrawi Refugee Camps Four Decades On’ (2017) 31 *Ethics & International Affairs* 31, n 7.

13 UNHCR’s figures for refugees and asylum seekers in Algeria in the same table is 99,949. The number needing humanitarian assistance is estimated to be far higher. UNHCR, *Global Trends: Forced Displacement in 2018*, June 2019, Table 1, note 12 and Table 2, note 21.

14 Charter of the United Nations, 1945, art 73.

15 General Assembly resolution 1514 (XV) of 14 December 1960, art 5.

Spanish Sahara as a ‘non-self-governing territory’

Spanish Sahara was included from 1963 in the list of non-self-governing territories to be considered under Chapter XI of the UN Charter.¹⁶ A series of General Assembly resolutions has repeatedly affirmed the applicability of the Declaration of 1960 to the territory.¹⁷

On 26 February 1976, Spain informed the UN Secretary-General that as of that date it had terminated its presence in the territory of Spanish Sahara, after establishing the temporary administration, and declared that it considered itself exempt from any further international responsibility in connection with the territory.

Moroccan sovereignty and administration not recognised by the UN

Morocco has never been recognised as the ‘administering power’ of the territory by the United Nations under the legal framework providing for non-self-governing territories. The UN position is that the transfer of administrative authority over the territory by Spain to Morocco and Mauritania in 1975 did not transfer sovereignty nor affect the international status of Western Sahara as a non-self-governing territory. This position was confirmed in a 2002 opinion by the UN Legal Counsel.¹⁸

Western Sahara remains on the UN list of non-self-governing territories under the mandate of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁹ Its status remains controversial. In 2016, following UN Secretary-General Ban Ki Moon’s labelling of Morocco’s administration as an ‘occupation’,²⁰ Morocco withdrew its personnel from MINURSO and expelled international staff, leading to a heated UN Security Council debate on the renewal of the MINURSO mandate.²¹ The latest General Assembly resolution continues to support ‘a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara’.²² However, less than 50 UN member states recognise the SADR.²³

The OAU and African Union have never recognised Moroccan sovereignty over the Western Sahara territory. The OAU recognised the Polisario Front as a liberation movement before the Spanish withdrawal and, following the Moroccan and Mauritanian occupation of the territory in 1976, announced continuing support for Sahrawi self-determination.²⁴ In 1982, the Sahrawi Arab Democratic Republic was admitted to the OAU Council of Ministers, and it

16 Report of the Committee on Information from Non-Self-Governing Territories, GAOR 18th Session, Sup No 14 (A/5514), July 1963, annex III. <https://digitallibrary.un.org/record/719840?ln=en>.

17 Discussed in Sidi M Omar, ‘The Right to Self-Determination and the Indigenous People of Western Sahara’ (2008) 21 Cambridge Review of International Affairs 41.

18 Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Document S/2002/161, available at <https://digitallibrary.un.org/record/458183>.

19 See information on the UN and decolonization, non-self-governing territories, at <https://www.un.org/en/decolonization/nonselfgovterritories.shtml>.

20 Michelle Nichols ‘U.N. chief regrets Morocco ‘misunderstanding’ over Western Sahara remark’, Reuters, 28 March 2016 <https://www.reuters.com/article/us-morocco-westernsahara-un-idUSKCN0WU1N9>.

21 Liesl Louw-Vaudran, ‘What next for Western Sahara?’ ISS Today, 21 June 2016 <https://issafrica.org/iss-today/what-next-for-western-sahara>.

22 UN General Assembly Resolution on the Question of Western Sahara, 7 December 2018, A/RES/73/107.

23 See list maintained at the Centro de Estudos do Sahara Occidental at the Universidade de Santiago de Compostela http://www.usc.es/en/institutos/ceso/RASD_Reconocimientos.html.

24 J Naldi, ‘The Organization of African Unity and the Saharan Arab Democratic Republic’ (1982) 26 Journal of African Law 152.

remains a member of the African Union. Morocco withdrew from the OAU in 1984 in protest at the invitation of the SADR to the annual summit.

The African Union Peace and Security Council issued a strongly worded statement condemning Morocco's expulsion of MINURSO personnel in 2016 and continues to support the self-determination of the territory.²⁵ Nevertheless, Morocco rejoined the African Union in 2017.²⁶ In 2018, the African Union Assembly resolved to limit its own peace efforts in Western Sahara in order to support the UN process, a decision perceived as a win for Morocco.²⁷ The SADR remains a recognised member of the African Union, although only a minority of AU member states individually recognise its status.

Moroccan sovereignty rejected by the Court of Justice of the EU

In 2018, the status of Western Sahara as a non-self-governing territory under the UN Charter was affirmed by the Court of Justice of the European Union, ruling in the context of a challenge to a fisheries agreement with Morocco that 'the territory of Western Sahara is not covered by the concept of "territory of Morocco"'. The Court based its finding on the grounds that:

'If the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention²⁸ is a specific expression.'²⁹

Nationality in international law

In considering questions of nationality it is important to distinguish between national ('municipal') and international law. The situation in national law on the entitlement of a person to the nationality of a state, or to enter and remain in its territory, may or may not be compliant with the rules in international law. If it is not compliant, other states are not obliged to respect a state's assertion that a person is its national.

Historically, the grant of nationality was generally regarded as being within the 'reserved domain' of states. However, this discretion was not absolute, as affirmed as early as 1923 by the Permanent Court of International Justice (PCIJ) established by the League of Nations, in its

25 Communique: The 588th meeting of the AU Peace and Security Council on the situation in Western Sahara, PSC/PR/COMM.(DLXXXVIII) 11 April 2016 <http://www.peaceau.org/en/article/the-588th-meeting-of-the-au-peace-and-security-council-on-the-situation-in-western-sahara>.

26 Peter Fabricius, 'Morocco, the AU's Prodigal Son?' ISS Today, 4 August 2016, <https://issafrica.org/amp/iss-today/morocco-the-aus-prodigal-son>.

27 Ndubuisi Christian Ani and Liesl Louw-Vaudran, 'AU limits its role in Western Sahara crisis', ISS Today, 11 September 2018 <https://issafrica.org/iss-today/au-limits-its-role-in-western-sahara-crisis>.

28 Article 34 of the Vienna Convention on the Law of Treaties, 1969, states: 'A treaty does not create either obligations or rights for a third State without its consent'.

29 Court of Justice of the European Union, Case C-266/16, *The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs; Intervening party: Confédération marocaine de l'agriculture et du développement rural (Comader)*, Judgment of the Court, 27 February 2018 (Grand Chamber), paras 63 and 64 <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-266/16>.

opinion on the *Nationality Decrees issued in Tunis and Morocco*.³⁰ The Court ruled that a dispute over nationality was not solely a matter of domestic jurisdiction because of the obligations undertaken by France towards other states in the treaties of 1881 and 1912 establishing the protectorates of Tunisia and Morocco.

The Convention on Certain Questions Relating to the Conflict of Nationality Laws, adopted in The Hague in 1930 under the auspices of the League of Nations (and to which the UK is a party), confirmed this position, stating in art 1 that:

‘It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States **in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality**.’ [emphasis added].

Thus, as confirmed by Paul Weis in his leading work on nationality in international law: ‘States are under an obligation to see that their municipal legislation conforms with the rules of international law’.³¹

In the case of Western Sahara, the nationality of those considering themselves Sahrawi depends at a national level on the laws of the different states where they live or have another connection entitling them to nationality. However, other states should not recognise Moroccan or other nationality imposed on Sahrawis without their consent, insofar as these laws are not in compliance with international legal principles as they are currently understood.

This includes nationality imposed in the context of illegal occupation of territory. As stated by the ICJ in its 1971 advisory opinion on the South African administration of Namibia: ‘A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence’.³²

Moreover, while nationality was historically understood in international law almost entirely as a matter of regulating the relations between states in their assertion of sovereignty over persons and territory, international law has moved towards a position where the will of the person has more weight than in the past. State discretion in relation to recognition and grant of nationality is thus more constrained than it was in 1930.

This opinion will first consider the nationality of people of Sahrawi origin living in Morocco or in exile, under the laws of the relevant states; and then go on to consider whether other states should recognise the attribution or acquisition of nationality under these laws.

Nationality of Sahrawis in Morocco and in exile, under the laws of the relevant states

Morocco

Those Sahrawis living in the area under Moroccan occupation are Moroccan nationals according to Moroccan law and are eligible to be issued documentation evidencing that status. Since 1977,

30 *Nationality Decrees Issued in Tunis and Morocco: Advisory Opinion No 4* [1923] PCIJ, Ser B, No 4 7 (Permanent Court of International Justice).

31 Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Brill 1979) 90.

32 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970): Advisory Opinion* (1971) 1971 ICJ Reports 16 (International Court of Justice) [117].

the inhabitants of the Western Saharan territories administered by Morocco have also been able to participate in Moroccan national and regional elections.³³ The Moroccan nationality code does not allow for an individual to renounce Moroccan nationality except as authorised by decree.³⁴

Many Sahrawis, however, reject Moroccan nationality and continue to protest Moroccan administration of the territory; there were waves of protest in 1999, 2005, and 2010.³⁵ Moroccan legislation prohibits attacks on the kingdom's 'territorial integrity'. Activists for Western Saharan independence (whether Sahrawi or not) have faced harassment from the Moroccan state, which has included confiscation of Moroccan travel and nationality documents for those who hold them.³⁶

It is not clear whether the Moroccan authorities consider Sahrawis born and resident in the Tindouf refugee camps under Polisario administration in Algeria to be currently Moroccan nationals. A report by the European Asylum Support Office published in 2015 could source no official information from the Moroccan government on this point.³⁷ Moroccan officials have stated that the refugees have the right to (claim) Moroccan nationality.³⁸ There is no published information on the evidence that would be required to show the necessary connection to Morocco; however, it would include documents linking the person by paternal descent to the territory of Western Sahara (Morocco's 2007 nationality law reform establishing gender equality in transmission to children does not apply retroactively). SADR documents are not recognised by Morocco. Thus, even Sahrawis who have returned to the Moroccan-administered territory but lack documentation of their historical connection could face challenges in practice in obtaining recognition of Moroccan nationality.

Over the years a not insignificant number of the Sahrawi refugees and their descendants have returned from Algeria to Moroccan-held territory and been recognised as Moroccan on their return (*les ralliés*). The Moroccan state encourages them to do so, and those who have returned and satisfy the Moroccan authorities of their origins are issued national identity cards and other necessary official documents. In 2010, it was estimated that several thousand people had returned since the 1991 ceasefire, among them hundreds in the first half of 2010, due both to discontent at oppressive Polisario rule of the Tindouf camps and the incentives offered by the Moroccan government.³⁹ A number of leading figures in the SADR have returned to the

33 Delphine Perrin, 'Country Report: Morocco' (EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute 2011) RSCAS/EUDO-CIT-CR 2011/42.

34 Code de la nationalité marocaine, 1958, as amended (most recently in 2011), chapitre IV.

35 On the 2010 protests, see Carmen Gómez Martín, 'Sahara Occidental : quel scénario après Gdeim Izik ?' [2012] *L'Année du Maghreb* 259.

36 Amnesty International, *Morocco/Western Sahara: 'Turning the page': Achievements and obstacles*, 4 August 1999, Index Number: MDE 29/001/1999; Amnesty International, *Morocco/Western Sahara: Stop the judicial harassment of Sahrawi human rights defenders*, 5 February 2007, Index Number: MDE 29/003/2007; Human Rights Watch, Letter to King Mohammed VI on the Trial of Sahrawi Human Rights Defenders in the Western Sahara, 8 December 2005; UN Committee Against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 606/2014, CAT/C/59/D/606/2014, 18 April 2017.

37 EASO COI Query Final Answer: Western Sahara / Morocco/ Algeria, European Asylum Support Office, 16 November 2015 https://coi.easo.europa.eu/administration/easo/PLib/009_EASO_COI_Query_Response_Western_Sahara_Morocco_Sahrawi.pdf.

38 'Morocco: Whether a Sahrawi whose parents were born in Sahara, who is now living outside Morocco and who spent several years in the Sahrawi camps in Algeria, has a right to Moroccan citizenship; if not, whether this person would have problems returning to Morocco; whether, upon returning to Morocco, a Sahrawi can relocate anywhere in Morocco', Immigration and Refugee Board of Canada, 19 October 2000, MAR35608.E, <https://www.refworld.org/docid/3df4be6529.html>.

39 François Soudan, 'Les ralliés de Sa Majesté' *Jeune Afrique*, 9 June 2010 <https://www.jeuneafrique.com/196643/politique/les-ralli-s-de-sa-majest/>.

area under Moroccan control and become prominent figures in the (Moroccan) politics and administration of the territory.⁴⁰ With the recent political uncertainty in Algeria, there have reportedly again been increased returns.⁴¹

There is no officially published information on whether all those who have returned to Moroccan territory are required to take an oath of allegiance in order to be issued Moroccan nationality documents. In principle, given that the official position is that returnees are entitled by right to Moroccan nationality, an oath would not be required if they can show the requisite connection to the territory. However, since those who joined the Polisario are said to be from tribes that in principle owe allegiance to the Moroccan kingdom (the basis of the claim Morocco put to the ICJ), a pledge of allegiance to the king, affirmation of the territorial integrity of Morocco, and public denunciation of the cause of independence (not just the Polisario leadership) has been required at least from more prominent figures among the returnees.⁴² Each year the Moroccan king, currently Mohammed VI, holds a ceremony known as the *bey'a* where several hundreds of Moroccan dignitaries, including deputies elected to parliament, pledge their allegiance to the monarch in his role as defender of the faithful and a descendant of the Prophet Mohammed. Among these are representatives of the Western Saharan regions, including returnees.⁴³

There is no requirement established by the nationality code itself for those who acquire Moroccan nationality by naturalisation, or based on marriage or birth and residence in Morocco, to swear an oath of allegiance. Naturalisation (discretionary acquisition, not based on marriage or birth and residence in the territory) is, however, proclaimed by *dahir*, or royal decree, and is rarely accorded.⁴⁴

Sahrawi Arab Democratic Republic

The SADR constitution provides for the national council to adopt legislation on nationality,⁴⁵ but this has never been done, and the criteria for who would be considered nationals of a future state remain uncertain. However, the SADR administration issues birth certificates, as well as national identity cards and passports, to those under its administration. It appears that these documents have been issued since the SADR was established (though the sources available are

40 Leïla Slimani, 'Que sont-ils devenus?' *Jeune Afrique*, 9 June 2010 <https://www.jeuneafrique.com/196639/politique/que-sont-ils-devenus/>; Mohsen-Finan (n 2).

41 Mohammed Jaabouk, 'Les récents ralliements de Sahraouis à la lumière des manoeuvres du Polisario de 2010', YaBiladi.com (Casablanca), 27 March 2019 <https://www.yabiladi.com/articles/details/76343/recents-ralliements-sahraouis-lumiere-manoeuvres.html>.

42 Mohsen-Finan (n 2) 150–70. See also mention of an oath of allegiance in 'Maroc: La récupération de Oued Eddahab, un épisode important dans le parachèvement de l'intégrité territoriale du Royaume' AtlasInfo (Paris), 13 August 2010 https://www.atlasinfo.fr/Maroc-La-recuperation-de-Oued-Eddahab-un-episode-important-dans-le-parachevement-de-l-integrite-territoriale-du-Royaume_a7895.html.

43 See 'La bey'â, contrat moral', *L'Économiste* (Casablanca), 31 July 2012 <https://www.leconomiste.com/article/897117-la-bey-contrat-moral>; 'Maroc: La Bay'a, le péplum du sultan' *Slate Afrique*, 23 August 2012 <http://www.slateafrique.com/91859/mohammed-vi-maroc-baya-prosternation-alaouite>; 'Éclairage – 40è anniversaire de la récupération de Oued Eddahab ... quand Hassan II distribua des armes de ses propres mains aux Chioukhs des tribus', Article19.ma (Rabat), 14 August 2019, <http://article19.ma/accueil/archives/116205>.

44 In recent years, no more than a handful of people have been naturalised in any one year in Morocco, while it was reported that only 6,228 people were naturalised from independence to 2006: <http://o-maroc.com/obtenir-nationalite-marocaine>; see also naturalisation decrees published in the Bulletin Officiel for Morocco at <http://www.sgg.gov.ma/Legislation/BulletinsOfficiels.aspx>.

45 Sahrawi Constitution 1999, art 104, available in French at <http://arso.org/03-const.99.htm>.

not clear on this point); and since 2012 passports and identity cards are in biometric format.⁴⁶ The passports are accepted for travel to those countries which recognise SADR sovereignty. There is no published information on whether or how these documents can be obtained by those who are not resident in the camps, although the SADR does have diplomatic representation in a number of countries that recognise its sovereignty.

Algeria

The largest population of Sahrawis in exile lives in Algeria. They are not considered Algerian nationals: Algerian nationality law is founded on descent and does not provide rights based on birth in Algeria.⁴⁷ Travel within Algeria beyond Tindouf requires permission from the Algerian authorities, which also requires Polisario approval.⁴⁸ The government of Algeria also issues short-term passports to Sahrawi refugees to travel out of the country to states that do not recognise SADR documents – usually for reasons of medical treatment or family unification, but also for children on short-term group permits. These passports are obtained by applying to the Algerian authorities via the SADR bureaucracy, but are only travel documents, and do not imply recognition of the refugees as Algerian nationals.⁴⁹ Passports are reportedly being confiscated in increasing numbers on return to Algeria.⁵⁰

UNHCR considers the Sahrawis resident in the Tindouf camps to be refugees, and coordinates the UN agencies' assistance programmes, but has never been permitted to conduct any registration of the population, leading to uncertainty on the total number of people concerned.⁵¹ Algeria has in practice, though without international legal effect, delegated its responsibility for administration of the territory of the camps to the Polisario/SADR.⁵²

46 Moral report of the National Secretariat by Mr Mohamed Abdelaziz, President of the SADR and Secretary-General of the Frente POLISARIO, submitted to the XIII Congress held in Tifariti, from 15 to 19 December 2011, archived at <https://web.archive.org/web/20131213041940/http://www.spsrasd.info/en/content/moral-report-national-secretariat-submitted-xiii-congress-mr-mohamed-abdelaziz-president-sad>; 'Launch of first Saharawi biometric passport', Sahara Press Services, 8 September 2012; 'Algeria: Citizenship of persons born in the Sahrawi refugee camps in Tindouf; whether they have identity documents and/or a birth certificate; whether and how a person can leave Tindouf', Immigration and Refugee Board of Canada, 18 July 2000, DZA34601.E, available at: <https://www.refworld.org/docid/3ae6ad338c.html>.

47 Ordonnance no. 70–86 du 15 décembre 1970 portant Code de la nationalité algérienne, modifiée par l'Ordonnance no. 05–01 du 27 février 2005, art 6. Article 32 of the nationality code provides for an assertion of nationality of origin to be accepted (even if neither parent has proof of nationality) if there is evidence that a person is the third generation born in the country and his or her ascendants are of Muslim religion; but this would apply to those who are presumed on other grounds to already be Algerian and not to the refugees.

48 San Martin (n 6); Human Rights Watch (n 12).

49 Human Rights Watch (n 12).

50 See 'Rapport parallèle à l'examen du Vingtième et Vingt et unième rapports périodiques de l'État d'Algérie' submitted to the 94th session of the UN Committee on the Elimination of Racial Discrimination, November 2017, submitted by the *Forum Justice et Droits de l'Homme* (no registration location specified) paras 31–33 https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/DZA/INT_CERD_NGO_DZA_29336_F.pdf; Mohammed Ould Boah, 'Voici pourquoi l'Algérie retire ses passeports aux Sahraouis de Tindouf', *Le360* (Casablanca), 15 May 2019 <http://fr.le360.ma/monde/voici-pourquoi-lalgerie-retire-ses-passeports-aux-sahraouis-de-tindouf-190282>.

51 UNHCR Submission for the Office of the High Commissioner for Human Rights' Compilation Report on Algeria, to the Universal Periodic Review: 3rd Cycle, 27th Session, May 2017 https://www.upr-info.org/sites/default/files/document/algeria/session_27_-_may_2017/unhcr_upr27_dza_e.pdf; UNHCR Fact Sheet, Algeria, February 2019 <http://reporting.unhcr.org/sites/default/files/UNHCR%20Algeria%20Fact%20Sheet%20-%20February%202019.pdf>.

52 Human Rights Watch (n 12).

Spain

In 1976, Spain adopted a decree giving some natives of former Spanish Sahara the option during a period of one year to opt for Spanish nationality, under certain conditions.⁵³ Following a Supreme Court decision of 1998, those who qualified to opt for Spanish nationality under the 1976 decree were once again given the possibility of facilitated acquisition of Spanish nationality.⁵⁴ This applies to those who were resident in the territory of Spanish Sahara before 1976 and held documents issued by the Spanish government showing that connection, or their descendants.

There is an agreement between Spain and Algeria in relation to return of nationals of the other country who are in irregular immigration status, but this is only stated to apply to nationals, thus excluding the possibility of returning Sahrawis to Algeria.⁵⁵

Nationality of Sahrawis in international law

Imposition of nationality generally

International law in relation to nationality was historically more concerned about the imposition of nationality than the avoidance of statelessness, which gains more attention today. The concern over imposition was not based on the rights of the person affected, but rather because such imposition could be seen to infringe on the interests of the other state whose nationality the person held.

Thus, Rudolf Graupner, writing in the immediate aftermath of the Second World War, stated that, in relation to nationality in the context of state succession: 'there cannot be any question of any conferment of international rights upon the individuals affected by the territorial change, for at most the States concerned may have rights and duties against each other, the individuals merely being the objects of international law'.⁵⁶

Accordingly, the UK argued in the *Tunis and Morocco* case before the Permanent Court of International Justice that laws adopted in France and in the protectorates of Tunisia and Morocco in 1921 could not impose nationality on British subjects even if they satisfied the conditions for automatic attribution of Tunisian or Moroccan nationality (which had been established as applying to the second generation born in the country).⁵⁷ Following the issue of the Court's opinion, which established that the question of nationality was 'not solely within the domestic jurisdiction of France', the question was settled by direct negotiation, and the French government undertook to ensure that a child born in Tunis of a British subject who was himself also born in Tunis should have the right to decline French nationality (though this right would not extend to the next generation): the parties thus agreed on a right of option in the first instance, rather than the unilateral imposition of nationality.⁵⁸

53 Decree 2258 of 10 August 1976.

54 Respuesta del Gobierno (184), Pregunta Escrita Congreso 184/36171, 16 July 2018 http://www.congreso.es/l12p/e10/e_0106338_n_000.pdf; see also Javier Otazu, 'Miles de saharauis se han nacionalizado españoles en últimos años' *La Vanguardia* (Barcelona), 22 March 2017 <https://www.lavanguardia.com/politica/20170322/421089550323/miles-de-saharauis-se-han-nacionalizado-espanoles-en-ultimos-anos.html>.

55 Protocolo entre el Gobierno de España y el Gobierno de la República Argelina Democrática y Popular sobre circulación de personas, 31 July 2002 <https://boe.es/boe/dias/2004/02/12/pdfs/A06350-06352.pdf>.

56 Rudolf Graupner, 'Nationality and State Succession: General Principles of the Effect of Territorial Changes on Individuals in International Law' (1946) 32 *Transactions of the Grotius Society* 87, 93.

57 *Nationality Decrees Issued in Tunis and Morocco: Advisory Opinion No. 4* (n 30).

58 Weis (n 31) 71–76; see also William Latey, 'The Anglo-French Tunis Dispute' (1923) 9 *Transactions of the Grotius Society* 49.

The generally accepted norms are now that a state may not unilaterally impose its nationality against the (adult) person's will or if there is no reasonable basis on which to do so.⁵⁹ Of course, nationality is attributed to children at birth without their consent; however, a state may not do so in the absence of a connection recognised as sufficient in international law. The most commonly recognised connections are the child's birth in the territory or the nationality of either or both parents. International law does not provide a definitive list of such connections; however, since the *Nottebohm* case decided by the ICJ in 1955, the rule has been that there must be a 'genuine link' with an individual for a state's right to provide diplomatic protection to that person to be recognised by other states.⁶⁰

In some contexts, consent to acquisition of nationality may be legitimately inferred by a state based on the nature of an act, such as marriage or adoption. However, the trend in national laws has for some time been to include a requirement for volition to be clearly demonstrated before nationality is acquired by an adult. McDougall, Lasswell and Chen argued, in a comprehensive survey published in 1974, that:

'[...] apart from acts which can reasonably be supposed to indicate intention, his national character may with propriety be considered to remain unaltered. It is unquestionably not within the competence of a state to impose its nationality in virtue of mere residence, of marriage with a native, of the acquisition of landed property, and other such acts, which lie wholly within the range of the personal life, or which may be necessities of commercial or industrial business.'⁶¹

The language used by McDougall, Lasswell and Chen implies that the person they are considering is a man. However, the trend to provide a greater role for the will of the person concerned is particularly shown in international law on nationality in relation to the status of a woman upon marriage.⁶² It was presumed by the drafters of the Hague Convention of 1930 that in most cases the nationality of a woman (and her children) would follow that of her husband.⁶³ The 1957 Convention on the Nationality of Married Women focused on avoiding statelessness deriving from conflict of laws, but also specified that there should be no automatic change of nationality.⁶⁴ The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) then provided for equal rights in relation to nationality on marriage and reaffirmed the right of woman to choose.⁶⁵ The 1997 European Convention on Nationality

59 Weis (n 31) 95–115; Ruth Donner, *The Regulation of Nationality in International Law* (Transnational Publishers Inc 1994) 96–118.

60 *Nottebohm Case (Liechtenstein v Guatemala) (second phase)* [1955] ICJ Reports 4 (International Court of Justice); see also discussion in René de Groot and Olivier W Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2015) ch 5.1.

61 Myres S McDougall, Harold D Lasswell and Lung-chu Chen, 'Nationality and Human Rights: The Protection of the Individual in External Arenas' (1974) 83 *Yale Law Journal* 900, citing W. Hall, *International Law*, 267–68 (8th ed. 1924).

62 Karen Knop and Christine Chinkin, 'Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law' (2001) 22 *Michigan Journal of International Law* 523.

63 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930; Protocol Relating to a Certain Case of Statelessness, 12 April 1930.

64 Convention on the Nationality of Married Women, 20 February 1957, art 1: 'Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.'

65 Convention on the Elimination of All Forms of Discrimination Against Women, Article 9(1): "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."

similarly provides that marriage or dissolution of a marriage should not automatically affect the nationality of the other spouse.⁶⁶ The trend in practice is for states to allow equal rights to women and men in relation to acquisition of nationality based on marriage; and, even if that is not the case, to remove automatic acquisition or loss by a person (previously almost always a woman) marrying a person of another nationality.⁶⁷

Accordingly, a person's possession of official civil status documents issued by a country of residence cannot in itself be regarded in international law as constituting acceptance of the nationality of that state. At the same time, as affirmed by the ICJ in its advisory opinion on the South African administration of Namibia, such documents should be recognised by other states as valid, even if the status of the authority issuing the document is challenged:

'In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.'⁶⁸

Similar concerns about individual volition and friendly relations among states informed the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations adopted by the High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe (OSCE) in 2008. The Recommendations explain the conditions under which and the limitations within which states may support citizens of another country based on shared ethnic, cultural or historical ties.⁶⁹ In relation to the grant or imposition of nationality on ethnic kin in neighbouring countries, the Recommendations state:

'States may take preferred linguistic competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad. States should, however, ensure that such a conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring citizenship en masse, even if dual citizenship is allowed by the State of residence. If a State does accept dual citizenship as part of its legal system, it should not discriminate against dual nationals.'⁷⁰

Attribution of nationality in the context of state succession

State succession, when sovereignty over a territory is transferred from one state to another, creates well-recognised challenges in relation to determination of the legal membership of the

66 European Convention on Nationality, 6 November 1997, art 4(d).

67 Bernard Dutoit and others, *La nationalité de la femme mariée* (Librairie Droz 1976); Bernard Dutoit and Denis Masméjan, *La nationalité de la femme mariée, Supplément 1976–1990* (Librairie Droz 1991); Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart Publishing 2018).

68 *Legal Consequences for States of the Continued Presence of South Africa in Namibia: Advisory Opinion* (n 32) para 125.

69 Enrico Milano 'The Conferral of Citizenship *En Masse* by Kin-States: Creeping Annexation or Responsibility to Protect?' in Francesco Palermo and Natalie Sabanadze (eds), *National Minorities in Inter-State Relations*, Leiden: Nijhoff, 2011.

70 *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note* Organisation for Security and Cooperation in Europe, High Commissioner on National Minorities, June 2008, Recommendation 11.

successor states. Whether in the context of decolonisation, the break-up of federal territories, the secession of a part of a state to form its own new country, or annexation, the transfer of legal authority creates multiple opportunities for people caught between different rules to find themselves stateless or holding a nationality they do not prefer.⁷¹

The situation of Western Sahara is complicated by the fact that there was no agreement for a transfer of sovereignty, and there is no internationally recognised successor state or legitimate administration of the territory.

Annexation

The prohibition of the use of force established by art 2(4) of the UN Charter, and the non-recognition of Moroccan sovereignty over Western Sahara, means that historical rules regulating nationality in the context of annexation of territory are no longer directly applicable. However, they are relevant as background information on the previous understanding of customary international law.

In the case of annexation taking place before the adoption of the UN Charter, some experts asserted that the annexing state might unilaterally impose its nationality on all nationals of the former state (including non-residents). Most, however, argued that nationality could be imposed only on those who were physically present in the affected territory at the time of annexation, or only if they acquiesced in the new sovereignty.⁷² Although the former nationality was extinguished, the right to emigration was also asserted. Those already resident abroad at the time of conquest would therefore be considered to become stateless unless they returned to the territory (indicating consent to the change in sovereignty), while those who emigrated before acquiring the new nationality (under the law of the annexing state) left the country as stateless persons, and remained so, even if the successor state declared that they were its nationals. There was consensus that nationals of third states resident in the territory might not have nationality imposed upon them by the annexing state.⁷³

The use and abuse of nationality law by the National Socialist government of Germany before and during the Second World War resulted in a development of these positions. Decrees imposing German nationality on persons living in territories occupied by Germany during the Second World War were regarded as 'obviously inconsistent with international law'.⁷⁴ German courts indeed ruled of no effect decrees imposing nationality on foreign nationals of 'German origin' serving in the army. The German Federal Republic then undertook to enable those on whom nationality had been imposed to disclaim nationality by declaration.⁷⁵ The US Courts

71 See generally, Weis (n 31) ch 11 (Effect of territorial transfers on nationality); Donner (n 59) ch V (Nationality and state succession).

72 In the case of the annexation of the Boer republics of South Africa, for example, the Foreign Office stated that: 'the effect of these annexations is to confer the status of British subjects upon such persons as were either (a) natural born or (b) actually within the limits of the territories annexed at the time of the publication of the proclamations. HM Government do not, however, claim to impose the status of British subject on persons belonging to either of the above mentioned categories who were not within the limits of these territories at the time of annexation, unless they subsequently return thereto or voluntarily claim the status of British subjects, by virtue of the annexation'. Quoted in Weis (n 31) 140–41. In France, the 1945 nationality code provided that all those who remained domiciled in French-annexed territories acquired French nationality. Ordonnance n° 45/2447 du 19 octobre 1945 portant code de la nationalité française, Article 12.

73 For this discussion of historical views, see Graupner (n 56); 'Report on Nationality, Including Statelessness, by Mr. Manley O. Hudson, Special Rapporteur, UN Doc. A/CN.4/50' (1952) 2 Yearbook of the International Law Commission 3; Weis (n 31) 136–144.

74 'Report on Nationality, Including Statelessness, by Mr. Manley O. Hudson, Special Rapporteur, UN Doc. A/CN.4/50' (n 73) 8.

75 McDougal, Lasswell and Chen (n 61) 920–21.

also paid attention to the will of the person concerned and the avoidance of undesired outcomes in similar cases arising out of the war.⁷⁶

In the context of the current conflict in Eastern Ukraine and the decision of the Russian government to offer Russian nationality to former Ukrainian nationals living in the territory no longer under the control of the Ukrainian government, these questions have received more recent attention. Although the Russian policy is to offer facilitated naturalisation rather than impose its nationality unilaterally, it has been argued that:

‘Individualised naturalisations are illegal under international law if the affected persons’ consent is not free and therefore vitiated, i.e. legally non-existent. This is the case when pressure, threat, or force is applied to gain the individual’s consent to acquire the new citizenship.’⁷⁷

While this argument has been disputed as going beyond where international law currently stands, the Ukraine case also raises ‘the possibility of non-recognition [of Russian nationality acquired in this way] based on breach of recognised international norms’, in particular the prohibition of acts of aggression.⁷⁸ In this, it may be similar to the Western Saharan situation.

Transfer by agreement

It is also worth summarising the general rules in the case of cession of territory based on agreement between states when both nationalities continue to exist, although this is not the case for Western Sahara, to illustrate the situation of non-resident nationals and the increasing attention paid to the will of the person concerned.

In relation to those persons who had the nationality of the predecessor state but are not-resident in the territory whose sovereignty is transferred, the historical customary law position is not clear. However, Ian Brownlie, in his *Principles of Public International Law*, stated that the British doctrine in relation to non-residents of a transferred territory was that, ‘unless they have or acquire a domicile in the transferred territory, they do not acquire the nationality of the successor State’.⁷⁹

The International Law Commission (ILC) draft Articles on Nationality of Natural Persons in Relation to the Succession of States endorse the starting principle of attribution after state succession based on habitual residence (rather than former nationality). The ILC Articles also propose the possibility of an option in several circumstances, while art 11(1) provides in general that: ‘States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.’ The ILC adopts the term ‘appropriate connection’ – to be ‘interpreted in a broader sense than the notion of “genuine link”’ – as the basis for a person to have the right to opt for the nationality of a particular state.⁸⁰

76 Weis (n 31) 142–43.

77 Anne Peters, ‘Passportisation: Risks for international law and stability – Part I’, EJILTalk! 9 May 2019 <https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-one/>.

78 Eric Fripp, ‘Passportisation: Risks for International Law and Stability – Response to Anne Peters’, EJILTalk! 30 May 2019 <https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-response-to-anne-peters/>.

79 Second edition 1973, p.641, cited in Donner (n 59) 190.

80 International Law Commission, ‘Articles on Nationality of Natural Persons in Relation to the Succession of States, with Commentaries’ (United Nations 1999), commentary to art 11, paras 9 and 10.

This respect for a person's wishes on nationality in the context of state succession was also endorsed by the European Convention on Nationality adopted by the Council of Europe in 1997,⁸¹ and by the Convention on the Avoidance of Statelessness in Relation to State Succession adopted by the Council of Europe in 2006.⁸² (The UK is not a party to either of these treaties.)

There are also other indications that the interests of the people affected by state succession are obtaining greater recognition in international law, rather than an exclusive focus on the interest of states. In his separate concurring opinion in the ICJ judgment of 2013 on the frontier dispute between Niger and Burkina Faso, Judge Cançado Trindade noted, referring to other ICJ judgments, that: 'It is reassuring that, even a classic subject as territory, is seen today – even by the International Court of Justice – as going together with the population.' Thus he argued that the ICJ has moved 'beyond a strictly territorial inter-State outlook, also towards the affected segments of the local populations concerned'.⁸³

Compatibility with international law of the imposition of Moroccan nationality on a person of Sahrawi origin

The legal status of the Western Sahara territory is highly unusual. Unlike other UN-listed 'non-self-governing territories' there is no recognised administering power, since Spain has withdrawn itself from that role. Moroccan administration is not recognised by the UN; but the SADR's claim to sovereignty is also not recognised, while the Polisario has no form of UN recognition. The UN commitment is to find a negotiated solution to the impasse. The Sahrawis desirous of independence thus live in a nationality vacuum.

The historical focus of international law in relation to nationality was on respect for the sovereignty of the states claiming the right to attribute or grant nationality to a person. In this case, no sovereignty is recognised by the international legal regime, so the traditional deference to state sovereignty does not apply.

Since the de facto status of most of the territory under Moroccan control is not recognised as being in conformity with international law, the general principles set out by the ILC Articles on Nationality of Natural Persons in Relation to the Succession of States, do not apply.⁸⁴ Nonetheless, the Articles are in part an expression of customary international law, and also provide an indication of the current consensus of international legal opinion.

We can in addition draw upon the practice of states to determine the current status of customary law in this field. The following positions can be found from publicly available information.

Spain

In light of the historical connection, it is probable that, outside Algeria, the largest number of applications for refugee or stateless person status from people of Sahrawi origin are lodged

81 European Convention on Nationality, 1997, art 18.

82 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, art 2 – Right to a Nationality. See also the Declaration on the Consequences of State Succession for the Nationality of Natural Persons (the Venice Declaration), adopted in 1980.

83 *Frontier Dispute (Burkina Faso/Niger)*, *Separate Opinion of Judge Cançado Trindade* [2013] ICJ Reports 44 (International Court of Justice) [89, 92].

84 The ILC Articles apply only to 'the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations' (art 3).

in Spain. In 2007, the Spanish Supreme Court ruled in favour of a Sahrawi refugee who had travelled to Spain seven years earlier on an Algerian passport granted to enable her to seek medical treatment and who had applied to be given protection as a stateless person.⁸⁵ This was followed by other Supreme Court decisions establishing the principles by which such applicants will be recognised.⁸⁶ In particular, the Supreme Court has consistently held that those who moved from Western Sahara to the Tindouf camps immediately after Morocco took over the administration of the territory thereby implicitly refused Moroccan nationality. The Court has, however, rejected some cases where it has considered that an applicant has availed him or herself of Moroccan protection; for example by applying for or renewing a Moroccan passport.⁸⁷ In 2013, for the first time, the Spanish Minister of the Interior followed the principles established by the Supreme Court to recognise a person of Sahrawi origin as stateless through a purely administrative process, without a court order – a departure for the Spanish authorities in these cases.⁸⁸ A person officially recognised as stateless by the Spanish authorities is automatically issued with a residence permit.⁸⁹

France

The French government national contact point for the European Migration Network (EMN) reported a similar attitude in response to a query about the status of Western Saharans issued by the EMN in 2015:

‘France does not recognize the existence of the Sahrawi Arab Democratic Republic (SADR) as an independent state. As a consequence, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) considers that Sahrawi asylum seekers are of Sahrawi origin and not Sahrawi nationals. Moreover, in the case of Sahrawi people coming from the territory under Moroccan administration and providing, in support of their application, a birth certificate or any other identity or travel document established by the Moroccan authority, the OFPRA registers them as Moroccan nationals (since they have implicitly availed themselves of the protection of the Moroccan authorities when asking for the issuance of the documents). In the case of Sahrawi people living on the territories controlled by the Polisario Front (SADR + the portion of Algerian territory accommodating the Sahrawi refugee camps in Tindouf) and providing documents issued by the SADR or no document at all, the OFPRA registers them as “being of Sahrawi origin”.

The Sahrawi people born and living in Western Sahara under Moroccan administration (in Laayoune for example) are de facto Moroccan citizens. For those born on the other

85 Case of Ms. Khadijatou Bourkari Dafa, Recurso Casacion Num: 10503/2003, Tribunal Supremo, Spain, judgment of 20 November 2007 https://www.refworld.org/cases/SPA_TS/493511da2.html.

86 Supreme Court judgments N° 8948/2007, N° 4083/2008, N° 6381/2008, N° 6589/2011, N° 2824/2012, N° 3212/2012, N° 3754/2012, N° 1330/2014, all available at: <http://www.poderjudicial.es/>.

87 Supreme Court judgement N° 1679/2014.

88 Valeriia Cherednichenko, ‘A ray of hope for stateless Sahrawis in Spain?’ European Network on Statelessness (blog), 22 October 2013 <https://www.statelessness.eu/blog/ray-hope-stateless-sahrawis-spain-1>.

89 European Migration Network, ‘EMN INFORM: Statelessness in the EU’, 11 November 2016 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf; ‘Statelessness determination and the protection status of stateless persons: A summary guide of good practices and factors to consider when designing national determination and protection mechanisms’ European Network on Statelessness, 2013 <https://www.statelessness.eu/resources/ens-good-practice-guide-statelessness-determination-and-protection-status-stateless>.

side of the separating wall on the territory under SADR administration, it is possible that the Moroccan authorities refuse to recognize them as Moroccan nationals for imputed political motive (origin from a territory under enemy administration, connection with the Polisario Front).

It is reasonable to expect that a Sahrawi obtains the Moroccan nationality, if he/she is born or if he/she is living on the Sahrawi territory under Moroccan administration. It is not reasonable to demand that a Sahrawi obtains the Moroccan nationality, if he/she is born or if he/she is living on the Sahrawi territory under the administration of authorities that are de facto of the Polisario Front.

For the same reasons, it is difficult to imagine that the Moroccan authorities would recognize the Moroccan nationality to a Sahrawi (of origin) born in Algeria (country hosting and supporting the separatist enemy movement).⁹⁰ In addition, even if his/her parents are born in Western Sahara, it all depends on the birth documents of the parents that the Sahrawi may be able to provide the Moroccan authorities with to apply for naturalization: birth or identity documents delivered before 1976 (end of the Spanish administration on the whole Sahrawi territory) or delivered after 1976, either by the Moroccan authorities, by the United Nations Mission for the Referendum in Western Sahara, or the SADR authorities according to the place of birth in Western Sahara.⁹¹

Two 2017 decisions in the French *Cour nationale du droit d'asile* are relevant.⁹² In the case of MN, a Sahrawi individual born and previously resident in one of the camps in the region of Tindouf, the Court considered the applicant to be stateless (although an asylum application was rejected, on the grounds that allegations of persecution by the SADR authorities were not substantiated).⁹³ In the case of MZ, a person of Sahrawi origin formerly resident in Moroccan-administered territory was considered to be a Moroccan national; the Court recognised refugee status on the grounds of well-founded fear of persecution by the Moroccan authorities resulting from his activism for the independence of Western Sahara.⁹⁴

Germany

Germany also reported a similar position to the EMN. However, in the absence of a statelessness determination procedure, if an asylum application is rejected, the person will be deported to the country of previous habitual residence, eg Algeria.⁹⁵

90 As noted on page 17, this statement does not appear to be correct.

91 European Migration Network, 'Ad-Hoc Query on Citizenship status of persons from Western Sahara (Sahrawi citizens)', compilation of responses produced 9 June 2015 (Responses from Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Netherlands, Slovak Republic, Sweden, United Kingdom plus Croatia). https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2015.684_fi_citizenship_of_sahrawi_wider_diss.pdf.

92 The CNDA is a specialised administrative court of first and last instance, hearing challenges to the decisions of the French refugee authority (*Office français de protection des réfugiés et apatrides*, OFPRA).

93 *Cour nationale du droit d'asile*, M.N., N°16010071, 13 février 2017; available at <http://www.cnda.fr/>.

94 *Cour nationale du droit d'asile*, M.Z., N° 16031097, 25 janvier 2017; available at <http://www.cnda.fr/>.

95 European Migration Network, 'Ad-Hoc Query on Citizenship status of persons from Western Sahara' (n 91).

United Kingdom

The UK reported no specific country policy in response to this query, stating that each case would be dealt with on its merits, while in general affirming that it is ‘not unreasonable’ to expect those born in Moroccan administered territory to obtain Moroccan citizenship, and that ‘there is evidence in the public domain to indicate persons born in Algeria, but whose parents are born in Western Sahara are still able to obtain Moroccan citizenship.’⁹⁶

Deeming a person of Sahrawi origin to be ‘admissible for the purposes of permanent residence’ in Morocco or Algeria

Morocco

The analysis above suggests that the Moroccan authorities would regard any person who could document a historical connection to the territory of Western Sahara as at least potentially a national and admissible to Morocco. However, the relevance of this position must be evaluated based on principles of international law, as set out above.

In my opinion, a person who can properly be considered a Moroccan national by the rules set out above can also properly be considered admissible to Morocco.

However, the involuntary removal of a person to Morocco who cannot properly be considered a Moroccan national is illegitimate, since the person would have no choice but to accept Moroccan nationality. Without accepting Moroccan nationality and a national identity card the person would not be able to access basic rights in Morocco, such as the right to reside lawfully, travel within the territory or leave by regular means, work, study, marry, register the birth of children, access state healthcare, own property, vote, etc. A person refusing such documentation would also likely be at risk of persecution relating to imputed political opinion in opposition to the Kingdom of Morocco.

Algeria

There is no published information available on the conditions applied by Algeria to admission of Sahrawis expelled from other countries. However, a Sahrawi issued an Algerian passport for travel would presumably be re-admitted in almost all cases; for others, acceptance of the person as admissible would likely depend on evidence that he or she was formerly recognised as resident of the camps by the SADR administration (such as possession of an SADR identity card).

The Algerian penal code was modified in 2009 to create the offence of leaving the country illegally, applicable both to Algerian nationals and resident foreigners (which would include Sahrawis from the Tindouf camps), and punishable by two to six months in prison, a fine, or a combination of the two. The offence applies to those using false documents or a stolen identity, or any other fraudulent means to evade control of documents, including crossing the border other than at official frontier posts.⁹⁷ The land border with Morocco has been closed since 1994.

⁹⁶ *ibid.*

⁹⁷ Loi n° 09-01 du 25 février 2009 modifiant et complétant l’ordonnance n° 66-156 du 8 juin 1966 portant Code pénal, inserting art 175 bis 1.

Those removed to Algeria from EU member states or elsewhere, whether irregular migrants or failed asylum seekers, may reportedly be subject to a prison term on the grounds of illegal exit alone. Those who are suspected, rightly or wrongly, of involvement in terrorist offences may face additional hostile treatment.⁹⁸

A failed asylum seeker returned to the camps might also potentially face consequences from the SADR authorities, especially if the basis of the asylum claim had been persecution by those authorities, but there is no published information on this point.

Conclusion

The current consensus among states and scholars seems to be that under customary international law other states may in general recognise the Moroccan nationality of those Sahrawis voluntarily remaining in or returning to Moroccan-administered territory.

There may be exceptions to this rule where individuals could legitimately argue that their presence in Moroccan territory does not indicate consent to Moroccan nationality. This could include, for example, children who have returned to Moroccan-held territory with their parents, or women forced to return with their husbands, or those who by civil disobedience demonstrate their rejection of Moroccan sovereignty. This would require a careful case-by-case assessment.

Those Sahrawis who have remained in exile in Algeria, or are habitually resident in the SADR-administered territory not occupied but claimed by Morocco, or live in another country, and have not made any claim to Moroccan protection nor obtained any other nationality, must be considered stateless. The issue of an identity document or passport by the SADR cannot be held to constitute the status of a recognised nationality under international law. There may also be cases where a person of Sahrawi origin factually resident in the Moroccan-controlled territory cannot obtain recognition of Moroccan nationality in practice, for lack of the necessary documentary evidence of a connection to the territory. Such a person would remain stateless.

There is no international law obligation on any individual of Sahrawi origin who is not currently or previously habitually resident in the Moroccan-controlled territory to seek recognition as a Moroccan national, nor to accept Moroccan nationality if it is imposed upon him or her. In light of historical practice and the increasing emphasis of international law relating to nationality on the will of the person concerned, other states may not impose that requirement.

Persons of Sahrawi origin who cannot properly be considered to be Moroccan nationals can also not be considered admissible to Morocco. To suggest otherwise would make a mockery of the relevant international legal principles.

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