

African Union stance on the Sahara issue: incipient change

By Mohammed Loulichki

Summary

Morocco's return to its "institutional family" by joining the African Union (AU) two years ago heralds renewed hope for positive progress in terms of the Organization's stance on the Sahara issue. This comeback, however, also raises fears and apprehensions over possible complications due to an intrusion by the continental organization into an exclusively UN process, geared since 2000 towards seeking a realistic and mutually acceptable political resolution.

Morocco's protracted absence from the Pan-African Institution allowed its' adversaries to influence the AU into adopting one-sided decisions that favor the opposing parties, in total disconnect from the United Nations settlement process. The freeze in the African stance was made possible by the continued Algerian presidency of the Peace and Security Council (PSC), since the body's creation in 2003. In other words, Morocco is now striving to catch up on a deficit accumulated throughout its 33-year absence from an Organization increasingly asserting itself as a conflict resolution instrument and a catalyst for African integration.

By joining the African Union, Morocco needs to simultaneously find its bearings within the new African environment and become familiar with the internal mechanisms and procedures to bring the Pan-African Organization's resolutions on the Sahara in step with United Nations dynamics.

Significant developments have occurred in connection with this issue over the past two months. Two legal opinions were rendered successively in January and February 2019. One pertains to the inclusion or not of a paragraph relating to the Sahara in the 2019 edition of the Peace and Security Council Annual Report and the second to the participation of Member States in annual partnership meetings with regional organizations such as the European Union (EU), the League of Arab States (Arab League) as well as with States such as China and Japan.

On the face of it, one can only commend the African Union's inclination to seek legal advice, and to ensure compliance through its bodies. In this context, one recalls a preliminary question raised by Morocco in 1980, on whether the SADR meets the criteria of an "independent and sovereign State," which remains in abeyance to this day. A timely response to this substantial question might have spared the African Union from the awkward position of an Organization accepting an entity as a member and

simultaneously advocating for the self-determination of its' people.

A review of these two opinions reveals the degree of transformation occurring within the African Union in terms of functioning of the bodies, compliance with decisions taken, conformity with international legality and coherence in the way sensitive issues are addressed. Such developments, if confirmed, will positively impact the Union's image among Member States and the quality of relations with foreign partners.

The 14 January 2019 Legal Opinion on participation in partnership meetings

In the aftermath of the Cold War and the advent of globalization, Africa has become a continent that is coveted for its mining and oil resources, its strong domestic market potential, enhanced by a rapidly growing population, and its strategic positioning at the crossroads of major trade routes.

In addition to Multilateral Cooperation Agreements, involving a limited number of African States, such as the Cotonou Agreement or AGOA, between the United States and certain English-speaking African countries, the Summit format covering Africa as a whole, was pioneered by Japan in 1993.

While some partnerships date back to the OAU period, most were established since 2002 and the creation of the new Pan-African Organization, as follows:

- Arab-African partnership launched in 1977 and revitalized in 2010;
- European Union-Africa Partnership, 2000;
- China-Africa Partnership, 2000;
- South America-Africa Partnership, 2006;
- Korea-Africa Partnership, 2006;
- India-Africa Partnership, 2008;
- Turkey-Africa Partnership, 2008;
- Australia-Africa Partnership, 2010;
- United States-Africa partnership, 2010.

This process was not without difficulty. Indeed, many Partnership Conferences were either postponed, delayed or disrupted due to SADR's presence as an African Union Member. This issue came to the fore quite acutely recently, particularly at the Maputo Ministerial Meeting of August 2017 in preparation for the Sixth Tiscad Summit, and at the October 2018 Ministerial Meeting in preparation for the Seventh Tiscad Summit of August 2019.

In the absence of Morocco, the African Union has since 2006 endeavored to lay down rules in order to resolve the now recurrent issue of the right of all Member States to attend these meetings.

This issue was recently addressed, notably in 2015, 2016 and above all in 2017, the year of Morocco's return to the Pan-African Organization.

Accordingly, African Heads of State and Government agreed at the 7th AU Assembly in Banjul (July 2006) on six formats for Member State participation and AU representation at the various Partnership Summits:

- 1.** Continent-Continent Summit: all Member States, Union President and African Union Commission Chairperson;
- 2.** Country-Continent Summit: Union President and African Union Commission Chairperson, Regional Economic Communities (RECs) Presidents and African States with a specific interest in the Summit's agenda;
- 3.** Commonwealth Summit: Representatives of African Union Commonwealth Member States, the President of the Union and the President of the Commission;
- 4.** France-Africa Summits: Member States with historical relations with France, the President of the Union and the President of the Commission. Other Member States with a particular interest in the procedure may attend meetings as observers;
- 5.** Regional Organizations: Union President and African Union Commission Chairperson, Regional Economic Communities (RECs) Presidents; and
- 6.** Afro-Arab and Caribbean Summits: same format as the Continent-to-Continent Summit.

The above classification raises some questions with respect to both categories identified and participating States:

a. As for category identification, it should be noted that participation formats 2 (Country-Continent Summit) and 4 (France-Africa Summit) refer to similar situations since both involve one country in partnership with the African continent. This is true of France, China, Japan, Korea and Turkey. We therefore do not comprehend the reason for this distinction.

b. As for participation, the legal opinion confirms the participation of the Chairperson of the African Commission and of the current Chairperson of the African Union in both cases. While the text provides for the participation of Regional Economic Communities Presidents in Country-Continent meetings, it excludes them for France-Africa meetings although France maintains long-standing relations with communities that are entirely or predominantly Francophone, such as ECOWAS (representing West Africa) or ECCAS (representing Central Africa).

In either case, a different formula is used in the text to allow the participation of other Member States that so wish. In format 2, the text refers to "African States with a particular interest in the Summit agenda", while format 4 refers to "Member States with historical relations with France" and "States with a particular interest in the procedure".

Two questions come to mind: the first relates to the meaning to be ascribed to the term "special interest", the second relates to the party entitled to assess this interest: Should it be the State requesting participation or an African Union body? Can this assessment be challenged by another Member State or is it a subjective and indisputable determination?

The second question concerns the connection of this particular interest, which is at times made to the "agenda" - one or more items of which may be of some importance to the State requesting participation - and at other times to the "procedure", that in turn raises the question of which procedure is referred to, that of the African Union or that of the partner, unless it is the translation of the English term "proceedings", meaning "debate" or "work", in which case the ambiguity is dispelled.

Lastly, while in the "Country-Continent Summit" case, the absence of qualification of the scope of participation of Member States that so wish suggests full participation, in the "France-Africa Summit" case, it is specified that

participation is limited to observer status. This raises questions about the validity of this distinction and the need for alignment in one direction or the other.

Beyond these question marks, the rationale for the Legal Opinion is to seek a balance between two requirements: "the right of an AU Member State to participate in all partnership meetings, activities and events organized by the Organization " on one hand, and the stated AU objective of "providing an effective framework for African Union partnerships" on the other.

All options envisaged in the Opinion provide both for an absolute right of direct participation by Member States "without distinction" and for participation by representatives of the Union body (the President of the Union and the President of the Commission) and of Regional Economic Communities. This combination reflects the competition between a reluctance of Member States to delegate power of representation to AU organs, and a desire to reform African institutions, sought by Union bodies and supported by members seeking to transform the AU in the image of the European Union.

Indeed, AU partnerships are one of the institutional reforms proposed by the Rwandan President in 2017. In this specific regard, it is stated that "Partnership Summits organized by external parties will be reviewed, with a view to providing an effective framework for African Union partnerships". Africa shall be represented by the Troika, namely the current, incoming and outgoing Chairpersons of the African Union, the AU Commission Chairperson and the Presidents of Regional Economic Communities, as well as the Chairperson of NEPAD".

This formula results in a configuration of thirteen (13) members:

- The Troika (current Chairperson and incoming and outgoing Chairpersons);
- The Chairpersons of the Eight African Regional Economic Communities;
- The Chairperson of the African Commission; and
- The Chairperson of NEPAD.

This reform proposal - which had the merit of developing and strengthening AU representative bodies while streamlining the work of Partnership Summits - was neutralized one year later by Executive Council Decision 986 (XXXII) Rev. 1 of January 2018, which reaffirmed the

inherent right of Member States to participate, without distinction, in all Partnership Meetings.

In light of these decisions, one can only share the perplexity expressed by the Legal Opinion drafters when they affirm that a distinction must be made between the "right of participation of Member States" and the "representation mandate" conferred on the thirteen representatives. Perhaps the legislative bodies ought to clarify the obligations of the thirteen representatives mentioned in Conference decision 635, given that all Member States have the right to participate in all meetings organized within a partnership framework, pursuant to the above-mentioned Executive Council decision.

The presence of the SADR in the AU is reflected in these decisions, and in the reluctance to resolve the issue of participation. Indeed, it is impossible not to note the coincidence between the intensification of debates on this issue and Morocco's accession to the AU. This activism conveys the impression of a desire to consolidate the 1982 fait accompli, to make it irreversible and thus conceal the unsustainable contradiction that taints the AU position on the Sahara dispute.

Legal Opinion on the role of the AU Peace and Security Council with regard to the Sahara issue

The examination of the Sahara issue at the last African Union Summit marked significant progress in determining the role of the African Union in addressing the Sahara issue.

Morocco's challenge to the inclusion of a passage devoted to this point in the report of the African Peace and Security Council (PSC) prompted the request for a Legal Opinion on the validity of such an insertion. The Legal Advisor of the African Union's response is unequivocal: the PSC is no longer competent to discuss or produce a recommendation/ decision on the Sahara issue.

This important development is the culmination of a process that began with the gradual adjustment of the

language of PSC and Commission reports, as well as the AU's change of approach from re-engagement as called for by Algeria and Polisario, to the pure and simple disengagement of the PSC.

It should be recalled that, prior to Morocco's accession to the AU, the discourse of AU bodies reflected the position of the other two parties literally and without nuance, focusing in particular on:

- The self-determination referendum and fixing a date for its organization;
- The call on the UN Security Council to find a solution addressing the issue of human rights;
- The call on the Council to address the issue of "the illegal exploitation of the natural resources of the Sahara";
- The call for an AU delegation to visit the Sahara to investigate the human rights situation;
- The appointment of an AU High Representative in the person of former Mozambican President Joaquim Chissano; and
- The call for a boycott of the Crans Montana Conference.

The substance of these decisions is certainly explained by Morocco's absence from the African Union, but above all by the activism of its adversaries who promoted the development of this discourse to the indifference and sometimes acquiescence of a number of Member States, and also by the action of the Algerian presidency of the Peace and Security Council. All African Union decisions on peace and security are based on PSC reports, which is the central organ of the Union's Peace and Security Architecture.

The mandate, as specified in the 2002 Protocol, establishing the PSC, describes it as "a permanent decision-making body for conflict prevention, management and resolution" and as "a collective security and early warning system, aimed at ensuring a rapid and effective response to conflict and crisis situations in Africa".

In terms of objectives and functions, the PSC is mandated to:

- Promote peace, security and stability in Africa;
- Consolidate peace and prevent conflict;

- Develop a common defense policy for the Union;
- Authorize the organization and deployment of peace support missions;
- Recommend to the Assembly, on behalf of the Union, intervention in a Member State in the event of war crimes, genocide and crimes against humanity;
- Impose sanctions, whenever an unconstitutional change of government occurs in a Member State; and
- Decide on any other matter affecting the maintenance of peace, security and stability on the continent.

The breadth of these powers led the Chairmanship of this body to believe that the powers vested in it by the Union, equivalent to an absolute and general mandate over all conflicts on the continent, and that its competence-- much like that of the United Nations Security Council-- would apply to all Union bodies without distinction, including the Troika, established by the Nouakchott Summit of July 2018.

In Resolution 693 (XXXI) of 2 July 2018, adopted on the basis of the PSC Report, the Assembly of Heads of State and Government "decided to establish an African mechanism comprising the AU Troika, namely the outgoing, current and incoming AU Chairpersons, as well as the Chairperson of the Commission, to provide effective support to UN-led efforts by encouraging flexibility on both sides, mobilizing as broad a support as possible for UN efforts, and reflecting, in close consultation with the UN, on the substance of desired compromise. This mechanism will regularly report on the implementation of its mandate to the Union Assembly and, as appropriate, to the Peace and Security Council at the level of Heads of State and Government. The Assembly decided that the question of the Western Sahara would be addressed only within this framework and at this level".

This paragraph provides that:

- The Troika is a political body established at the level of Heads of State and not a technical mechanism comparable to the PSC;
- Its mandate is to provide effective support to the efforts of the United Nations, which means that it can neither replace them nor initiate a parallel process.
- It will report, essentially, to the Summit and, secondarily, as necessary, to the PSC, represented at the level of Heads of State and Government; and

- The Sahara issue will only be addressed in this context and at this level.

According to the final passage of the decision, there can be no doubt that the PSC should not have addressed the issue of the Sahara in its report to the Union's Summit Conference of February 2019. The Report having nevertheless circulated among Member States with a paragraph on the Sahara, its challenge by Morocco was legitimate and inevitable and the verdict of the AU Legal Adviser was both predictable and clear-cut.

In a letter dated 8 February 2019, distributed generally to Ambassadors, African Permanent Representatives accredited to the African Union and the Secretariat of the PSC, the Ambassador of Nigeria, Acting Chairman of the Permanent Representatives Group for the month, reiterated the quintessence of the Legal Opinion, revolving around the following points of law:

- In accordance with Articles 6 (2) and 9 of the Constitutive Act of the African Union, the Assembly is the supreme body of the AU and, as such, may create any other body such as the PSC and issue it directives;
- The Protocol establishing the PSC is a legal instrument subsidiary to the Constitution of the Union;
- The Nouakchott decision prohibits the PSC from raising, quoting or referring to the situation in the Sahara in any way or form whatsoever; and
- The PSC must comply with the spirit and letter of the Nouakchott Summit decision.

This clarification on the distribution of roles and responsibilities of various African Union bodies, reflecting the importance of a command of rules of procedure, is a first step in the process of adjusting the African Union's position on the Sahara issue.

This is a significant development that should be encouraged, as a manifestation of the collective African will to put the rule of law at the heart of the Union's action, and to build trust among Member States and between Member States and the Organization's structures.

Confirmation of this development and promotion of this new culture are likely to contribute to strengthening inter-African relations, consolidating the Union's partnerships and serving the continent's image on the international stage.

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Mohammed Loulichki is Senior Fellow at Policy Center for the New South. He has an extensive experience of 40 years in diplomacy and legal affairs. He assumed inter alia the functions of Head of the Department of Legal Affairs and Treaties in the Ministry of Foreign Affairs. He was also Ambassador of Morocco in Hungary, Bosnia – Herzegovina and Croatia (1995-1999), Ambassador Coordinator of the Government of Morocco with MINURSO (1999 – 2001), Ambassador of Morocco to the United Nations in Geneva (2006-2008) and New York (2001-2003 and 2008-2014), as well as President of the Security Council (December 2012).

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