

**A DISAPPEARING RIGHT OF SELF-DETERMINATION:
THE ONGOING IMPASSE IN WESTERN SAHARA AND ITS
CONSEQUENCES**

Master of Arts in Law and Diplomacy Thesis

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1. Introduction

"I'm for [self-determination], but I don't think it's natural for an entity so accidentally formed."

– Henry Kissinger, referring to the Spanish Sahara¹

The case of the Western Sahara, regarded as Africa's last colony, perfectly illustrates the tension between international legality and political reality. As long ago as 1976, Thomas Franck wrote, "the Sahara case faces us with a classic conflict of legal and political values."² That conflict is one that we still face 34 years later, to the detriment of both the international legal order and the United Nations' (UN) conflict resolution mechanisms. Previously accepted international legal norms relating to self-determination in the context of decolonization suggest a relatively clear process by which to solve this long-running territorial dispute, but political reality dictates caution. The result is stalemate.

This paper will assess whether the continued impasse over the final status of the Western Sahara is based on a failure of international law or of international politics. It will also assess the prospects for a resolution to the dispute, and more generally, the impact of the ongoing dispute on the international law of self-determination. The thesis that will be developed is that initially, the failure to resolve the dispute was due to politics. The fact that "self-determination has meant at least decolonization since 1945"³ suggests that at the time that the dispute arose in the 1970s, the international law of self-

¹ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Talk with Houari Boumediene; Memorandum of Conversation; October 14, 1974; Item Number KT01372)*, Page 31, <http://nsarchive.chadwyck.com/nsa/documents/KT/01372/all.pdf> (accessed October 15, 2009).

² Thomas M. Franck, "The Stealing of the Sahara," *The American Journal of International Law* 70, no. 4 (October 1976): 696, <http://www.jstor.org/stable/2200382?origin=JSTOR-pdf> (accessed June 1, 2009).

³ Hurst Hannum, "Rethinking Self-Determination," *Virginia Journal of International Law* 34 (Fall 1993): 32, <http://www.lexisnexis.com/us/lnacademic/> (accessed October 8, 2009).

determination was fairly clear. Notwithstanding the 'accidental formation' of many colonies, during the era of decolonization many independent African states emerged based on colonial borders.⁴ However, failure to implement decolonization in Western Sahara at the time that the dispute first arose means that the situation is now hostage not only to current events, but also to a changing international understanding of the law of self-determination. Since the era of decolonization, there has been a shift to a much more nuanced support by states for self-determination, which has come to be viewed as a byword for secession and therefore as a threat to states' territorial integrity, despite the legal merits of individual cases. The continued impasse in Western Sahara is still primarily a failure of politics, but also of the law, which has not been powerful enough to force strict compliance. The two are of course linked: the self-determination of peoples is now so inconsistently promoted in practice that the international legal norms have been weakened, and they are further weakened by the ongoing failure to resolve the dispute in Western Sahara. In this case especially, there is at best a misunderstanding – and at worst a willful obfuscation of – the difference between secession and decolonization. Politically, the same dynamics that originally led to support for the status quo are still in evidence today, with state stakeholders attempting to balance their geopolitical interests with their desire both to support UN conflict resolution mechanisms and to appear to be acting consistently with international legal norms.

⁴ To add to this, Franck notes: "It is widely observed that states or even colonies with established boundaries and fixed populations, however unjustly or serendipitously arrived at, soon develop a cohesive logic of their own that should not be lightly overridden." Franck, "The Stealing of the Sahara", 698.

Having defined the current situation as a failure of both law and politics, it should be underlined that the law does have limits. The norms relating to self-determination in the context of decolonization, to the extent they still apply, provide at best the general outline of what a resolution to the dispute could look like, but they do not point to a specific and definitive solution. The expectation that the law should provide the basis for a specific resolution may indeed be unrealistic. This expectation has in part been fed by the numerous references to the principle of self-determination throughout the course of the dispute by those purporting to offer solutions. Yet even if the UN Security Council, tasked with resolving the dispute, wanted to use international law as the only basis for a resolution, it would struggle. The Council has further confused the issue by paying lip service to the concepts of decolonization and self-determination throughout its handling of the 34-year-long dispute, and claiming that qualitatively different political solutions are all consistent with international legal principles. But when faced with opportunities to act decisively to resolve the dispute in ways that are consistent with the norms it has claimed to support, the Council has allowed politics to trump international law, even ignoring its own resolutions in the process. Its inconsistent behavior has had the effect of further weakening the usefulness of the international norms on self-determination. It has also cornered itself into demanding that the parties look for a “just, lasting and mutually acceptable political solution,”⁵ which has merely served to reinforce the parties in their entrenched positions.

⁵ U.N. Security Council, 6117th Meeting, *Resolution 1871 (2009) [The situation concerning Western Sahara] (S/RES/1871)*, 30 April 2009, OP 4, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1871%20\(2009\)&Lang=E&Area=UNDOC](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1871%20(2009)&Lang=E&Area=UNDOC) (accessed June 5, 2009).

That the impasse is still primarily a political one does not mean that a political solution that puts the law to one side is what is necessarily required. A solution that conforms to legal norms is still possible and arguably desirable. Just because the norms of self-determination are no longer as potent and regarded by many as not viable in practice – because accepting an expansive right to self-determination would lead to an endless quest for statehood – this does not mean that some legal norms could not be applied in the Western Sahara case. The political challenge for the UN Security Council is in a sense to treat Western Sahara as an exception. A solution could be implemented under the norms relating to decolonization - as they existed at the time that the conflict first emerged - rather than applying new and far less certain rules. If in the end Western Sahara cannot be granted a decolonization process for political reasons, then the Security Council must face the consequences of its political decision and move to a different kind of resolution, which could be simply to endorse Moroccan annexation. If the Security Council were to take this route, the Sahrawis could still attempt to have legal principles applied, on the basis that the UN Security Council has failed so spectacularly to implement its own resolutions, and is so structurally dysfunctional in its ability to deal with this issue, that it is no longer the right political forum in which to resolve it. The Sahrawis would then be free to have the dispute taken up again by the General Assembly, with a view to having Western Sahara given back to Spain as the original administering power, and thereafter declared as a UN trust territory.

To address all of these issues, the paper will begin with a history of the conflict, up to and including the most recent round of informal talks, which ended in another stalemate in early February 2010. It will then examine the basis in law of the competing proposals for resolution of the dispute, and assess whether there is a clear answer in

law that could be implemented today. It will move on to explore the failures of the political process. The paper will then look at the available options for resolution, the extent to which they satisfy the legal norms such as they are today, and the political process that is required to implement them.

2. History of the conflict

“Look, if you work something out with the King of Morocco, all right. But it’s not an American concern.” – Henry Kissinger, to Pedro Cortina Mauri, Minister of Foreign Affairs of Spain⁶

The ongoing conflict over Western Sahara, a territory on Africa’s northwest Atlantic coast roughly the size of the United Kingdom or the US state of Colorado, pits the Kingdom of Morocco against the Sahrawi independence movement, the *Frente Para la Liberación de Saguia Al Hamra y Rio de Oro* (abbreviated as Frente POLISARIO, hereafter POLISARIO). However, the dispute over territorial ownership is connected to a larger geopolitical struggle for influence in the Maghreb, played out between Morocco and its larger and more resource-rich eastern neighbor, Algeria.⁷ This competition for preeminence in the Maghreb also draws in France and Spain, former regional colonial powers, who have interests in strong political and commercial ties with North Africa, and who also desire political stability on the southern rim of their zone of influence in the Mediterranean.

The dispute over Western Sahara is intimately bound up in its history as a Spanish colony from 1884 until 1975. While the POLISARIO’s struggle today may be against Morocco, the organization was originally founded in 1973 to fight for independence

⁶ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Discussion with Pedro Cortina Mauri, Spanish Minister of Foreign Affairs; October 9, 1974; Item Number KT01358)*, Page 10, <http://nsarchive.chadwyck.com/nsa/documents/KT/01358/all.pdf> (accessed October 15, 2009).

⁷ See John R. Bolton, *Surrender is not an option: defending America at the United Nations and abroad* (New York: Threshold Editions, 2008), 367.

from Spain.⁸ Pressure on Spain to decolonize the territory began at the United Nations in 1963, when the then Spanish Sahara was first added to the list of Non-Self-Governing Territories (NGSTs).⁹ While “maintaining generally cordial relations with Spain,”¹⁰ Morocco argued strongly in favor of self-determination for Spanish Sahara at the UN, including in favor of a referendum in which the people could choose to live “under the Moroccan aegis or their own aegis or any other aegis.”¹¹ Morocco was clearly operating “in the hope, or expectation, that self-determination would lead to territorial integration.”¹²

Following UN General Assembly resolutions which initially called for Spain to enter into negotiations over the status of the territory, but quickly transitioned to calling for the organization of a self-determination referendum,¹³ and in light of Portuguese decolonization begun as a result of the 1974 coup, Spain eventually accepted that the Sahara should be decolonized, hoping “to lead the territory to independence in close association with Spain.”¹⁴ It also hoped as a consequence that it could recruit African members of the UN General Assembly to support its concurrent claim for the decolonization (and eventual return to Spain) of Gibraltar. In August 1974, Spain announced that “a referendum would finally be held under UN auspices during the first half of 1975,”¹⁵ and conducted a census of the population in preparation for it.

⁸ Tony Hodges, *The Western Saharans (Report No. 40)* (London: Minority Rights Group, 1984), 7.

⁹ U.N. Security Council, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*, by Hans Corell, Paragraph 5.

¹⁰ Hodges, *The Western Saharans (Report No. 40)*, 8.

¹¹ King Hassan of Morocco, quoted in Hodges, *The Western Saharans (Report No. 40)*, 8.

¹² Hodges, *The Western Saharans (Report No. 40)*, 8.

¹³ *Ibid.*

¹⁴ *Ibid.*, 9.

¹⁵ *Ibid.*

In reaction to the impending referendum, Morocco and Mauritania successfully persuaded the UN General Assembly to refer the issue to the International Court of Justice (ICJ) for an advisory opinion, and Spain put the referendum plans on hold pending the ICJ ruling. In the interim, in the spring of 1975, the UN Decolonization Commission visited the Territory, and issued a report calling on the General Assembly to enable the local population to choose their future in free and fair circumstances. When the ICJ opinion was published in October 1975, both sides claimed victory. Most analysts, however, support the view that the ICJ rejected Morocco's and Mauritania's case, given that it had found "that neither the internal nor the international acts relied upon by Morocco indicate the existence at the relevant period of either the existence or the international recognition of legal ties of territorial sovereignty between Western Sahara and the Moroccan State,"¹⁶ and found similarly against Mauritania. Solarz concludes that the ruling "represented a decisive rejection of the case for Moroccan and Mauritanian sovereignty over the Western Sahara."¹⁷

Publicly, King Hassan hailed the ICJ decision – which did note some overlap between tribes residing in Morocco and Western Sahara – as supporting the Moroccan claim, arguing that it legitimated his plans to conduct a peaceful march into the territory to reclaim it for Morocco. However, it is likely that this Green March was a response to what could only be viewed as an unfavorable decision by the international court, in an attempt to put additional pressure on a Spanish colonial regime weakening by the day as Franco's health deteriorated. Hodges notes that "the Green March was a political

¹⁶ International Court of Justice, *Western Sahara - Summary of the Advisory Opinion of 16 October 1975*, 3, <http://www.icj-cij.org/docket/addHit.php?summaryID=323&case=61&lang=en> (accessed April 24, 2009).

¹⁷ Stephen J. Solarz, "Arms for Morocco?" *Foreign Affairs*, Winter 1979/80, II, <http://www.foreignaffairs.com/articles/33325/stephen-j-solarz/arms-for-morocco> (accessed March 8, 2010).

masterstroke”¹⁸ as it “precipitated events before the UN had time to consider the ICJ’s conclusions”¹⁹ and “brought enormous pressure to bear on Spain.”²⁰ The US, favoring its already close connection with Morocco, did not attempt to thwart the course of events.²¹ Desperate to avoid a confrontation with Morocco, and hoping to persuade the Moroccans to call off the Green March, the Spanish offered a compromise whereby it would “turn [Sahara] over to the UN with a guarantee it will go to Morocco.”²² Spain seemingly had no desire to use force to defend the territory, despite having some 60,000 troops stationed there, but at the same time did not want to hand the territory over to Morocco without at least the semblance of an internationally recognized process. In the end, Spain and Morocco concluded a deal whereby the March could proceed up to 8 miles into the territory without being engaged by the Spanish army, which had already pulled back to that point.²³ Under these terms, 350,000 Moroccans marched into the territory in early November 1975 to “in a modern ritual of manifest destiny.”²⁴

As a result of the deal reached prior to the Green March, and with Franco’s deteriorating health and the “impending succession crisis”²⁵ distracting Spanish authorities, Spain signed a tripartite treaty on November 14, 1975 with Morocco and Mauritania that would formally end the Spanish occupation on February 28, 1976, in

¹⁸ Hodges, *The Western Saharans (Report No. 40)*, 9.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Discussion with Abdelaziz Bouteflika; Memorandum of Conversation; December 17, 1975; Item Number KT01853)*, 7, <http://nsarchive.chadwyck.com/nsa/documents/KT/01853/all.pdf> (accessed October 15, 2009).

²² United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (The Secretary’s 8:00 a.m. Staff Meeting; Wednesday, November 5, 1975; Item Number KT01824)*, 28, <http://nsarchive.chadwyck.com/nsa/documents/KT/01824/all.pdf> (accessed October 15, 2009).

²³ Hodges, *The Western Saharans (Report No. 40)*, 10.

²⁴ Solarz, “Arms for Morocco?” *Foreign Affairs*, Winter 1979/80, II.

²⁵ *Ibid.*

return for “respite for Ceuta and Melilla [two Spanish presidios on Morocco’s northern coast],”²⁶ “guarantees for Spanish fishing interests off the Moroccan and Saharan coasts,”²⁷ and “a 35% stake in Fosbucraa,”²⁸ the previously Spanish-owned phosphate mine located in Western Sahara, that continues to be an enormous revenue source for Morocco. Hodges notes that “In effect, Spain agreed to hand Western Sahara over to Morocco and Mauritania,”²⁹ though afterwards, successive Spanish governments “tried to exploit the ambiguities of the Madrid accords”³⁰ by insisting that Spain “had not ceded sovereignty – which, it declared, was vested in the Saharawi (*sic*) people.”³¹ Under the Madrid Accords (as they became known) all three countries would participate in an interim administration that was supposed to include opportunities for the Sahrawi people to voice their views about the territory’s future through the Jema’a, “the largely Spanish-picked local territorial council.”³² (The *Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania* stated that “The views of the Saharan population, expressed through the Yema’a [*sic*], will be respected.”³³) Two weeks after the Madrid Accords were signed, “the Jema’a voted to dissolve itself and transfer its authority to the POLISARIO.”³⁴ However, Morocco and Mauritania reassembled it a few months later, and the Jema’a subsequently agreed to the partition of Western Sahara between the two countries.

²⁶ Hodges, *The Western Saharans (Report No. 40)*, 10.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, 16.

³¹ *Ibid.*

³² Solarz, “Arms for Morocco?” *Foreign Affairs*, Winter 1979/80, II.

³³ U.N. Security Council, *Third Report by the Secretary-General in Pursuance of Resolution 379 (1975) Relating to the Situation Concerning Western Sahara (S/11880, 19 November 1975)*, Annex III, Paragraph 3, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/11880&Lang=E> (accessed March 8, 2010).

³⁴ Solarz, “Arms for Morocco?” *Foreign Affairs*, Winter 1979/80, II.

As a result, Spain withdrew from the interim administration two days before its official dissolution to protest what it saw as an illegal carve-up of the territory, which had used a reconstituted Jema'a to rubber stamp plans for a partition (although arguably, this is much as Spain had originally intended to use the Jema'a). The fact that Spain left the interim administration prior to its official dissolution leaves some doubt as to whether the Madrid accords were ever implemented properly. Furthermore, it is unclear whether the process that took place thereafter constitutes a formal act of self-determination by the Sahrawi people, as question marks surround the legitimacy of the Jema'a as reconstituted by the Moroccans and Mauritians, as well as whether the second Jema'a vote constitutes "a free and genuine expression of the will of the Saharan people."³⁵

To signal its lack of acceptance of the outcome, the POLISARIO declared the formation of the Saharawi Arab Democratic Republic (SADR) on February 28, 1976. This marked the beginning of a 15-year period of active hostilities between POLISARIO guerillas and Moroccan and Mauritanian forces, in "a classic example of a war of attrition."³⁶ At the outset of the war, tens of thousands of Sahrawis fled to Algeria, and were accommodated in refugee camps near Tindouf (where they and their descendants have remained to this day). The POLISARIO guerillas, numbering some 12-15,000,³⁷ were relatively effective, particularly against Mauritania. In August 1979, an Organization of African Unity (OAU, now African Union or AU) mediation initiative resulted in the signature of a ceasefire agreement between POLISARIO and Mauritania, and "a peace treaty in which Mauritania renounced all territorial claims to its portion of the

³⁵ Ibid.

³⁶ Hodges, *The Western Saharans (Report No. 40)*, 13.

³⁷ Solarz, "Arms for Morocco?" *Foreign Affairs*, Winter 1979/80, II.

territory,"³⁸ which included a secret annex under the terms of which Mauritania would cede its portion of the Western Sahara to the POLISARIO within 7 months of the agreement.³⁹ However, Morocco quickly moved in to claim the territory surrendered by Mauritania, beginning construction of a fortified wall, the so-called berm, to isolate the Sahrawis in the territory's barren and resource-free eastern edge.⁴⁰

The OAU went further by admitting the SADR to membership during its 69th Council of Ministers Conference in February 1982. This was a significant step in establishing the legitimacy of the Sahrawis' claim to the territory, and led to Morocco's withdrawal from the organization (an absence which continues to this day in the AU). Morocco argued "inter alia that SADR was not a sovereign State as laid down in Article 4 of the OAU Charter,"⁴¹ which stated that "Each independent sovereign African State shall be entitled to become a Member of the Organization."⁴² (Today, this issue is somewhat moot within the AU as at the time of its establishment in 2000, all OAU members, including the SADR, signed its Constitutive Act as Member States. The Act says only that "Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as

³⁸ Ibid.

³⁹ Hodges, *The Western Saharans (Report No. 40)*, 12.

⁴⁰ MINURSO, the UN mission in Western Sahara, notes on its website that "The berm [...] is a 1600 km long system (approximate figure) of defensive sand walls built in six stages between 1981-1987. [...] The berm is made of earth, rock and sand and is in most places, three metres high. There are Moroccan garrisons (strong points) regularly spaced every 5 Km along its length, protected by bunkers, trenches, barbed wire fences, landmines (anti-personnel and anti-tank) and electronic detection systems." See MINURSO – the United Nations Mission for the Referendum in Western Sahara, <http://www.minurso.unlb.org/berm.html> (accessed April 14, 2010).

⁴¹ E. K. M. Yakpo, "Review of "The Organization of African Unity: An Analysis of Its Role" by G. J. Naldi," *The International and Comparative Law Quarterly* 40, no. 3 (July 1991): 747, <http://www.jstor.org/stable/759822> (accessed April 14, 2010).

⁴² African Union, *OAU/AU Treaties, Conventions, Protocols, Charters: OAU Charter, Addis Ababa, 25 May 1963*, Article IV, http://www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf (accessed April 14, 2010).

a member of the Union,”⁴³ and that “Admission shall be decided by a simple majority of the Member States.”⁴⁴)

Following the admission of the SADR, the OAU embarked on further mediation efforts. Between July 1985 and August 1988, a joint effort of good offices by the UN and the OAU culminated in the presentation to Morocco and the POLISARIO of a document known as the Settlement Plan in Resolution 690. In 1990, Morocco and the POLISARIO agreed to a ceasefire under the auspices of the UN Security Council, and in April 1991, the UN Security Council endorsed the Settlement Plan. In doing so, it established MINURSO - the French acronym for the “Mission of the United Nations for the Referendum in Western Sahara” - with a mandate to implement the Settlement Plan, which included a referendum on self-determination giving the Sahrawi people a choice between independence and integration with Morocco.

One of the major sticking points almost immediately was the issue of voter eligibility in the referendum. There have been two official counts of eligible voters in preparation for a referendum. A census conducted by the Spanish in 1974 counted 74,343 eligible voters.⁴⁵ This census was used by MINURSO as the basis for its own census effort beginning in the early 1990s. An Identification Commission (IDC) was established as part of MINURSO under Security Council resolution 690 to identify people eligible to vote in a self-determination referendum scheduled to take place in January 1992, some

⁴³ African Union, *Constitutive Act of the African Union*, Article 29 (1), http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm (accessed April 14, 2010), emphasis added.

⁴⁴ *Ibid.*, Article 29(2).

⁴⁵ United Nations, MINURSO - United Nations Mission for the Referendum in Western Sahara, *Identification of Eligible Voters, Revision of the Spanish census (June - November 1993)*, <http://www.minurso.unlb.org/IDC.html> (accessed April 16, 2010).

six months after MINURSO came into being.⁴⁶ However, Morocco and the POLISARIO disagreed over eligibility criteria, and the IDC mandate and terms of reference could only be finalized in mid-1993. The process was suspended in December 1995 due to further disagreements between the parties. In September 1997, former US Secretary of State James Baker, recently nominated as the Personal Envoy of the UN Secretary-General, mediated the Houston Accords, which set out agreed processes to enable the holding of the much-delayed referendum, including a re-start of the identification exercise. MINURSO eventually issued a provisional voting list in 1999 (once it had discarded tens of thousands of Morocco appeals), identifying 86,425 eligible voters, which was still subject to appeal.⁴⁷ The parties disagreed on the implementation of the appeal procedures, and the UN decided in 2001 to put the implementation of the Settlement Plan “on hold.”⁴⁸ Pending a wider political settlement of the future of Western Sahara, the IDC was wound up (and because the political process went in a different direction, the IDC was eventually closed in March 2004, once all of its material had been transferred to UN archives in Geneva).⁴⁹

In the meantime, Baker persisted with his efforts, and in June 2001 the Secretary-General submitted to the Security Council the Personal Envoy’s “Framework agreement

⁴⁶ Ibid., Establishment of the Identification Commission (IDC).

⁴⁷ Ibid., Second Phase of Identification (June - December 1999).

⁴⁸ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/2001/613)*, 20 June 2001, Paragraph 57, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2001/613&Lang=E&Area=UNDOC> (accessed March 10, 2010).

⁴⁹ The POLISARIO maintains that any future referendum must use MINURSO’s final tally. Morocco objects that neither this number nor the original Spanish census takes into account those Moroccans who trace their ancestry to Sahrawi tribes and who apparently fled north into Morocco during the period of Spanish rule, only to return since 1976. (The second iteration of the Baker Plan tried to get around this issue by proposing an initial restricted vote to elect a temporary self-governing administration, followed by a ‘mixed’ vote including all of the Territory’s inhabitants.)

on the Status of Western Sahara”, known informally as the Baker Plan I.⁵⁰ The plan established a partially autonomous Authority of Western Sahara comprised of an Executive and an Assembly, to be elected by those identified in MINURSO’s provisional voter list, widely viewed as the most accurate count of Sahrawis resident in the territory and not including post-occupation Moroccan settlers. Significantly, this Authority was to have competence over many domains long coveted and exploited by Morocco, such as mining and fisheries, but not foreign relations, security and defense, or “territorial integrity”. The legislation and court decisions passed by the respective bodies of the Authority also had to “respect and comply with the constitution of the Kingdom of Morocco.”⁵¹ Within a 5-year period following the initial implementation of the agreement, the status of Western Sahara was to be submitted to a referendum. The criterion establishing voter eligibility for the referendum was extremely favorable to Morocco: “To be qualified to vote in such a referendum a voter must have been a full time resident of Western Sahara for the preceding one year.”⁵² Given this, Morocco accepted the plan, but perhaps unsurprisingly it was rejected by the POLISARIO.

Almost two years later, in May 2003, the Secretary-General submitted to the Security Council a much more comprehensive “Peace plan for self-determination of the people of Western Sahara,” known as the Baker Plan II. It called for a period of provisional self-administration by an authority with similar powers to those outlined in the first Baker plan, elected by the ‘core’ of roughly 85,000 Sahrawis. This was to be followed by a referendum including the two options agreed to in the 1991 Settlement Plan, plus any others to which the parties might agree, to take place no earlier than four years and no

⁵⁰ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/2001/613)*, Annex I (Framework agreement on the Status of Western Sahara).

⁵¹ *Ibid.*, Annex 1, Paragraph 4.

⁵² *Ibid.*, Annex 1, Paragraph 5.

later than five years after the effective date of the plan. Those eligible to vote in the final status referendum would be: the 'core' of roughly 85,000 Sahrawis identified by MINURSO and reflected by the December 1999 provisional voter list; those whose names were on the repatriation list from the Tindouf refugee camps drawn up by the UNHCR as at 31 October 2000; and those who had resided continuously in Western Sahara since 30 December 1999. As Mundy notes, "It is reasonable to assume that the first two groups consist primarily of Western Saharans."⁵³ He adds that another advantage of the second Baker plan from the POLISARIO perspective was that "Morocco would be unable to relocate a decisive number of its citizens to the Western Sahara in the years before the final status referendum, as the first Baker plan would have allowed."⁵⁴ Importantly, the plan also stipulated that the UN would determine voter eligibility and that the UN's decision would be final and without appeal (as was the case in the 1991 Settlement Plan).

The Baker Plan II was accepted by the POLISARIO, which was initially dissatisfied with the level of autonomy that the Sahrawis would receive under the plan, and as a result, "strongly supported" by the Security Council. This was another Security Council compromise to placate France, Morocco's strongest ally - the United States had originally wanted to go further and actually "endorse" the plan.⁵⁵ In the end, however, the plan was rejected by Morocco, which was not comfortable either with the idea of granting anything more than token autonomy to Western Sahara, or with having independence as an option in a future referendum (especially since the Baker Plan II

⁵³ Jacob A. Mundy, "'Seized of the Matter': The UN and the Western Sahara Dispute," *Mediterranean Quarterly* 15, no. 3 (Summer 2004): 137, http://muse.jhu.edu/journals/mediterranean_quarterly/v015/15.3mundy.pdf (accessed October 8, 2009).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 139.

reduced the number of Moroccan settlers who would be eligible to vote in the referendum). This caused “confusion in the UN, since Rabat had supported Baker’s original plan containing a similar option.”⁵⁶

After 7 years in the role of Personal Envoy, and having failed to make progress, Baker resigned in 2004. Since his resignation, the status quo has become more entrenched. In an apparent attempt to pre-empt the organization of a referendum, Morocco proposed a series of arrangements granting autonomy to Western Sahara, but stopping short of independence. In 2005 and 2006, Morocco put forward two unilateral proposals granting autonomy to Western Sahara under Moroccan sovereignty. There is some skepticism about the genuineness of these offers.⁵⁷ Under further pressure to move the process forward, it proposed the “Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region” of April 2007, the most extensive offer of autonomy yet.⁵⁸ Morocco continues to present this plan as the only basis on which it will conduct further negotiations. The POLISARIO submitted its own plan for the holding of a referendum to the Council in the same month. Having received proposals from each side, in April 2007 the Security Council called on the parties to open direct talks. UN-sponsored negotiations began in Manhasset, a suburb of New York, in June 2007. After four inconclusive rounds, talks were suspended in March 2008, but both parties agreed to come back to the table. However, in April 2008, during the Security Council’s annual debate about the renewal of MINURSO’s mandate, the UN Secretary-General’s new Personal Envoy, Peter Van Walsum, cast doubt on the Sahrawis’ prospects for

⁵⁶ Ibid., 138.

⁵⁷ See Bolton, *Surrender is not an option: defending America at the United Nations and abroad*, 367.

⁵⁸ Kingdom of Morocco, Ministry of Foreign Affairs and Cooperation, *Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region*, <http://www.maec.gov.ma/Initiative/Docs/Initiative%20ang.pdf> (accessed October 18, 2009).

independence when he reported that "there was no pressure on Morocco to abandon its claim of sovereignty over the territory and, therefore, [...] an independent Western Sahara was not a realistic proposition."⁵⁹ While some may have claimed he was stating a fact based on an analysis of dynamics at the UN, the POLISARIO demanded his immediate resignation.

In January 2009, the Secretary-General appointed a new Personal Envoy, Ambassador Christopher Ross, a former US Ambassador to Algeria. Ambassador Ross has since convened two rounds of 'informal talks', in August 2009 in the Austrian town of Dürnstein, and in February 2010 in Armonk, a suburb of New York. Neither round of talks produced a breakthrough, and nor did either side accept to move forward into a fifth round of formal negotiations. The stalemate comes against a backdrop of heightened tension in the territory and an escalation by Morocco against the freedom of movement and freedom of speech of Sahrawi human rights defenders.⁶⁰

⁵⁹ Patrick Worsnip, "U.N. envoy calls Sahara independence unrealistic," *Reuters AlertNet*, April 21, 2008, <http://www.alertnet.org/thenews/newsdesk/N21382839.htm> (accessed October 18, 2009).

⁶⁰ United States, Department of State, Bureau of Democracy, Human Rights and Labor, *2009 Human Rights Report: Western Sahara*, <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136076.htm> (accessed March 11, 2010).

3. A failure of law? The legal basis for the competing claims over Western Sahara

“We are preoccupied with the [Spanish] Sahara. Spain seems to be thinking now of independence for it. We ask, why should it be independent? It is a country of 45,000 people, two-thirds uneducated. It controls the sea routes. I don’t want you to think that Morocco wants it for itself.” – Moroccan Foreign Minister Benhima⁶¹

“Do any of the people know they live in the Spanish Sahara? It is 80,000 Bedouins, right?” – Henry Kissinger⁶²

The conflict over Western Sahara has both legal and political dimensions. To understand and consider the merits of different possible solutions, an analysis of each is required. One of the few things that can be said with certainty about Western Sahara in international legal terms is that it is a conundrum. Morocco claims unequivocally that Western Sahara is part of its own territory – the 100-year colonial period being merely a brief aberration in historical terms, interrupting otherwise continuous Moroccan rule over the area. The Sahrawi position is that Western Sahara is a Non-Self-Governing Territory (NGST) that should be subject to decolonization according to established international norms. However, unlike in other decolonization situations, while most of the Territory happens to be occupied by Morocco on a *de facto* basis, Morocco does not accept the responsibilities of an administering power as defined by the UN (and nor

⁶¹ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Conversation with Foreign Minister Benhima; Memorandum of Conversation; October 5, 1973; Item Number KT00833)*, 5, <http://nsarchive.chadwyck.com/nsa/documents/KT/00833/all.pdf> (accessed October 15, 2009).

⁶² United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (The Secretary’s 8:00 a.m. Staff Meeting; Wednesday, November 5, 1975; Item Number KT01824)*, Page 30.

does the UN list it as the administering power). The recognized representatives of the Sahrawi people, the Frente POLISARIO, have declared their own state, the SADR, which claims but does not control the Territory. Some 82 states have at one stage recognized the SADR and many have full diplomatic relations with it,⁶³ but SADR is not a member of the United Nations, and it does not have control over much of the territory.

To understand the current impasse over the Territory's future, a legal analysis of the competing claims is required. This will enable an assessment of whether international law clearly articulates the status of Western Sahara and how it should be treated. It will also help establish whether there is a legal basis for the current impasse, or whether the law is actually clear about what should be done with the territory.

The legal basis of Morocco's claim

Morocco argues that Western Sahara is a fully-fledged part of its territory, over which it exercises complete sovereignty. This view is evidenced by its regular description of the territory as the Moroccan "southern provinces" or the "Moroccan Sahara."⁶⁴ Also, its 2007 proposal for resolution of the dispute through the granting of a form of autonomy to Western Sahara is positioned "within the framework of the Kingdom's sovereignty

⁶³ No official list of recognizing states is maintained by the SADR. A Spanish academic and scholar of the Western Sahara, Carlos Ruiz Miguel, maintains a list on the website of a pro-Sahrawi NGO, on which he claims that 82 states have at one point since 1976 recognized the SADR. During the period, somewhere between 20 and 30 of these have canceled or frozen their relations, while some 15 maintain embassies in the SADR. See http://www.umdraiga.com/documentos/RASD/RECONOCIMIENTOS_DE_LA_RASD.htm (accessed March 20, 2010)

⁶⁴ See for example *Agence Maghreb Arab Presse*, "Morocco's sovereignty over Sahara is 'indisputable', lower house speaker says," March 20, 2010, http://www.map.ma/eng/sections/see_also/morocco_s_sovereignty/view (accessed March 20, 2010).

and national unity.”⁶⁵ As far as the Moroccans are concerned, the Western Sahara has already been decolonized, and Morocco was the beneficiary of that decolonization process. In other words, Morocco believes that the Madrid Accords transferred power to Morocco legally, and that POLISARIO’s subsequent attempts to claim the territory by force could be legitimately resisted as an act of self-defense.

The legal basis of Morocco’s claim is weak, and there are several inconsistencies in its position. Firstly, Morocco does not completely occupy the territory that it claims – it currently controls roughly only 80% of Western Sahara.⁶⁶ It therefore cannot plausibly say that the status of the territory is final, unless it is not claiming the remaining 20%, and it views its southern provinces as extending only as far as its berm. Official communications and documentation do not suggest this. Instead, Morocco claims that the territory that it does not occupy is a “buffer zone,”⁶⁷ implying that it has control but has chosen not to occupy the space. This is disputed by accounts from the territory itself.⁶⁸ In fact, Morocco has never controlled this area – which was hardly even controlled by Spain in colonial times – and POLISARIO claims it as its “liberated zone.” The SADR was actually proclaimed from inside this zone, at Bir Lahlou, in February

⁶⁵ Kingdom of Morocco, Ministry of Foreign Affairs and Cooperation, *Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region*, Paragraph 2.

⁶⁶ United States, Central Intelligence Agency, *CIA - The World Factbook*, Africa - Western Sahara - Government type, <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html> (accessed February 21, 2010).

⁶⁷ See for example Morocco, Maroc.ma (Moroccan National Portal), *Peaceful march to Tifariti buffer zone postponed to March 16*, <http://www.maroc.ma/PortailInst/An/Actualites/Peaceful+march+to+Tifariti+buffer+zone+postpone+d+to+March+16.htm> (accessed April 14, 2010).

⁶⁸ “Morocco tries its best to prevent any foreign activity in the Polisario controlled zone (or “Free Zone”) in order to maintain the fiction that this is actually a demilitarized “buffer zone”, and not an independent region within Western Sahara that Morocco has not managed to acquire, run by a government (the Polisario) with which Morocco is competing for sovereignty over Western Sahara.” Nick Brooks, “Well, it’s a start,” Footnote 1, *Sand & Dust: Climate change, civilisation, the Sahara*, web log entry posted February 26, 2008, <http://nickbrooks.wordpress.com/2008/02/26/well-its-a-start/> (accessed April 14, 2010).

1976.⁶⁹ Under the 1991 ceasefire agreement the POLISARIO maintains a troop presence inside the zone – a 2001 report states that “The Polisario controlled eastern section of the Western Sahara Territory is divided into six military regions.”⁷⁰ Furthermore, “the Polisario have constructed a sizeable infrastructure base in Tifariti and Bir Lahlou,”⁷¹ both of which are inside the zone. Therefore, the territory of Western Sahara is in fact partitioned and as a result it is impossible for Morocco to make definitive claims about sovereignty.

Secondly, the Madrid Accords did not result in the decolonization of the Western Sahara on the basis of free and informed consent of the Sahrawi people, as stipulated in general terms in GA Resolution 1514 and reaffirmed in specific terms in subsequent resolutions. Prior to the Madrid Accords, the UN clearly identified Spain as the administering power of the territory. This is spelled out, for example, in GA Resolution 3458A (XXX), in which the General Assembly requests the “Government of Spain, as the administering power [...] to take immediately all necessary measures [...] so that all Saharans originating in the Territory may exercise fully and freely, under United Nations supervision, their inalienable right to self-determination.”⁷² Confusingly, however, in the same session the GA passed Resolution 3458B, in reaction to the transmission of the text of the Madrid Accords to the UN the previous month. This second resolution took note of the tripartite agreement, and then appeared to recognize

⁶⁹ Tami Hultman, “With the POLISARIO Front of Sahara,” *MERIP Reports*, no. 53 (December 1976): 20, <http://www.jstor.org/stable/3011206> (accessed April 14, 2010).

⁷⁰ Michael Bhatia, “The Western Sahara under Polisario Control,” *Review of African Political Economy* 28, no. 88 (June 2001): 294, <http://www.jstor.org/stable/4006727> (accessed April 14, 2010).

⁷¹ *Ibid.*, 298.

⁷² U.N. General Assembly, 2435th plenary meeting, *Resolution 3458 [Question of Spanish Sahara] (A/RES/3458 (XXX))*, 10 December 1975, A, OP7, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3458\(XXX\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3458(XXX)&Lang=E&Area=RESOLUTION) (accessed March 6, 2010).

that the responsibility for the territory had shifted from Spain to the interim administration formed by Spain, Morocco and Mauritania. This is demonstrated by the GA's request that "the interim administration [...] take all necessary steps to ensure that all the Saharan populations originating in the Territory will be able to exercise their inalienable right to self-determination through free consultations [...]"⁷³ However, the resolution only *takes note* of the agreement, and does not endorse it. It also never recognizes either Morocco or Mauritania as the administering power - instead, it assumed that the interim administration would take responsibility for a process of self-determination. Most importantly, the resolution's focus is to reaffirm "the inalienable right to self-determination, in accordance with General Assembly resolution 1514 (XV) of all the Saharan populations originating in the Territory."⁷⁴ This analysis was confirmed in an opinion delivered to the Security Council in 2002 by the UN Legal Counsel, who affirmed that "The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory."⁷⁵

It is an open question whether the Madrid Agreement was in fact invalid from the outset on the basis of coercion of a state by the threat or use of force. Article 52 of the Vienna Convention on the Law of Treaties (1969), which both Spain and Morocco (but

⁷³ U.N. General Assembly, 2435th plenary meeting, *Resolution 3458 [Question of Spanish Sahara] (A/RES/3458 (XXX))*, 10 December 1975, B, OP4.

⁷⁴ *Ibid.*, B, OP2.

⁷⁵ U.N. Security Council, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*, by Hans Corell, Paragraph 6.

not Mauritania) had ratified at the time of the conclusion of the Madrid Agreement,⁷⁶ states that “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”⁷⁷ Akehurst confirms that “Article 52 is an accurate statement of the modern law.”⁷⁸ Of course, whether the Madrid Agreement was in fact invalid hinges on whether Morocco’s Green March constituted the threat or use of force in violation of Article 2(4) of the UN Charter. It is certainly plausible that a march of some 350,000 albeit “unarmed civilians”⁷⁹ could be construed by Spain as a threat. In fact, Spain’s representative to the UN, in a letter to the President of the Security Council during the weeks leading up to the March, said that the March “threatens international peace and security”⁸⁰ and that Spain was “bringing this situation to the attention of the Security Council in accordance with Article 35 of the United Nations Charter”.⁸¹ While Morocco denied this characterization and “France and the United States [...] prevented the Council from ordering the King to call off the march,”⁸² negotiations on the Madrid Agreement began on November 11, 1975, only 2 days after King Hassan “requested the “Green Marchers” to return to their starting point”⁸³ inside southern Morocco, suggesting that Spain had indeed been heavily influenced by the Green March.

⁷⁶ United Nations, United Nations Treaty Collection, *Status of Treaties, Chapter XXIII, Law of Treaties, Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (accessed April 18, 2010).

⁷⁷ United Nations, International Law Commission, *Vienna Convention on the Law of Treaties, 1969, Article 52*, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed April 18, 2010).

⁷⁸ Peter Malanczuk and Michael Akehurst, *Akehurst’s modern introduction to international law* (London: Routledge, 1997), 139.

⁷⁹ U.N. Security Council, *Letter dated 18 October 1975 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council (S/11852)*, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/11852&Lang=E> (accessed April 18, 2010).

⁸⁰ U.N. Security Council, *Letter dated 18 October 1975 from the Permanent Representative of Spain to the United Nations addressed to the President of the Security Council (S/11851)*, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/11851&Lang=E> (accessed April 18, 2010).

⁸¹ *Ibid.*

⁸² Franck, “The Stealing of the Sahara,” 714.

⁸³ *Ibid.*, 715.

Somewhat confusingly, Franck only goes as far as saying that the March constituted “peaceful aggression.”⁸⁴ Spain’s original characterization of the March as a threat to international peace and security is also undermined by its subsequent face-saving deal with Morocco allowing for a symbolic March in exchange for the negotiations that led to the conclusion of the Madrid Agreement. Akehurst says that Article 2(4) of the Charter “gives effect to the principle that ‘armed force shall not be used, save in the common interest,’”⁸⁵ and that an interpretation of the word ‘force’ to include political and economic coercion “is an extremely strained interpretation,”⁸⁶ preferring to label treaties concluded on such a basis ‘unequal’ rather than ‘invalid.’ That the Security Council did not take action against Morocco under Chapter VII of the Charter may be conclusive, although this needs to be viewed in light of the strong backing Morocco received from France and the United States, both veto-wielding permanent members of the Council. Franck notes that the view that Morocco’s action did not constitute a threat was not shared by all Council members at the time, with several (non-permanent) members indicating “their displeasure that the need for a consensus had prevented the drafting of a more specific decision addressed to Morocco.”⁸⁷ Nonetheless, the lack of formal action established the Council’s use of using non-coercive mechanisms for dealing with the dispute (see Chapter 4).

Leaving to one side the legality of the treaty, Morocco’s claim to Western Sahara is in any event further diminished by the circumstances under which it eventually took over the territory. Arguably, when Spain withdrew from the interim administration on

⁸⁴ Ibid., 714.

⁸⁵ Malanczuk and Akehurst, *Akehurst’s modern introduction to international law*, 140.

⁸⁶ Ibid.

⁸⁷ Franck, “The Stealing of the Sahara,” 713.

February 26th 1976, two days prior to the scheduled handover of the territory, the interim administration ceased to exist under the terms of the Madrid Agreement. It is therefore possible that the events of February 28th 1976, when Morocco and Mauritania claimed to have taken legal possession of the territory, were no longer taking place in the context of treaty arrangements. On February 26th, Spain also communicated to the United Nations that it was renouncing its claim to the territory, but it did not specify that it was handing the territory over to the interim administration, Morocco, Mauritania, or any combination thereof. The UN itself notes that “On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory.”⁸⁸ The UN does not say anything about Morocco or Mauritania’s position, but it has subsequently never wavered in its call for decolonization of the Western Sahara, suggesting that it does not view the transfer as legal. Haugen’s view is that “the unilateral declaration of 26 February 1976 is both in contradiction with international law on the self-determination of peoples, and is without any legal effect.” Without taking a clear view on this point, the General Assembly stuck by its belief that the territory should be decolonized, and merely addressed its request that this decolonization take place to another entity.

Today, the UN still lists Western Sahara as a Non-Self-Governing Territory, and it has

⁸⁸ United Nations, *Non-Self-Governing Territories Listed by General Assembly in 2002*, Footnote 2, <http://www.un.org/Depts/dpi/decolonization/trust3.htm> (accessed February 28, 2010).

still not recognized Morocco as the administering power.⁸⁹ (In any event, Morocco would be unlikely to accept this designation, since to do so would be to accept that the territory is non-self-governing, thereby contradicting its claim that Western Sahara is part of Morocco's sovereign territory). However, as a result, Western Sahara remains in a unique limbo as the only listed Non-Self-Governing Territory without a recognized administering power, despite being the largest such territory by far in terms of geographical area. This only compounds the difficulties in holding any country to account for events inside the territory or for facilitating the process of decolonization that the organs of the UN continue to officially endorse, since in accordance with Article 73 of the UN Charter, "Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government [...] accept as a sacred trust the obligation to promote to the utmost [...] the well-being of the inhabitants of these territories, and, to this end [...] to develop self-government [...]"⁹⁰

Morocco's claim is weakened yet further by the lack of formal recognition by other states of its possession of the territory, notwithstanding the prevalent view of recognition having only declaratory effect. While many countries support Morocco's political position, this does not imply that they recognize or legitimize Morocco's presence in Western Sahara. Even France, Morocco's most consistent ally on the Sahara issue, does not recognize Western Sahara as part of Moroccan territory. For example, the map of Morocco on the French Ministry of Foreign Affairs website includes Western

⁸⁹ United Nations, *Non-Self-Governing Territories Listed by General Assembly in 2002*.

⁹⁰ United Nations, *Charter of the United Nations, Chapter XI: Declaration Regarding Non-Self-Governing Territories*, Article 73, <http://www.un.org/en/documents/charter/chapter11.shtml> (accessed March 1, 2010).

Sahara, but the territory is shaded differently than the rest of Morocco and labeled separately.⁹¹ The website specifies Morocco's size both with and without the inclusion of Western Sahara, but it does say that Morocco borders Mauritania to the south⁹² (which would only be true, in anything more than a technical sense, if Western Sahara were part of Morocco). Nonetheless, France has never declared that Western Sahara is a part of Morocco, although it supports political solutions to the current impasse that would imply acceptance and eventual legitimization of Morocco's hold over the territory. In an interview with the Spanish newspaper *El Mundo* in late 2007, President Sarkozy would only go as far as saying that the Moroccan autonomy proposal was "serious and constructive"⁹³ (echoing language from that year's UN Security Council resolution on Western Sahara⁹⁴), while also expressing the hope that continued negotiations between Morocco and the POLISARIO would result in a "mutually acceptable solution."⁹⁵

In December 2009, Morocco secured a small diplomatic coup in obtaining statements from both France and Spain concerning the current application of Moroccan law in Western Sahara. This was Morocco's price for allowing Aminatou Haidar, a well-known Saharawi human rights defender and recipient of several international human

⁹¹ France, Ministère des Affaires Étrangères et Européennes, *France-Diplomatie: Maroc*, http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/maroc_410/index.html (accessed February 28, 2010).

⁹² France, Ministère des Affaires Étrangères et Européennes, *France-Diplomatie: Présentation du Maroc - Géographie*, , http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/maroc_410/presentation-du-maroc_997/geographie_8685.html (accessed February 28, 2010).

⁹³ France, Présidence de la République française, *Entretien avec le quotidien espagnol "El mundo," Parution Jeudi 27 Décembre 2007*, <http://www.elysee.fr/president/les-actualites/interviews/2007/entretien-avec-le-quotidien-espagnol-el.5540.html>, author's translation (accessed February 28, 2010).

⁹⁴ U.N. Security Council, 5669th Meeting, *Resolution 1754 (2007) [The situation concerning Western Sahara] (S/RES/1754)*, 30 April 2007, PP5, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1754%20\(2007\)&Lang=E&Area=UNDOC](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1754%20(2007)&Lang=E&Area=UNDOC) (accessed February 28, 2010).

⁹⁵ France, Présidence de la République française, *Entretien avec le quotidien espagnol "El mundo," Parution Jeudi 27 Décembre 2007*, author's translation.

rights awards, back into Western Sahara. (Haidar had been denied entry in early November 2009 and deported to the Canary Islands, where she proceeded to go on hunger strike for 32 days in protest at her deportation. Following international pressure, France, Spain and the United States intervened with Morocco to secure her return). France, in a statement by the French President welcoming Haidar's release, confirmed its support for Morocco's autonomy proposal and underlined that Moroccan law is in force in Western Sahara pending a resolution to the dispute: "The President of the Republic welcomed the Kingdom's proposal of a wide-ranging autonomy in the context of a political solution under the auspices of the United Nations. Pending this solution, Moroccan legislation applies."⁹⁶ In its own statement, Spain affirmed that "pending a solution to the dispute, in conformity with the position of the UN, Spain notes that Moroccan law is in application in the territory of Western Sahara."⁹⁷ The Spanish statement is of greater concern because the UN has never issued a statement noting that Moroccan law is in application in the territory of Western Sahara, nor has it ever formally recognized Morocco as the *de jure* administering power. This was doubtless an attempt to reinforce Spain's claim that its February 26, 1976 declaration is valid.

Nonetheless, despite Moroccan satisfaction with these statements,⁹⁸ it is unlikely that they imply French or Spanish recognition of Morocco's sovereignty over the territory of

⁹⁶ France, Présidence de la République française, *Communiqué de la Présidence de la République*, , http://www.elysee.fr/documents/index.php?lang=fr&mode=view&cat_id=8&press_id=3207, author's translation (accessed December 18, 2009).

⁹⁷ Spain, La Moncloa, *El Gobierno realiza gestiones para resolver la situación de Aminetu Haidar*, <http://www.la-moncloa.es/ActualidadHome/2009-2/171209Haidar.htm>, author's translation (accessed December 18, 2009).

⁹⁸ See for example *Agence Maghreb Arab Presse*, "Madrid supports political solution to Sahara issue, notes application of Moroccan law in the region," December 18, 2009, http://www.map.ma/eng/sections/sahara/madrid_supports_poli/view (accessed December 18, 2009) and *Agence Maghreb Arab Presse*, "France hails autonomy proposal, underlines importance of applying Moroccan legislation in Sahara," December 18, 2009, http://www.map.ma/eng/sections/sahara/france_hails_autonom/view (accessed December 18, 2009).

Western Sahara. While the statements of leaders do implicate their countries, these are statements of policy that apply pending the emergence of a final solution to the dispute, rather than formal statements of recognition of territorial boundaries. Statements noting that Moroccan law applies in the territory are merely an acknowledgement of the reality of Morocco's *de facto* control and its current occupation of most of the territory. They do not imply that France and Spain definitively recognize Morocco's control, even if they suggest a clear political tilt in that direction.

The existence of burgeoning political and economic ties between Morocco and other states again does not necessarily imply endorsement of Morocco's claim over Western Sahara, although it is suggestive of where these countries' sympathies lie. Morocco's trade agreements with third countries provide an interesting example. For instance, despite its strong alliance with Morocco, the United States has specifically excluded Western Sahara from the countries' Free Trade Agreement. In a letter to Congressman Joseph Pitts on July 19, 2004, Robert Zoellick, the then United States Trade Representative said: "The Administration's position on Western Sahara is clear: sovereignty of Western Sahara is in dispute, and the United States fully supports the United Nations' efforts to resolve this issue. The United States and many other countries do not recognize Moroccan sovereignty over Western Sahara and have consistently urged the parties to work with the United Nations to resolve the conflict by peaceful means."⁹⁹

⁹⁹ "Rep. Pitts lauds protection of Sahrawis in Morocco trade pact," United States House of Representatives, 111th Congress, 2nd Session, <http://www.house.gov/pitts/press/releases/040722r-FTAsahara.htm> (accessed March 12, 2010). Full letter available at http://www.vest-sahara.no/files/pdf/Zoellick_FTA_2004.pdf.

The European Union's (EU) position in this regard is slightly less clear-cut. In March 2007, a 4-year Fisheries Partnership Agreement between the EU and Morocco came into force, allowing EU fishing vessels access to Moroccan fisheries. The Agreement makes no distinction between the territorial waters of Morocco and those of Western Sahara, stipulating only that EU fishermen would be granted "fishing opportunities in the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco."¹⁰⁰ At the time of its signature, the Agreement was the subject of two internal legal opinions written by the legal services of the European Commission and the European Parliament. They purported to justify why the arrangement was consistent with international law, on the basis that it *could* benefit the people of Western Sahara. The question of whether or not the activity benefits the peoples of the Non-Self-Governing Territory is relevant given the opinion of the UN Legal Counsel, issued in 2002, which considered international custom, ICJ rulings, and State practice, concluding that "where resource exploitation activities are conducted in Non-Self-Governing Territories *for the benefit of the peoples of those Territories*, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein,"¹⁰¹ while also noting that "the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of those Territories and deprive them of their

¹⁰⁰ European Union, Council of the European Union, *Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (7587/1/06 REV 1)*, 2, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:EN:PDF> (accessed September 15, 2009)

¹⁰¹ U.N. Security Council, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*, by Hans Corell, Paragraph 24, emphasis added.

legitimate rights over their natural resources,"¹⁰² which it continues to do to this day.¹⁰³

It is on this precise basis that the Agreement has recently come under challenge. The European Parliament's Legal Service issued a new opinion in July 2009 declaring that the Agreement as presently implemented was illegal under international law, stating, "It is not demonstrated that the EC financial contribution is used for the benefit of the people of Western Sahara. Yet, compliance with international law requires that economic activities related to the natural resources of a Non-Self-Governing Territory are carried out for the benefits of the people of such Territory, and in accordance with their wishes".¹⁰⁴ Some months earlier, the former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations Ambassador Hans Corell, and author of the 2002 letter, declared in a speech in Pretoria: "Under all circumstances I would have thought that it was obvious that an agreement of this kind that does not make a distinction between the waters adjacent to Western Sahara and the waters adjacent to the territory of Morocco would violate international law."¹⁰⁵ Since the EU's decision not to make a distinction between waters falling within the sovereignty of Morocco and waters falling within the control of Morocco has come under legal scrutiny, there have

¹⁰² Ibid., Paragraph 22.

¹⁰³ See for example U.N. General Assembly, 64th Session, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/RES/64/106)*, 10 December 2009, OP10, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/64/106&Lang=E> (accessed February 1, 2010).

¹⁰⁴ European Union, European Parliament, Legal Service, *Legal Opinion SJ-0269/09 (13 July 2009)*, by Ricardo Passos and Gabriele Mazzini, available at http://www.wsrw.org/index.php?parse_news=single&cat=105&art=1346 (accessed February 23, 2010).

¹⁰⁵ Hans Corell, "The legality of exploring and exploiting natural resources in Western Sahara" (Lecture, Conference on Multilateralism and International Law with Western Sahara as a Case Study (hosted by the South African Department of Foreign Affairs and the University of Pretoria), Pretoria, South Africa, December 5, 2008), <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf> (accessed August 19, 2009).

now been calls from EU politicians to suspend the Agreement.¹⁰⁶ Given the ongoing debate, the EU's Fisheries Partnership Agreement cannot be viewed as formal acceptance by the EU or its Member States of Morocco's sovereignty over Western Sahara.

Morocco also makes the case that there is not a distinct Sahrawi people that is entitled to the right of self-determination. It is true that even on the eve of the Moroccan invasion, distinguishing the Sahrawi people and connecting them to a specific territory was a challenge. Franck cites the report of the 1975 United Nations Visiting Mission to Spanish Sahara, which said that "because of the close affinity between the Saharans of the Territory and those, for example, in the Moroccan province of Tarfaya or the border regions of Mauritania, it is extremely difficult to determine who among them is a Saharan indigenous to the territory."¹⁰⁷ However, Franck argued that "In virtually every African state there are tribes with close historic and social links across boundaries,"¹⁰⁸ implying that the mixing of tribes has not previously been an impediment to the establishment of an independent country for some members of that tribe. Moroccan development policies over the last 35 years have of course purposefully blurred the picture further. The question is whether the dispersal of Sahrawis across international boundaries, and the dilution of the Sahrawis living in the Territory implies that they no longer form a cohesive unit that can lay claim to Western Sahara, in accordance with the

¹⁰⁶ See for example "GUE/NGL demands cancellation of illegal EU-Morocco fisheries agreement," EurActiv.com, <http://pr.euractiv.com/press-release/guengl-demands-cancellation-illegal-eu-morocco-fisheries-agreement-13611> (accessed March 12, 2010).

¹⁰⁷ Franck, "The Stealing of the Sahara," 697.

¹⁰⁸ Ibid.

criterion of a “permanent population”¹⁰⁹ laid out in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States. The treaty does not specify whether the permanent population must remain separate and distinguishable. Arguably, there is still a permanent population of Sahrawis in the Territory, but one that coexists with other populations. Separately, there is a population of Sahrawis living in the camps around Tindouf in Algeria, comprised of those who fled the territory and their descendants. This population has been classified as “refugees” by the UNHCR, which counted 116,530 such people “originating from Western Sahara Territory” as at January 2009.¹¹⁰ Furthermore, the Sahrawi as a people have been recognized by the United Nations in multiple resolutions in both the General Assembly and the Security Council. Therefore, we must distinguish between the concept of a Sahrawi people and the logistical difficulties associated with establishing their whereabouts and numbers. The fact that it is hard to determine who is a Sahrawi does not mean that Sahrawis do not exist as a people, nor that an exercise to establish who is Sahrawi should not be carried out. The UN evidently believed that this was an exercise worth supporting, which is why it established MINURSO, and even got to the stage of establishing a reasonably accurate “provisional” voter list in 1999.

Lastly, Morocco makes the argument that an independent Western Sahara would not be a viable state. Legally, this is entirely inconsistent with the provisions of GA Resolution 1514, which states that “Inadequacy of political, economic, social or educational

¹⁰⁹ "Convention on Rights and Duties of States (inter-American); December 26, 1933," The Avalon Project - Documents in Law, History and Diplomacy, Article 1, http://avalon.law.yale.edu/20th_century/intam03.asp (accessed March 08, 2010).

¹¹⁰ "Western Sahara Territory," UNHCR, Statistical Snapshot, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4861f6#> (accessed March 08, 2010).

preparedness should never serve as a pretext for delaying independence.”¹¹¹ Just because Western Sahara risks challenges as a state is not an argument against the exercise by the people of their right to self-determination. The argument that the Sahrawis would be better off maintaining a formal link with Morocco is one that should be put to the electorate during a vote on self-determination. Furthermore, as noted by Solarz some four years into the dispute, “with its natural resources of phosphates and its rich coastal fisheries, not to mention possibilities for iron and oil, the Western Sahara should not have great difficulty in supporting its modest population.”¹¹² Hodges noted in 1984 that “With its phosphate revenues, which had already reached 4.7 billion pesetas by 1974, Western Sahara would be economically viable as an independent state. Indeed, it might, in view of its small population, enjoy a per capita income comparable to that in Western Europe or the Gulf oil states.”¹¹³ Despite ongoing Moroccan exploitation of Western Sahara’s phosphates and fisheries since the mid-1970s – a major incentive for its continued hold on the territory - this assertion is likely still valid.

To conclude, while Morocco’s *de facto* control of the bulk of the territory – in particular the populated and resource-rich sections – is indisputable and gives it significant power and leverage politically, its legal claim to sovereignty over Western Sahara is weak. Under international law, Western Sahara is therefore not plausibly part of Morocco.

¹¹¹ U.N. General Assembly, 947th plenary meeting, *Resolution 1514 [Declaration on the granting of independence to colonial countries and peoples] (A/RES/1514 (XV))*, 14 December 1960, OP 3, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/1514\(XV\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/1514(XV)&Lang=E&Area=RESOLUTION) (accessed October 13, 2009).

¹¹² Solarz, "Arms for Morocco?" *Foreign Affairs*, Winter 1979/80, II.

¹¹³ Tony Hodges, *The Western Saharans (Report No. 40)*, 6.

The legal basis of POLISARIO's claim

The essence of the POLISARIO position is that Western Sahara has been designated as a Non-Self-Governing Territory (NGST) by the United Nations, and as such the people of the territory are entitled to an exercise of self-determination on exactly the same basis as other former colonies that went through processes of decolonization in the 1960s and 1970s.

UN General Assembly Resolution 1514, *the Declaration on the granting of independence to colonial countries and peoples*, is the basis for customary international law regarding self-determination. It states that "All people have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹¹⁴ It also states that "Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire [...]"¹¹⁵

Non-Self-Governing Territories are defined in Article 73 of the UN Charter as "territories whose peoples have not yet attained a full measure of self-government."¹¹⁶

The Annex to UN General Assembly Resolution 1541 (XV) adds that "The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to

¹¹⁴ U.N. General Assembly, 947th plenary meeting, *Resolution 1514 [Declaration on the granting of independence to colonial countries and peoples] (A/RES/1514 (XV))*, 14 December 1960, OP 2.

¹¹⁵ *Ibid.*, OP5

¹¹⁶ "Charter of the United Nations: Chapter XI: Declaration regarding Non-Self-Governing Territories," United Nations, <http://www.un.org/en/documents/charter/chapter11.shtml> (accessed March 01, 2010).

territories which were then known to be of the colonial type.”¹¹⁷ It goes on to say that “Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a “full measure of self-government”.”¹¹⁸

The UN itself determines whether a territory is Non-Self-Governing through its Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (or Committee of 24). The UN has been consistent in its treatment of Western Sahara (and previously Spanish Sahara) as a NSGT that must be subject to decolonization. Spanish Sahara was added to the list of NSGTs in 1963. The Committee of 24 passed its first resolution on Spanish Sahara the following year.¹¹⁹ Subsequently, in Resolution 2072 (XX), the UN General Assembly called on Spain to “take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination.”¹²⁰

The POLISARIO case says that since the UN defines Western Sahara as a NSGT, then in accordance with UN rules and practice, Western Sahara must move towards “a full measure of self-government.” The UN clearly spells out that this occurs through a process of self-determination, implying the indivisibility of decolonization and self-determination. General Assembly resolution 1541 (XV) lays out how a Non-Self-

¹¹⁷ U.N. General Assembly, 948th plenary meeting, *Resolution 1541 (XV) [Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter]* (A/RES/1541(XV)), 15 December 1960, Annex (Principle I).

¹¹⁸ *Ibid.*, Annex (Principle II)

¹¹⁹ United Nations, GAOR, 19th Session, Annex No. 8 (part I), UN Document A/5800/Rev.1 (1964), pp.290-91.

¹²⁰ U.N. General Assembly, 1398th plenary meeting, *Resolution 2072 [Question of Ifni and Spanish Sahara]* (A/RES/2072 (XX)), 16 December 1965, OP2, [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/2072\(XX\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/2072(XX)&Lang=E&Area=RESOLUTION) (accessed March 5, 2010).

Governing Territory could be judged to have achieved self-government. The purpose of the resolution was to establish principles for when an administering power should transmit information on a Non-Self-Governing Territory to the UN under Chapter XI of the Charter. If a Territory were to achieve a “full measure of self-government”, then an administering power would be relieved of its obligations under Chapter XI. In Principle VI of the Annex to Resolution 1541, three different criteria for transition to self-government are listed: a) emergence as a sovereign independent state; b) free association with an independent state; and c) integration with an independent state.¹²¹ The resolution goes on to specify conditions under which each of these scenarios could transpire in a way that is consistent with the principles of the Charter. For example, Principle VII states that “Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.”¹²² Principle IX(a), in the context of integration, again mentions the need for a choice to occur “through informed and democratic processes.”¹²³ Principle IX(b) goes into more detail: “The integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.”¹²⁴ These principles are a critical lens through which to examine current Moroccan proposals to grant autonomy to Western Sahara in the context of overall Moroccan sovereignty, through a political settlement to the dispute. It is clear from Resolution 1541 that a NGST can only achieve “a full measure of self-government” when the peoples of the

¹²¹ U.N. General Assembly, 948th plenary meeting, *Resolution 1541 (XV) [Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter]* (A/RES/1541(XV)), 15 December 1960, Annex (Principle VI).

¹²² *Ibid.*, Annex (Principle VII)

¹²³ *Ibid.*, Annex (Principle IX(a))

¹²⁴ *Ibid.*, Annex (Principle IX(b))

territory have engaged in a process of self-determination. Furthermore, self-determination is clearly defined as occurring through the exercise of a free popular vote. While Resolution 1541 does not rule out arrangements that fall short of independence, "The assumption is that independence will be the usual option, with the latter two possibilities subject to greater requirements of informed consent."¹²⁵ Also, according to the standards set out in the Declaration - the UN's basic text on the conduct of decolonization - a free vote is a prerequisite for the achievement of self-determination in whatever form. Of course, this raises the thorny issue of who is entitled to vote. Interestingly, Resolution 1541 specifies that the territory's "peoples" (plural) are entitled to determine their future, which textually foreshadowed the lengthy conflict between the parties in Western Sahara over the referendum voting list during the 1990s.

It is noteworthy that on the basis of Resolution 1541, not all Non-Self-Governing Territories are necessarily independent states in waiting, and independence does not have to be a component of decolonization. While it could be argued that in accordance with the spirit of GA Resolution 1541, the Sahrawis should be given the choice between all three options outlined, this is not a strict legal requirement (and indeed, under the 1991 Settlement Plan to which the POLISARIO agreed, only the two choices of independence or integration were to be offered in the referendum). In other words, self-determination could be exercised without resulting in independence – there is no absolute requirement that exercising self-determination involves achieving independence. Independence is only one of three specific ways that the UN recognizes in Resolution 1541 for a Non-Self-Governing Territory to achieve "a full measure of self-

¹²⁵ Hurst Hannum, "Rethinking Self-Determination," *Virginia Journal of International Law* 34 (Fall 1993): 14.

governance.” (In Resolution 2625 (XXV), the GA added “the emergence into any other political status freely determined by a people” as a fourth way of implementing the right of self-determination.)¹²⁶ However, Resolution 1541 also implies that self-determination could be an ongoing process, and that the peoples of a territory could have the option of choosing independence even after they chose free association.¹²⁷ It does not, however, make the same qualification with regards to the option of integration. Thus international law offers the following scenarios for the implementation of the right to self-determination: independence; free association on a permanent basis; free association as a staging post towards independence or integration with another state; integration with another state; or any other political status that is freely determined.

On this basis, the Moroccan autonomy proposal of 2007 is in theory not completely inconsistent with the norms of decolonization *per se*, as established by Resolution 1541 and supplemented by Resolution 2625. Given its content, the proposal most plausibly fits into the concept of integration, but depending on the level of autonomy finally negotiated, might possibly be aligned with the option of free association outlined in GA Resolution 1541. What is problematic, and what rankles with the Sahrawis, is Morocco’s insistence that the autonomy solution can be imposed as the sole basis for a settlement in the current UN-led political process either as a “political solution” or following a confirmatory referendum with one option, instead of emerging as a result of a free vote

¹²⁶ U.N. General Assembly, 1883rd plenary meeting, *Resolution 2625 (XXV) [Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations]* (A/RES/2625 (XXV)), 24 October 1970, Annex 1, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/2625\(XXV\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/2625(XXV)&Lang=E&Area=RESOLUTION) (accessed April 15, 2010).

¹²⁷ U.N. General Assembly, 948th plenary meeting, *Resolution 1541 (XV) [Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter]* (A/RES/1541(XV)), 15 December 1960, Principle VII(a).

of the Sahrawi people between several choices. The proposal as written is therefore more of a *granting* of autonomy as if Western Sahara were already part of Morocco proper, ignoring the circumstances under which Morocco has come to be in possession of most, but crucially not all, of the Territory. This is clearly inconsistent with the letter and spirit of Resolution 1541. Morocco argues for its proposal by claiming that “a referendum with extreme options is not workable”¹²⁸ and that “the recourse to the referendum is rare in the UN practice, with most situations resolved through negotiations between the parties,”¹²⁹ which is not strictly accurate. (This recent stance also contradicts the language in Morocco’s own official autonomy proposal of 2007, which states that “As the outcome of negotiations, the autonomy statute shall be submitted to the populations concerned for a referendum, in keeping with the principle of self-determination and with the provisions of the UN Charter.”¹³⁰ That Morocco is now moving away from this approach in its more recent public announcements suggests that it perceives less of a need than it once did to frame its proposals in terms of their consistency with the norms of self-determination, perhaps based on its reading of shifting international sentiment.) If anything is clear from the norms established by Resolution 1541, self-determination exercised through a free vote is the *only* basis for a solution that is consistent with those norms.

Additionally, contrary to Moroccan claims, a solution that allows for the self-determination of the Sahrawi people that is consistent with GA Resolution 1541 cannot occur without a free vote by the peoples of the territory. It is on the basis of the conflict

¹²⁸ *Agence Maghreb Arab Presse*, “Sahara: Morocco renews readiness to negotiate a realistic and feasible solution based on autonomy,” February 12, 2010, http://www.map.ma/eng/sections/sahara/sahara_morocco_rene/view (accessed February 28, 2010).

¹²⁹ *Ibid.*

¹³⁰ Kingdom of Morocco, Ministry of Foreign Affairs and Cooperation, *Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region*, Paragraph 8.

over voting lists that Morocco now claims that a referendum in Western Sahara is unworkable in practice. However, the challenges of agreeing a voter list (mainly generated, according to the UN,¹³¹ by Morocco's insistence on establishing a lengthy appeals process and lodging appeals on behalf of 131,038 people who were not certified by the UN as having the right to vote) should not be a justification for not holding a vote. As noted, that does not say anything, however, about what options must be available as part of the exercise of the right of self-determination. Even if a form of enhanced autonomy were the only option that could be agreed to politically between the parties, it would still need to be presented to the Sahrawi people for a free vote, as even Morocco articulated in its 2007 proposal. Hillebrink concludes similarly "that alternative forms of self-government can only be accepted as a 'full measure of self-government' and a completion of the legal process of decolonization if the wishes of the population with regard to the political status of their territory are respected."¹³²

That said, presenting only one option to the Sahrawi people could be problematic. If autonomy were the only option on offer, and it were rejected, the status of the Territory would be even less clear than it is today. If a vote on Morocco's 2007 plan were held and if autonomy were rejected, the international legal norms suggest that self-determination would not have occurred, and to comply with these norms another vote on a different option would need to take place. It may be for this reason that all of the solutions agreed to thus far between the parties in Western Sahara – albeit never implemented fully – have involved a choice between two options, one of which was full

¹³¹ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/2001/613)*, 20 June 2001, Paragraph 28.

¹³² Steven Hillebrink, *The Right to Self-Determination and Post-Colonial Governance* (The Hague: T.M.C. Asser, 2008), 140.

independence. The settlement proposals signed by the parties in 1991 constituted an agreement to hold a referendum in which the people of Western Sahara would choose specifically between independence and integration with Morocco.¹³³ In 1990, the Security Council approved the Secretary-General's report containing the full text of the settlement proposals and the outline of the Secretary-General's Plan for implementing them. This implies official endorsement by the UN Security Council of the settlement plans. On 29 April 1991, the Security Council, in its resolution 690 (1991), decided to establish the United Nations Mission for the Referendum in Western Sahara (MINURSO) in accordance with the Secretary-General's report (S/22464) which further detailed the implementation plan. The Plan provided for a transitional period during which the Special Representative of the Secretary-General would have sole and exclusive responsibility over all matters relating to a referendum in which the people of Western Sahara would choose between independence and integration with Morocco. Therefore, at the time, independence was one of two voting options that were officially endorsed by the UN, including the Security Council. Thus the option of independence, while not a legally necessary component of self-determination, has been on the table as an option in Western Sahara, and endorsed by the UN, since the POLISARIO and Morocco agreed their ceasefire in 1991.

Lastly, on top of concerns about whether autonomy must be put to a vote and presented alongside other options, the nature of the autonomy currently on offer from Morocco is problematic, and is most likely inconsistent with the notion of "a full measure of self-government." The 2007 autonomy proposal says that "The State will keep its powers in

¹³³ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/21360)*, 18 June 1990, Paragraph 31, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/21360&Lang=E> (accessed October 17, 2009).

the royal domains, especially with respect to defense, external relations and the constitutional and religious prerogatives of His Majesty the King.”¹³⁴ It adds that “The State shall keep exclusive jurisdiction over [...] the attributes stemming from the constitutional and religious prerogatives of the King, as Commander of the Faithful and Guarantor of freedom of worship and of individual and collective freedoms.”¹³⁵ The relevant passage of the Moroccan Constitution states that:

*“The King, “Amir Al-Muminin” (Commander of the Faithful), shall be the Supreme Representative of the Nation and the Symbol of the unity thereof. He shall be the guarantor of the perpetuation and the continuity of the state. As Defender of the Faith, He shall ensure the respect for the Constitution. He shall be the Protector of the rights and liberties of the citizens, social groups and organisations. The King shall be the guarantor of the independence of the Nation and the territorial integrity of the Kingdom within all its rightful boundaries.”*¹³⁶

If Morocco were to maintain the constitutional prerogatives of the King as outlined in Article 19 of its Constitution, this would give the King absolute power to determine what threatened the “continuity of the state” and the “territorial integrity of the Kingdom.” It is hard to imagine a genuine autonomy regime that allowed for a “full measure of self-government” for the Saharawi people being compatible with this.

Alongside demands for the holding of a referendum that includes the option of independence, the POLISARIO also claims that Western Sahara is already a separate state. On February 28th 1976, the POLISARIO declared the formation of the Sahrawi Arab Democratic Republic (SADR), established at the exact time of the scheduled

¹³⁴ Kingdom of Morocco, Ministry of Foreign Affairs and Cooperation, *Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region*, Paragraph 6.

¹³⁵ *Ibid.*, Paragraph 14.

¹³⁶ “Morocco: The Constitution,” *Arab Law Quarterly* 17, no. 3 (2002): 306 (Article 19), <http://www.jstor.org/stable/3382031> (accessed February 13, 2010).

dissolution of the interim administration established under the Madrid Accords, to delegitimize Morocco's claim to the territory. The SADR claims sovereignty over the entirety of the territory of Western Sahara. The exact status of the SADR in international law is unclear. It only partially satisfies the four criteria laid out in the 1933 Montevideo Convention.¹³⁷ There is a defined territory, but the SADR does not control most of it. There is a permanent population, albeit one that is split between the Moroccan-occupied zone and the refugee camps in Algeria, and that in the territory itself now includes many non-Sahrawis, thanks to Morocco's aggressive settlement program. The SADR has a government – the POLISARIO – but confusingly, “The SADR's leading bodies tend to overlap, in function and composition, with those of Polisario [*sic*] itself.”¹³⁸ Lastly, the SADR can and has entered into relations with other states - some 80 states¹³⁹ and the African Union recognize the SADR and it has full diplomatic relations with many African countries, including Nigeria and South Africa. (The SADR is even considered a founding member of the AU, having signed the Constitutive Act along with 52 other Member States in 2000). Given this, and consistent with the “prevailing view today [...] that recognition is declaratory,”¹⁴⁰ implying that statehood is a fact which is then acknowledged by the international community, the SADR would appear to satisfy many criteria of statehood by itself.

On the other hand, without having achieved independence, separate statehood is hard to claim. Makonnen writes that “*Upon full independence, a State acquires sovereignty and*

¹³⁷ "Convention on Rights and Duties of States (Inter-American); December 26, 1933.

¹³⁸ Hodges, *The Western Saharans (Report No. 40)*, 11.

¹³⁹ See footnote 53, page 21.

¹⁴⁰ Malanczuk and Akehurst, *Akehurst's modern introduction to international law*, 84.

thus emerges with a new sovereign international legal identity."¹⁴¹ In a 1991 book review, Yakpo claims "It is doubtful though that SADR can and does exercise full sovereign rights of a State in its dealings with other States. Dr Naldi's claim that "The capacity to enter into relations with other States may be regarded as a consequence rather than as a criterion of statehood", appears to be slightly exaggerated."¹⁴²

The SADR perhaps exhibits more of the characteristics of a government-in-exile, described by McConnell as an entity that has "no jurisdiction over territory and operate[s] from within a 'foreign' sovereign state."¹⁴³ Even this characterization may not have much practical value: the fact remains that the government of the SADR is not viewed as the government in waiting of a future Western Sahara, to whom power could even be transferred on a temporary basis. For example, no agreement under consideration in the dispute has ever specified that following a successful referendum result, the SADR should merely take over the functions currently performed by the Moroccan state in the territory. McConnell takes a broader view, arguing that while "governments-in-exile are thus likely to be conceptualized by the realist paradigm as extraterritorial exceptions"¹⁴⁴ on "the assumption that there exists either 'absolute' sovereignty or no sovereignty at all [...] it is more productive to focus not on what governments-in-exile lack, but on their functionality and leverage of aspects of

¹⁴¹ Yilma Makonnen, *International law and the new states of Africa: a study of the international legal problems of state succession in the newly independent states of Eastern Africa* (Addis Ababa: UNESCO, 1983), 126, emphasis added.

¹⁴² E. K. M. Yakpo, "Review of "The Organization of African Unity: An Analysis of Its Role" by G. J. Naldi," *The International and Comparative Law Quarterly* 40, no. 3 (July 1991): 747, <http://www.jstor.org/stable/759822> (accessed April 14, 2010).

¹⁴³ Fiona McConnell, "Governments-in-Exile: Statehood, Statelessness and the Reconfiguration of Territory and Sovereignty," *Geography Compass* 3, no. 5 (August 25, 2009): 1905-1906, <http://www3.interscience.wiley.com/cgi-bin/fulltext/122575154/PDFSTART> (accessed April 10, 2010).

¹⁴⁴ *Ibid.*, 1908.

sovereignty,"¹⁴⁵ concluding that "a more flexible notion of the organization of political power over space is needed."¹⁴⁶ She goes on to argue that "entities can be seen to meet the criteria for international statehood to a greater or lesser degree, with conventional states often failing to enact the range of statehood functions, and less-than-state entities taking on attributes customarily associated with sovereign statehood,"¹⁴⁷ suggesting that "an alternative to territorial or juridical solutions is the continued existence of geopolitical anomalies in their present ambiguous status and, crucially, their acceptance into a more diverse international system."¹⁴⁸

McConnell certainly makes an interesting case for how long-established non-state entities take on important state-like functions in their domestic relations with the exiled populations that they claim to represent. However, reconceptualizing these entities as states in terms of their international and diplomatic relations is more difficult. While theoretically attractive, in practical terms the international system is a long way off from endorsing a breaking of the link between sovereignty and territory. The declaration of the SADR was meant to hasten the day that an independent Western Sahara took its place in the community of nations as strengthened and updated by the post-1945 consensus, not to challenge the traditional understanding of statehood. Looking at the situation through the lens of this system, as imperfect as it is, the unfortunate reality is that only some members of the international community recognize the SADR, and its claim to statehood does not add to the Sahrawi people's legitimacy in the eyes of many countries, including many of those with a disproportionate influence on the political

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid., 1910.

¹⁴⁸ Ibid., 1913.

discussions related to the dispute. In practical terms, declaring the SADR has not helped resolve the question of the final status of Western Sahara. Outside of Africa and certain parts of Latin America, the SADR is not recognized. The leadership of the SADR continues to find it very difficult to secure meetings with government officials and is excluded from formal UN Security Council proceedings, despite the trappings of statehood. (Mohamed Abdelaziz is both the Secretary-General of the Frente POLISARIO and the President of the SADR, but it is arguably in his former capacity rather than the latter that he is received by the UN, which views the Frente POLISARIO as a party to the dispute over Western Sahara). The recognition of SADR by the AU and many other individual states undoubtedly adds to the general legitimacy of the Sahrawi position, especially given the UN's desire to promote the role of regional organizations in the resolution of disputes. However, the AU is the only regional organization that recognizes the SADR. The Arab League, arguably the other regional organization with a stake in the case, supports Morocco's thesis and does not recognize the SADR (but nor does it officially recognize Morocco's sovereignty over the territory, and no official statement of Arab League policy is publicly available). While the SADR may participate in regional summits and has full diplomatic relations with many African countries, this is of limited practical value in terms of advancing its agenda in the UN Security Council. That said, it is hard to view the AU's recognition as declaratory only, because without it, the SADR would be even less of a credible entity than it is today. Recognition by regional organizations in this case appears to represent a political act that has partially constitutive consequences. Furthermore, until Security Council members – and in particular the P5 – recognize the SADR, it will for practical purposes not be a state. Therefore, without denying the broad acceptance of the declaratory theory of recognition, it seems increasingly that in practice, not only is recognition

constitutive, but that recognition by some states has greater weight than recognition by others. This is consistent with the observation that neither the declaratory nor the constitutive theories of recognition are of much assistance “in explaining recognition or determining the position of non-recognized entities in practice,”¹⁴⁹ and that in particular “[t]he declaratory theory leaves unresolved the difficulty of who ultimately determines whether an entity meets the objective test of statehood or not.”¹⁵⁰

It is also unclear how the claim that SADR is a state could be consistent with the determination by the UN – and repeated by the POLISARIO in its submissions to the organization – that Western Sahara is a Non-Self-Governing Territory. This is perhaps where the lack of physical control of the contested territory renders the claim of statehood difficult. It would seem hard to be defined, under international law, both as a state in the traditional sense referred to above and as a NGST, which is a politically useful designation. Politically, it may actually be safer for the POLISARIO to focus on the status of NGST – this is what has been established to entitle the Sahrawi people to an exercise of self-determination under international law. It would be unfortunate if the declaration of the SADR somehow did away with the requirement for a referendum of the Sahrawi people, because it could be construed as an act of self-determination. Therefore, it is both more legally correct as well as more politically useful for the POLISARIO to say that the declaration of the SADR was not, in fact, an act of self-determination in its own right that does away with the requirement for a referendum. Instead, it may be more helpful to view the establishment of the SADR as a political act to create a separate international identity and a mechanism to represent the needs of the

¹⁴⁹ Malanczuk and Akehurst, *Akehurst's modern introduction to international law*, 84.

¹⁵⁰ *Ibid.*, 84-5.

Sahrawi people, thereby communicating the Sahrawis' view that the acceptance by the Jema'a of Moroccan and Mauritanian annexation of Western Sahara did not constitute an act of self-determination. McConnell describes this as the basic rationale for the initial self-declaration of governments-in-exile: "A symbolic strategy to elicit international support without the intention of actually operating as a government whilst in exile."¹⁵¹ Given the SADR's longevity, however, it has also developed "relations with its exile population [that] are extensive and state-like."¹⁵² At best, therefore, it is an entity that has the potential to transfer its structures to the Western Sahara should the peoples of the territory vote for independence, but the SADR is not a state on the basis of the current understanding of the term.

Conclusion

The status of Western Sahara in international law is nothing if not confusing – a Non-Self-Governing Territory, occupied by a country that is not the administering power, claimed by an entity that has declared itself a state but that is most likely not one under international law. POLISARIO's claim, based on its prior status as a Spanish colony, is strong: the Saharawis' right to self-determination flows from Western Sahara's designation as a Non-Self-Governing Territory, and the right of its people to *choose* independence as an option flows from this, based on the principles enshrined in GA Resolution 1541. Furthermore, the illegality of Morocco's annexation and subsequent occupation renders its claim of sovereignty highly questionable. The POLISARIO is

¹⁵¹ McConnell, "Governments-in-Exile: Statehood, Statelessness and the Reconfiguration of Territory and Sovereignty," *Geography Compass* 3, no. 5 (August 25, 2009): 1907.

¹⁵² *Ibid.*

weakened politically because it lacks control of the territory that it claims – legally, its lack of control only weakens its claim to *statehood*, not its claim for self-determination.

As Franck says, “The “settlement” of the Saharan issue in favor of Morocco’s claim of historic title and the denial of self-determination to the Sahrawi people radically departs [sic] from the norms of decolonization established and consistently applied by the United Nations since 1960.”¹⁵³ This is consistent with the view that at least at one stage, there were clear rules for self-determination in the context of decolonization. Over time, however, Morocco has successfully established itself in the bulk of the territory, applying its own laws, settling its own population, and exploiting the territory’s natural resources. By positioning the POLISARIO as separatists, it has turned the quest for independence for Western Sahara into an issue of secession. This makes it easier to present its case politically at the UN and particularly with the permanent members (P5) of the Security Council, who are sensitive to the right of self-determination being used as a cover for separatism, as well as the political consequences of allowing a “new country” to be formed out of an old one. The fear of promoting separatism and creating negative precedents should not apply, as Morocco’s sovereignty over the territory has never been recognized, despite political support for its position. Given its designation as a Non-Self-Governing Territory, legally speaking it is not clear from which country Western Sahara would be seceding if it were to become independent. As long as the United Nations continues to classify Western Sahara as a Non-Self-Governing Territory, this means that it is not part of Morocco, and it cannot secede from Morocco.

¹⁵³ Franck, “The Stealing of the Sahara,” 694.

Legally, therefore, there should be very little debate about what Western Sahara *is* – Western Sahara is a Non-Self-Governing Territory that in theory is still in the process of decolonization. What is less clear is *how* this process of decolonization should play out – the law does not provide clear answers to this. Without clear answers, the status quo holds. Uniquely, Western Sahara lacks an administering power and the law is unclear as to the extent of the UN's power. It can only assist the process, but the membership of the UN, and in particular the UN Security Council, must ultimately decide. Therefore, in the absence of clear legal answers, politics fills the gap.

4. A failure of politics? The search for a solution through the United Nations

“We have no particular view about the future of the Spanish Sahara. I told you privately that, as a political scientist, the future of Spanish Sahara doesn’t seem particularly great. I feel the same way about Guinea-Bissau, or Upper Volta. The world can survive without a Spanish Sahara; It won’t be among the countries making a great contribution.” – Henry Kissinger¹⁵⁴

“We studied deeply the wishes of the population, and we concluded they don’t want to be Moroccans. We can’t treat them as a group of camels, just because King Hassan has the ambition of grasping territory.” – Pedro Cortina Mauri, Minister of Foreign Affairs of Spain¹⁵⁵

The United Nations has been the forum for resolution of the various disputes over Western Sahara since its status as a Spanish colony. From the onset of the war in the mid-1970s, the UN bodies and its membership have sought, to varying degrees, to promote, facilitate or define a solution that accords with international legal norms. Its lack of success reflects the fact that states are torn between competing priorities and are engaged in a delicate balancing act. On the one hand, no country wishes to formally recognize Morocco’s sovereignty over Western Sahara today – international law on self-determination, but perhaps even more importantly in some countries’ eyes on the use of force, would be rendered even less meaningful if they were to do so outside the context of a broader agreement. On the other hand, no country is prepared to ignore Morocco’s

¹⁵⁴ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Discussion with Pedro Cortina Mauri, Spanish Minister of Foreign Affairs; October 9, 1974; Item Number KT01358)*, Page 9, <http://nsarchive.chadwyck.com/nsa/documents/KT/01358/all.pdf> (accessed October 15, 2009).

¹⁵⁵ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Meeting with Pedro Cortina Mauri; Memorandum of Conversation; November 9, 1974; Item Number KT01408)*, Page 1, <http://nsarchive.chadwyck.com/nsa/documents/KT/01408/all.pdf> (accessed October 15, 2009).

de facto control of the bulk of the territory, nor force it to give the territory up, reflecting Morocco's geo-strategic and geopolitical importance, and the strength of its bilateral and regional relationships.

Following the agreement of the parties to the 1991 Settlement Plan, the UN Security Council took the lead within the UN, as the body that established MINURSO and to whom the Secretary-General and his envoys reported on the mission's progress. From the outset, the Security Council has always chosen to look for a solution that is consensual and that has the agreement of the parties, and it has always operated exclusively under Chapter VI of the UN Charter (a choice which has undoubtedly rendered resolution more difficult to achieve). In its resolution proclaiming support for the 1991 Settlement Plan, the Council expressed its desire to reach "a just and lasting solution."¹⁵⁶ From 1991 until 2001, the Council used its resolutions to express its support for the Settlement Plan and specifically for the holding of a self-determination referendum. Once the Settlement Plan was suspended and eventually sidelined, the Council began to stress the importance of finding a "political solution" - in Resolution 1429 of July 2002 it noted that "in view of lack of progress in the settlement of the dispute over Western Sahara the search for a political solution is critically needed."¹⁵⁷ In the same resolution, the Council declared itself "Determined to secure a just, lasting and mutually acceptable political solution which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the

¹⁵⁶ U.N. Security Council, 2984th Meeting, *Resolution 690 (1991) [The situation concerning Western Sahara] (S/RES/690)*, 29 April 1991, PP4, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/690%20\(1991\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/690%20(1991)&Lang=E&Area=RESOLUTION) (accessed March 4, 2009).

¹⁵⁷ U.N. Security Council, 4594th Meeting, *Resolution 1429 (2002) [The situation concerning Western Sahara] (S/RES/1429)*, 30 July 2002, PP2, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1429%20\(2002\)&Lang=E&Area=UNDOC](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1429%20(2002)&Lang=E&Area=UNDOC) (accessed March 17, 2010).

principles and purposes of the Charter of the United Nations.”¹⁵⁸ This formulation has remained unchanged in all Security Council resolutions since then. Officially, therefore, the Security Council, and by implication the UN, continues to support a consensual solution that allows for the self-determination of the people of Western Sahara, and that would therefore accord with international legal norms. When one such solution – the 1991 Settlement Plan – no longer had the support of both parties, the Council threw its weight behind efforts to find another solution, limiting itself only to defining the baseline criteria for that solution as first outlined in Resolution 1429. It should be noted that Resolution 1429 was the culmination of an intense debate in the Council following what is arguably the most straightforward and honest assessment to-date of the options available to the UN by then Secretary-General Kofi Annan, in his report to the Council of February 2002 (S/2002/178). In that report, he outlined four possible scenarios, including for the first time the option of imposed, non-consensual solutions. To Annan’s credit, he raised for the first time the possibility that the Council might need to acknowledge that the UN “was not going to solve the problem of Western Sahara without requiring that one or both of the parties do something that they would not voluntarily agree to do.”¹⁵⁹ The Council rejected all four scenarios and sent the Secretary-General and his envoy back to the drawing board.

With the passage of Resolution 1429, the Council clearly shifted away from its support for solutions that clearly allowed for self-determination, and towards the prioritization of a “political solution.” Its final mandate still represents an attempt to strike a balance,

¹⁵⁸ Ibid., PP6.

¹⁵⁹ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara* (S/2004/325), 23 April 2004, Paragraph 12, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2004/325&Lang=E&Area=UNDOC> (accessed April 15, 2010).

but it was clear from that point forward that reaching a political solution came first, and self-determination was a secondary requirement. The fact remains, though, that only one solution – the Settlement Plan of 1991 – has actually met all of the criteria laid out in Resolution 1429, being both a political solution in the sense that both parties formally agreed to it, and one that also allowed for self-determination. Apart from that, the Baker Plan II came closest to achieving this dual mandate, although arguably this required a dilution of the exercise of the right of self-determination in order to achieve consensus, when compared with the Settlement Plan. If, as discussed in Chapter 3, the law only provides general guidelines as to what the solution should be, the issue that must be addressed is why the political process has not enabled the definition and implementation of a specific solution. In reality, there have been two failures politically – a failure to use the tools of the political process to implement a classic process of self-determination as laid out in the 1991 Settlement Plan, and following that, a failure of the political process to come up with anything else that meets the requirement first laid out in Resolution 1429. These failures can be ascribed primarily to three factors: geopolitics and state interests; the UN Security Council’s use of non-coercive mechanisms and the resulting difficulty of balancing the dual requirements of its own mandate; and the failings of the UN as an organization.

Geopolitics and state interests

The first explanation for why the political process has failed is the complicated set of interests at stake in the dispute. The interests of outside stakeholders, and in particular foreign policy priorities of the P5, play a very large role in the political stalemate in the Security Council and also hamper the UN as an organization. Franck’s analysis, written

in 1976, but for changes to some names and figures, would still hold true today:

“Morocco, with Spain, is America’s key to the Mediterranean. The government of the King is generally perceived as pro-American, while Algeria’s rulers are not. [...] In Washington’s eyes, the right of a mere 75,000 persons to self-determination is of far less consequence, the more so as they might in any event tend to be dominated by Algeria, than is the stability of King Hassan’s shaky throne.”¹⁶⁰

The stalemate at the UN is thus in part a product of the web of state interests related to the Sahara. Morocco is supported heavily by France, its “closest diplomatic ally”¹⁶¹, and its “leading trade partner and the leading source of public development aid and private investments”¹⁶². France has occasionally acted as a spoiler by blocking efforts in the Security Council to take a tougher line against Moroccan intransigence or human rights abuses.¹⁶³ However, given Morocco’s historical agreement in principle to solve the issue through a referendum, France has never blocked Security Council resolutions calling for a solution based on self-determination. Recently France has supported Moroccan assertions that an independent Western Sahara would be a failed state and a breeding ground for Islamist terrorists aligned with Al-Qaeda in the Islamic Maghreb (AQIM), sometimes even implying that linkages exist between POLISARIO and AQIM, despite POLISARIO’s history as a non-fundamentalist movement in the socialist/pan-Arabist mold. Alongside this, France is keen to push the Moroccan autonomy plan

¹⁶⁰ Franck, “The Stealing of the Sahara,” 696.

¹⁶¹ “Morocco (Polisario Front) - Historical Background,” in IISS Armed Conflict Database, http://acd.iiss.org/armedconflict/MainPages/dsp_ConflictBackground.asp?ConflictID=162 (accessed April 24, 2009).

¹⁶² Eric Goldstein and Bill Van Esveld, *Human Rights in Western Sahara and in the Tindouf Refugee Camps*, report (New York: Human Rights Watch, 2008), 34, <http://www.hrw.org/en/node/77259/section/8> (accessed April 24, 2009).

¹⁶³ See for example Florence Beaugé and Philippe Bolopion, “La France bloque le dossier des droits de l’homme au Sahara occidental,” *Le Monde*, May 2, 2009, Available at: <http://www.independentdiplomat.org/documents/lemondews> (accessed April 16, 2010).

forward, and has tried to position a “political solution” as implying an agreement to implement the autonomy proposal without a referendum. It has also argued rather implausibly that Morocco’s 2007 autonomy plan would allow for the self-determination of the Sahrawi people. In an explanation of vote following the 2009 renewal of MINURSO’s mandate by the UN Security Council, France’s Permanent Representative to the UN called on the parties to “show realism, a spirit of compromise and political will, to arrive once and for all at a just, durable and mutually acceptable solution.”¹⁶⁴ In the same remarks he spoke of “the importance of the autonomy proposal advanced by Morocco in 2007 and which, in our eyes, forms a basis for credible, open and constructive negotiation that is respectful of the principle of self-determination, and merits therefore very close examination by the different parties.”¹⁶⁵

The United States has a longstanding alliance with Morocco. The State Department notes that “Morocco was the first country to seek diplomatic relations with the Government of the United States in 1777 and remains one of our oldest and closest allies in the region. Formal U.S. relations with Morocco date from 1787, when the two nations negotiated a Treaty of Peace and Friendship. Renegotiated in 1836, the treaty is still in force, constituting the longest unbroken treaty relationship in U.S. history.”¹⁶⁶ As a result of this relationship, the United States was “a principal backer of Moroccan efforts during its operations in Western Sahara. In the 1980s, American counter-insurgency

¹⁶⁴ France, Ministère des Affaires Étrangères et Européennes, *Renouvellement de la MINURSO : explication de vote par Jean-Maurice Ripert, représentant permanent de la France auprès des Nations unies (30 avril 2009)*, http://www.diplomatie.gouv.fr/fr/actions-france_830/crises-conflits_1050/sahara-occidental_1095/renouvellement-minurso-explication-vote-par-representant-permanent-france-aupres-onu-30.04.09_72941.html, author’s translation (accessed February 28, 2010).

¹⁶⁵ Ibid.

¹⁶⁶ United States, Department of State, *Background Note: Morocco, US-Moroccan Relations*, <http://www.state.gov/r/pa/ei/bgn/5431.htm> (accessed April 17, 2010).

advisers and support played a key role in reversing the war in Morocco's favor."¹⁶⁷ The US has welcomed Morocco's more progressive stance towards Israel and its support for the Middle East peace process. During the tenure of President George W. Bush, the US intensified its support for Morocco given its status as a key ally in the War on Terror. The US considered the 2007 Moroccan autonomy plan as "serious and credible," language that was inserted into that year's UN Security Council resolution on Western Sahara and has remained there since. John Bolton describes the US view in the George W. Bush administration that "stability for King Mohammed VI trumped self-determination."¹⁶⁸ This echoes Hodge's analysis back in 1984 that "The destabilization of Morocco's Alawite monarchy, a long-standing ally of the West, is arousing concern in Western capitals as the war drags on."¹⁶⁹ At the same time, "While the ultimate goal of France and the United States is probably the consolidation of Mohammed VI's regime through the formal annexation of the Western Sahara and the resuscitation of Algeria's economy, the current deadlock is more acceptable than any maneuver that might risk political instability in Morocco or the larger Maghreb."¹⁷⁰ As a result, the US has not recognized Morocco's sovereignty over the territory, as evidenced by its explicit exclusion of Western Sahara from the US-Morocco Free Trade Agreement. Officially, the US supports the UN process and the UN Security Council formula for a resolution. The US has recognized its central role in the resolution of the dispute and has regularly been the source of the UN mediator. It has officially supported all of the proposed settlement plans, including the Baker Plan. (As a P5 member of the UN Security

¹⁶⁷ "Morocco (Polisario Front) - Historical Background," in IISS Armed Conflict Database, http://acd.iiss.org/armedconflict/MainPages/dsp_ConflictBackground.asp?ConflictID=162 (accessed April 24, 2009).

¹⁶⁸ Bolton, *Surrender is not an option: defending America at the United Nations and abroad*, 369.

¹⁶⁹ Hodges, *The Western Saharans (Report No. 40)*, 16.

¹⁷⁰ Mundy, "'Seized of the Matter': The UN and the Western Sahara Dispute," *Mediterranean Quarterly* 15, no. 3 (Summer 2004): 146.

Council, it could of course have chosen to veto the settlement proposals, many of which have been formally endorsed by the Council). The US has therefore been marginally more neutral in the dispute than France.

Spain, the former colonial power, has taken a relatively hands-off approach to the dispute. It officially supports the UN Security Council formula of a political solution that provides for the self-determination of the people of Western Sahara. There is a large and active domestic civil society movement in favor of self-determination for the Sahrawis. However, Spain's political and commercial interests increasingly push it into Morocco's camp. The EU signed a four-year agreement in July 2006 allowing European vessels to fish off the coast of Morocco, including the disputed waters off the coast of Western Sahara, which "are particularly rich fishing areas."¹⁷¹ Spain is one of 11 countries that has received licenses under the agreement, for which the EU pays Morocco some €36 million annually.¹⁷² Spain also regularly expresses concern about illegal immigration and its need for Moroccan support to ensure that immigration into Spain from Africa is controlled. Spanish civil society activists, most notably Javier and Carlos Bardem, note the consensus that has existed across successive Spanish governments on the Sahara issue: "It is a curious case - one that should be studied in all political science classes - how a subject as thorny as this is the only one on which all the governments of this country since the death of the dictator have agreed, whether they

¹⁷¹ United States, Central Intelligence Agency, *CIA - The World Factbook*, Africa - Western Sahara - Geography, <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html> (accessed February 21, 2010).

¹⁷² European Union, European Commission, *Bilateral fisheries partnership agreements between the EC and third countries*, Table, http://ec.europa.eu/fisheries/cfp/external_relations/bilateral_agreements_en.htm (accessed April 17, 2010).

are from the centre, the left or the right. It is a perfect case study for understanding concepts such as reason of state or political opportunism."¹⁷³

The POLISARIO's main ally is Algeria, which has extended considerable military, economic and diplomatic backing to the Sahrawis. Algeria hosts the government-in-exile of the Sahrawi Arab Democratic Republic (SADR), and the Sahrawi refugee camps in Tindouf. Morocco regularly accuses Algeria of excessive intervention in the conflict, and accuses the POLISARIO of being an Algerian front. (In a speech in November 2009 marking the 34th anniversary of the Green March, King Mohammed VI said "By putting the Sahara issue at the heart of their hostile strategy, they confirm that they are, in fact, the party concerned in this artificial conflict, a reality which is inconsistent with the mutual fraternal feelings between the Moroccan and the Algerian peoples."¹⁷⁴) Morocco also accuses Algeria of supporting the POLISARIO out of pure self-interest, with the aim of establishing a friendly satellite state to its west that would grant it access to an Atlantic seaport. Algeria has consistently denied this. Arguably Algeria's position on the Sahara is probably more influenced by ongoing tensions with France, the former colonial power in Algeria and Morocco's principal supporter, as well as its historic support for self-determination. That said, Algeria continues to pursue commercial relations with the US and the EU without placing conditions on their positions on the Western Sahara question. Some speculate that the Algerians secretly favor the status quo, as they like "having the threat of POLISARIO action against Morocco, but [have]

¹⁷³ Javier Bardem and Carlos Bardem, "The value of a person," *El País* (Madrid), December 4, 2009, Print ed., Spain sec., http://www.elpais.com/articulo/espana/valor/persona/elpepiesp/20091204elpepinac_1/Tes (accessed December 4, 2009), translated by author.

¹⁷⁴ King Mohammed VI of Morocco, "HM the king's speech on occasion of 34th anniversary of the Green March" (speech, Ouarzazate, Morocco, November 6, 2009), http://www.map.ma/eng/sections/speeches/full_text_of_hm_the1682/view (accessed November 6, 2009).

found the threat more useful than the actual prospect of renewed hostilities."¹⁷⁵ Mundy notes that "where once the POLISARIO had a strong base of support within all sectors of Algeria's leadership,[...] Algeria's current interest in the Western Sahara is limited to the POLISARIO's value as a wedge against Morocco's regional hegemonic aspirations."¹⁷⁶

Unlike Morocco, the POLISARIO does not benefit from the active support of a P5 member of the Security Council. Despite this, over the years the POLISARIO has benefited from the vocal support of non-permanent members. For example, Uganda was very supportive on the issue of Sahrawi human rights during the Security Council's debate on the renewal of MINURSO's mandate in April 2009.¹⁷⁷ This ad-hoc support, combined with US vacillation between support for Morocco and its wider interests in regional stability, has generally been enough to ensure that the POLISARIO's needs get addressed, even though the playing field between the two parties is certainly not level.

The Security Council's reliance on non-coercive measures

With geopolitics as context, especially given the extensive involvement in the dispute of two veto-wielding permanent members, the stage is set for an excruciatingly slow process in the Security Council, which has yielded little, if any, progress since Morocco's rejection of the second Baker Plan in 2004. The most recent Secretary-

¹⁷⁵ Bolton, *Surrender is not an option: defending America at the United Nations and abroad*, 367.

¹⁷⁶ Mundy, "'Seized of the Matter": The UN and the Western Sahara Dispute," *Mediterranean Quarterly* 15, no. 3 (Summer 2004): 143.

¹⁷⁷ "Security Council Adopts Resolution 1871, Extending UN Mandate in Western Sahara," Global Policy Forum, Statements, Patrick Mugoya (Uganda), <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/western-sahara/47834.html> (accessed April 17, 2010).

General's report to the Security Council states that "the fundamental and, to date, non-negotiable difference between the two parties lies in the issue of self-determination. The Frente Polisario, with the support of Algeria, insists on a referendum with multiple options, including independence, while Morocco insists on a negotiated autonomy regime and a referendum of confirmation with one option."¹⁷⁸ The report adds that the pace and substance of mediation efforts have been "heavily affected by the parties' reaction to events in the region and their unyielding attachment to mutually exclusive positions."¹⁷⁹

While it may be true that the parties themselves remain as far apart as ever, the UN Security Council, tasked with resolving the dispute, often seems to mirror or even facilitate the stalemate. The Council remains mostly blocked as well, as certain countries' desire to push a political solution forward (and often the one most favorable to Morocco), is in tension with the general desire to stay somewhat consistent with the norms of self-determination in the context of decolonization. Despite this, for a variety of reasons, all of the parties choose to maintain the UN as the primary forum in which to pursue their interests: the POLISARIO has little international legitimacy except as a recognized party to the UN process; Morocco believes that it has the upper hand at the UN thanks to the French veto, while also being able to leverage the fact that it is a Member State of the Organization, giving it access and privileges that POLISARIO does not have; and interested Security Council members can claim that 'a process' is ongoing without being forced to do anything that might compromise their ties with Morocco.

¹⁷⁸ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/2010/175)*, 6 April 2010, Paragraph 17, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2010/175&Lang=E&Area=UNDOC> (accessed April 17, 2010).

¹⁷⁹ *Ibid*, Paragraph 20.

The Council is therefore stuck in a somewhat bizarre routine of supporting the appointment of Personal Envoys of the Secretary-General to mediate between Morocco and the POLISARIO, and continuing to fund MINURSO to the tune of some \$53 million a year,¹⁸⁰ notwithstanding the suspension of the referendum process, one of the main aspects of MINURSO's mandate.

One of the main reasons for the lack of progress in the Council is the Council's own unwillingness to impose a solution on the parties. The Council has always acted implicitly, and only once explicitly, under Chapter VI of the UN Charter (Article 36 (1) of the Charter says that the Council may "*recommend* appropriate procedures or methods of adjustment"¹⁸¹ for the pacific settlement of disputes.) At the time of the publication of the Baker Plan II, the Council expressed its "strong support" for the plan "as an optimum political solution on the basis of agreement between the two parties."¹⁸² This is the closest that the Council has ever come to inviting the parties to acquiesce to a specific proposal. Of note, the Council made this statement in the first operative paragraph of Resolution 1495 – which implies a recommendation or a statement of opinion on the basis of an agreed Council policy – whereas the usual reference to its support for a "political solution that allows for the self-determination of the people of Western Sahara" is always made in a preambular paragraph. However, this was immediately preceded by the Council's only ever explicit reference to Chapter VI of the

¹⁸⁰ United Nations, MINURSO - United Nations Mission for the Referendum in Western Sahara, *MINURSO Facts and Figures*, Financial aspects,

<http://www.un.org/en/peacekeeping/missions/minurso/facts.shtml> (accessed April 2, 2010).

¹⁸¹ United Nations, *Charter of the United Nations, Chapter VI: Pacific Settlement of Disputes*, Article 36 (1), <http://www.un.org/en/documents/charter/chapter6.shtml> (accessed April 17, 2010), emphasis added.

¹⁸² U.N. Security Council, 4801st Meeting, *Resolution 1495 (2003) [The situation concerning Western Sahara] (S/RES/1495)*, 31 July 2003, OP1, [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1495%20\(2003\)&Lang=E&Area=UNDOC](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1495%20(2003)&Lang=E&Area=UNDOC) (accessed April 17, 2010).

Charter.¹⁸³ In Resolution 1495 (and subsequently elsewhere), the Council then also qualified and defined a “political solution” as one that requires the consent of the parties to the dispute (as well as the acquiescence of the two regional stakeholders, Algeria and Mauritania, who have observer status at the UN-led mediations). When a party has disagreed with a solution, as Morocco eventually disagreed with the Baker Plan II, not only is the Council operating under Chapter VI, but it also has established that any political solution must have the consent of the parties themselves, and by definition would not be viable without that consent. This may reflect the fact that there is disagreement within the Council itself, where at least one country (France) always takes strong pro-Morocco positions, occasionally joined by a second (the United States). Regardless of whether the Council is operating under Chapter VI or Chapter VII, there is no mechanism for moving forward when there is a divergence of perspective within the P5 – Bosco describes this as the “council’s most glaring incapacity: its powerlessness when one of the Five is determined to pursue a course of action that others oppose.”¹⁸⁴ While France is certainly not out on a limb, it can make the running on Western Sahara in the Council, and due to a desire on the part of all permanent members to avoid provoking a veto, compromises are found to accommodate France’s position. This can be incredibly time-consuming and creates a dysfunctional dynamic. For example, in April 2009, in the annual debate on the extension of the MINURSO mandate, several members raised the question of broadening the mission’s mandate to include a capacity for human rights monitoring (given widely documented evidence of human rights abuses by Morocco). This was prompted by a comment in that month’s Secretary-General’s report on Western Sahara that “The United Nations has no staff on the

¹⁸³ Ibid., PP7.

¹⁸⁴ David L. Bosco, *Five to rule them all: the UN Security Council and the making of the modern world* (Oxford: Oxford University Press, 2009), 256.

ground dedicated to monitoring respect for human rights in the Territory or in the refugee camps near Tindouf, since MINURSO does not have a specific human rights mandate and the Office of the United Nations High Commissioner for Human Rights has no presence in the Territory or in the refugee camps near Tindouf. Nonetheless, the United Nations recognizes its duty to uphold human rights standards in all its operations, including those relating to Western Sahara.”¹⁸⁵ France objected to any change to the MINURSO mandate, particularly one that had the potential to cause the Moroccans so much embarrassment.¹⁸⁶ Eventually, an agreement was reached whereby the Council, in a preambular paragraph, stressed “the importance of making progress on the human dimension of the conflict as a means to promote transparency and mutual confidence through constructive dialogue and humanitarian confidence-building measures.”¹⁸⁷ This weak outcome demonstrates how easy it is for the Council to focus on internal agreement and the preservation of what Bosco calls “great-power comity,”¹⁸⁸ at the expense of progress in the management of the dispute: “The delays, word parsing, and ambiguity that help to smooth relations among the veto-wielding permanent members often cripple its efforts to assertively manage global security.”¹⁸⁹

Because the parties still disagree about the fundamental question of the nature of self-determination, this incremental approach is clearly insufficient. Without the use of more coercive approaches, it is hard to see how the Council can ever facilitate an agreement

¹⁸⁵ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara* (S/2009/200), 13 April 2009, Paragraph 48, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2009/200&Lang=E&Area=UNDOC> (accessed April 19, 2009).

¹⁸⁶ Beaugé and Bolopion, “La France bloque le dossier des droits de l’homme au Sahara occidental,” *Le Monde*, May 2, 2009.

¹⁸⁷ U.N. Security Council, 6117th Meeting, *Resolution 1871 (2009) [The situation concerning Western Sahara]* (S/RES/1871), 30 April 2009, PP7.

¹⁸⁸ Bosco, *Five to rule them all: the UN Security Council and the making of the modern world*, 252.

¹⁸⁹ *Ibid.*

that has the consent of both sides while also allowing for the self-determination of the people of Western Sahara. Morocco and its allies now paint the POLISARIO's insistence on self-determination as a stumbling block. Arguably, it is in fact the failure of the Council to follow through on its original endorsement of a self-determination referendum, and to empower MINURSO, that is the bigger stumbling block. Two components of MINURSO's mandate are to "identify and register qualified voters" and "organize and ensure a free and fair referendum and proclaim the results."¹⁹⁰ Having established MINURSO, the Council implicitly threw its support behind a self-determination referendum. By allowing either party a veto on progress in the hopes of achieving a political solution, the Council seems to be undermining its original commitment to self-determination, which can only be achieved in a limited number of ways. Despite this, the Council continues to extend MINURSO's mandate and fund it, without addressing the fact that the mission is not in a position to comply with one of the core parts of its mandate. In the words of John Bolton, MINURSO seems "a perfect example of costly UN peacekeeping operations that [are] not promoting resolutions to conflicts, but prolonging or even complicating them,"¹⁹¹ which in no small part is due to the Council's inability to move outside of the narrow parameters it has set itself.

The UN's failings as an organization

Given the complicated dynamics within the Security Council, it is perhaps unsurprising that the UN itself has been ineffective in its handling of the Western Sahara dispute and

¹⁹⁰ United Nations, MINURSO - United Nations Mission for the Referendum in Western Sahara, *MINURSO mandate*, <http://www.un.org/en/peacekeeping/missions/minurso/mandate.shtml> (accessed April 17, 2010).

¹⁹¹ Bolton, *Surrender is not an option: defending America at the United Nations and abroad*, 368.

of the specific mandates it has been given. Since these dynamics are not directly of the organization's own making, it may seem unfair to put any responsibility on the UN as an organization for the failure to make progress on the dispute over Western Sahara. After all, the UN can only accomplish what its Member States ask it to do and equip it to do. That said, since the UN process remains to this day the focal point for the disputants and other stakeholders, an analysis of the political dimension of the dispute must also look at the UN's own role. What is more, it transpires that despite the difficult hand that it has been dealt, the UN has also played many of its cards badly, or not at all.

In 1991, the UN was given a relatively clear, though undoubtedly complex, task in the Settlement Plan – most significantly, its job was to monitor the ceasefire and organize and proclaim the results of a referendum. The Settlement Plan called for a transitional period to “begin with the coming into effect of the cease-fire and end with the proclamation of the results of the referendum.”¹⁹² The Plan also stated that “During the transitional period lasting from the entry into force of the cease-fire to the announcement of the results of the referendum, the Special representative will have *sole and exclusive authority* over all matters relating to the referendum, its organization, and conduct.”¹⁹³ Perhaps demonstrating hubris, or lack of foresight, or both, the document also proclaimed that “MINURSO'S presence in the Territory is thus expected to last for up to 35 weeks from the coming into effect of the cease-fire.”¹⁹⁴ The formal ceasefire went into effect on 6 September 1991.¹⁹⁵ Some 970 weeks later, MINURSO is still present in the territory, and there has been no referendum.

¹⁹² U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/21360)*, 18 June 1990, Paragraph 50.

¹⁹³ *Ibid.*, Paragraph 8, emphasis added.

¹⁹⁴ *Ibid.*, Paragraph 55.

¹⁹⁵ United Nations, MINURSO - United Nations Mission for the Referendum in Western Sahara, *Ceasefire Monitoring*, Paragraph 1, <http://www.minurso.unlb.org/monitoring.html> (accessed April 17, 2010).

From the outset the UN demonstrated an extraordinary lack of clarity with regards to the extent of its own authority. As noted above, the Settlement Plan established that the Secretary-General's Special Representative was to have sole and exclusive authority over the referendum once the transitional period began. The transitional period was to begin when the ceasefire came into effect, which it did in early September 1991. To reinforce the point, the Security Council decided in Resolution 690, in which it approved the Settlement Plan, "that the transitional period will begin no later than sixteen weeks after the General Assembly approves the budget for the Mission."¹⁹⁶ Additionally, in Resolution 690, the Security Council called upon the two parties "to cooperate fully with the Secretary-General in the implementation of *his* plan."¹⁹⁷ In his April 1991 report detailing measures for the implementation of the Settlement Plan, the Secretary-General noted that "The two parties, namely the Kingdom of Morocco and the Frente POLISARIO, recognize in the settlement proposals that sole and exclusive responsibility for the organization and conduct of the referendum is vested in the United Nations."¹⁹⁸ With all of this in mind, it is quite absurd that the UN describes the situation immediately following the publication of this report as follows:

"On 24 May 1991, the Secretary-General proposed that the ceasefire should enter into effect on 6 September. Both parties accepted that date. During the following three months, however, it became clear that it would not be possible to complete before 6 September a number of tasks that were to be completed before the ceasefire. It also became clear that, notwithstanding the parties' earlier acceptance of the settlement plan, substantial areas of difference between them remained. One party, therefore, was not able to agree that the transition period should begin on 6 September 1991. Meanwhile,

¹⁹⁶ U.N. Security Council, 2984th Meeting, Resolution 690 (1991) [The situation concerning Western Sahara] (S/RES/690), 29 April 1991, OP5.

¹⁹⁷ Ibid., OP3, emphasis added.

¹⁹⁸ U.N. Security Council, Report of the Secretary-General on the situation concerning Western Sahara (S/22464), 19 April 1991, Paragraph 9, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/22464&Lang=E> (accessed April 16, 2010).

hostilities had broken out in the Territory, interrupting an informal ceasefire that had been in effect for over two years. In these circumstances, the Secretary-General decided that the formal ceasefire should come into effect on 6 September as initially agreed, on the understanding that the transition period would begin as soon as the outstanding tasks had been completed. [...] Since the deployment of MINURSO in September 1991, the ceasefire has generally held. The transitional period, however, has not begun, given the parties' divergent views on some key elements of the Plan, in particular with regard to the criteria for eligibility to vote. Notwithstanding these difficulties, the parties have repeatedly stated their commitment to implementing the Plan, and MINURSO has carried out its functions in so far as conditions have allowed."¹⁹⁹

This is entirely inconsistent with the mandate that the UN had been given and which had been confirmed with the parties. In none of the documents does it say that either of the parties had to agree to the start of the transition period. The documents are also clear that the start of the transition period and the start of the ceasefire were not meant to be separate events. Absurdly, despite the fact that hostilities had recently broken out, the ceasefire was still declared – which suggests that the UN made a political decision to declare the ceasefire somewhat irrespective of conditions on the ground. The beginning of the transition period was a *technical* matter that should have followed straight from the ceasefire, but it was turned into a *political* matter that became subject to the consent of the parties. Especially disturbing is the fact that the transition period is deemed not to have begun because of disagreements over issues relating to the conduct of the referendum, over which the UN was supposed to have sole and exclusive authority. This is a mess which appears to be mostly of the UN's own making. The UN was in effect given veto power over the conduct of the referendum and it proved excessively cautious in using it, thereby contributing to the failure to implement the one and only political agreement that allows for the self-determination of the Sahrawi people that

¹⁹⁹ United Nations, MINURSO - United Nations Mission for the Referendum in Western Sahara, *MINURSO Background*, "Ceasefire" and "Differences remain," <http://www.un.org/en/peacekeeping/missions/minurso/background.shtml> (accessed April 17, 2010), emphasis added.

close to 30 years of active mediation efforts have produced (excluding the Baker Plan II, which never received the consent of both parties).

The Houston Accords of 1997 were meant to address the challenges associated with implementing the Settlement Plan. The first part of the declaration of the parties coming out of the fourth round of direct talks in Houston states: “The parties agree to comply with their commitments as regards the identification process, repatriation of refugees, prisoners, detainees, confinement of their respective troops as well as the code of conduct for the referendum campaign.”²⁰⁰ In the first part of the code of conduct, the parties reaffirmed their agreement that “sole and exclusive authority over all matters relating to the referendum, including its organization and conduct, shall be vested in the United Nations. This authority shall be exercised, within the framework established by the Settlement Plan, by the Special Representative of the Secretary-General.”²⁰¹ This allowed for the re-starting of the identification process, only for it to flounder two years later on the issue of the appeals process.

In his report to the Security Council in June 2001 analyzing the failure of the Settlement Plan, Secretary-General Kofi Annan said that “Morocco was *of the opinion* that, despite all good will, the difficulties faced in the implementation of the [1991 settlement] plan could not be overcome.”²⁰² He then underlined: “It is particularly important to note that perhaps the main problem in implementing the settlement plan is the United Nations [*sic*] inability to implement any measures unless both parties agree to cooperate with it

²⁰⁰ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/1997/742)*, 24 September 1997, Annex III, Part I, OP1, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/1997/742&Lang=E> (accessed October 17, 2009).

²⁰¹ *Ibid.*, Annex III, Part II, OP1.

²⁰² U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/2001/613)*, Paragraph 39, emphasis added.

(S/22464, para.55).²⁰³ This is problematic for many reasons. First of all, Morocco's *opinion*, mostly relating to technical questions concerning the conduct of the identification and appeals processes, should not have held greater sway than the UN's supposed sole and exclusive authority over the referendum process. This is especially so because Annan's reliance on S/22464, his predecessor's report on the implementation of the Settlement Plan, seems to confuse the notions of cooperation and consent.

Paragraph 55 of the report Annan references says: "Four essential conditions must be met for [...] MINURSO to be able to carry out its responsibilities effectively and with complete impartiality. Firstly, MINURSO must at all times have the full support and backing of the Security Council; secondly, it must operate with the *full cooperation* of the two parties, particularly with regard to the comprehensive cessation of all hostile acts; [...]"²⁰⁴ Arguably this means that the parties' cooperation was required for the *effective conduct of the operation* consistent with UN peacekeeping principles. It does not mean that the parties' *consent* was required in order for the UN to be able to exercise its sole and exclusive authority over the conduct of the referendum. Perhaps the reference to the parties' cooperation also implied that if the parties did not comply with UN decisions, the Security Council would ultimately be required to enforce them. It is certainly fair to say that the Council would have been unlikely to force much on the parties, and that therefore the Secretariat needed to act with caution. However, that the UN itself rarely, if ever, put the Council in the difficult position of having to make that call in the 1991-2000 period does not reflect at all well on the organization. By interpreting the requirement for consent so broadly, the UN made its own job much more difficult. The UN must therefore take some of the responsibility for the continued

²⁰³ Ibid., Paragraph 21.

²⁰⁴ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/22464)*, 19 April 1991, Paragraph 55, emphasis added.

existence of a UN mission the *raison d'être* of which is the organization of a referendum that has been suspended for the past 10 years, but that continues to be financed at the rate of some \$50 million a year.

Conclusion

State interests, Security Council dynamics and processes, and the UN's organizational failings together create the 'political reality' that has hampered the implementation of solutions consistent with international law in the Western Sahara case. As has been discussed, this political reality may be too easily accepted or may serve some parties too well. Some may argue that the complexity of the case requires caution and steady progress. But inaction (poorly disguised as barely perceptible shifts in language or tone in Security Council resolutions), and the focus on process over substance, is itself a choice to favor the status quo and relegate international law to a secondary status. The UN is in the awkward position of endorsing the concept of self-determination while at the same time allowing the exercise of self-determination to be thwarted by favoring a "political solution" that requires the consent of the parties. For a solution to comply with the requirements of self-determination as understood in the context of decolonization, there are a limited number of options available, and none of them may ever have the consent of at least one of the parties. If a resolution does not enable the Sahrawis to determine their status freely, then it cannot be self-determination as most people understand it.

Because of the UN's failure to execute its mandate to organize the referendum, and lack of firm support from the Security Council to enable it to do so, the exercise of the right

of self-determination has been weakened by 'political reality.' This creates a vicious circle, whereby the right to self-determination is eroded by events, and then reference is made to the weakened principle as the justification for less balanced political solutions to be implemented. Having handed over responsibility to the UN in 1991, the Security Council is now firmly back in the driving seat on the Western Sahara question. It is now in effect in a position to determine whether the people of Western Sahara do or do not have the option of becoming an independent state. This means that the gift of self-determination is really in the hands of the P5, such that it is now the case that in order for the Sahrawi people to be able to determine their own future, the permanent five members of the UN Security Council must first determine that they deserve to exercise that right. This is dependent on them subjectively establishing that there is consent from both parties to a political solution, even though it has already passed several resolutions that unquestionably support the right of self-determination. This has created an endless loop of mediations, consultations, and draft plans, few of which can meet the Council's dual requirement of consensus and (secondarily) legality. Given this, it is fair to ask whether the Security Council can still meet the requirement of a political solution that allows for self-determination, or whether other forums should be used.

5. The way forward: are political solutions and legal norms mutually exclusive?

“Maybe it would have been easy to take the principle of self-determination as a starting point. [...] It’s not too late for you to aid a path to a solution. It would have to have the maximum of guarantees of the UN for a referendum [...]” – Abdelaziz Bouteflika, then Minister of Foreign Affairs of Algeria²⁰⁵

“I don’t know what self-determination means for the Sahara. I can understand it for the Palestinians, but it is a slightly different problem.” – Henry Kissinger²⁰⁶

The dispute over Western Sahara is stuck today between two competing visions. The POLISARIO calls for full decolonization of the territory, which involves an opportunity for the people of the territory to exercise their right to self-determination through a referendum, which in the POLISARIO’s eyes would lead to full independence as a sovereign state. Morocco, insisting that Western Sahara is (and - except for the period of Spanish colonial rule - has always been) part of the Kingdom, now offers autonomy for Western Sahara within the Moroccan state. There is no longer even agreement on the holding of a referendum, something to which both parties have agreed in the past. Morocco now refuses to accept the option of full independence ever being put to a vote, whereas the Sahrawis insist that this be included, consistent with their reading of the 1991 UN Settlement Plan calling for a referendum on self-determination. As things currently stand, the oft-repeated UN formula of “a just, lasting and mutually acceptable

²⁰⁵ United States, Digital National Security Archive, *The Kissinger Transcripts: A Verbatim Record Of U.S. Diplomacy, 1969-1977 (Discussion with Abdelaziz Bouteflika; Memorandum of Conversation; December 17, 1975; Item Number KT01853)*, 7, <http://nsarchive.chadwyck.com/nsa/documents/KT/01853/all.pdf> (accessed October 15, 2009).

²⁰⁶ *Ibid.*, 6.

political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations²⁰⁷ has never seemed more unattainable.

Even though the world's understanding of self-determination has shifted and there is a widespread belief that the era of decolonization is over, the issue of Western Sahara is still on the UN Security Council agenda and needs to be addressed. Despite the many challenges, the UN still seems to think that a solution that conforms to its formula is possible. In his most recent report to the Security Council, Secretary-General Ban Ki-moon wrote:

"I recommend that the Security Council reiterate its call upon the parties, Morocco and the Frente Polisario, to negotiate in good faith and without any preconditions, under the auspices of my Personal Envoy, and to show the political will required to enter into substantive discussions and ensure the success of the negotiations, where possible by drawing on and developing the contents of their two proposals. Imagination and creativity will be needed if progress is to be made."²⁰⁸

It is not unduly harsh to say that Mr. Ban's recommendation is not a demonstration of original thinking, nor does it appear to have been made with regard to the events on the ground. It is in fact almost identical to the recommendation he made in his 2009 report, despite yet another year of failed talks and protracted stalemate. The Secretary-General's last sentence only begins to acknowledge the difficulties inherent in the task at hand. With this in mind, the following analysis of the situation in Western Sahara is worth quoting at length:

"Unfortunately, a negotiated settlement will not be easy to achieve. On both the substance of a solution as well as the modalities of a negotiation the parties to the conflict

²⁰⁷ U.N. Security Council, 6117th Meeting, Resolution 1871 (2009) [The situation concerning Western Sahara] (S/RES/1871), 30 April 2009, PP3.

²⁰⁸ U.N. Security Council, Report of the Secretary-General on the situation concerning Western Sahara (S/2010/175), 6 April 2010, Paragraph 73.

are far apart. Morocco, contending that the Polisario is not a free agent, insists on solving the problem through bilateral discussions with Algeria, which it firmly believes holds the key to a solution. Algeria, on the other hand, takes the position that the conflict in the Sahara is between the Polisario and Morocco, and that any negotiation to bring the war to an end should be between them. Similarly, while Morocco is prepared to accept a settlement based on the principle of autonomy within the framework of Moroccan sovereignty, but is not willing to consider a withdrawal from the Western Sahara, the Polisario is insisting on complete independence (or at least the right of self-determination which, in their view, would produce the same result) and categorically rejects the possibility of accepting autonomy in lieu of sovereignty.”²⁰⁹

The fact that this analysis was written over 30 years ago by a then US Congressman, while perhaps a depressing indication of how little distance has been traveled on the path to a resolution, does not detract from its applicability to today’s situation. The question that policymakers are trying to answer remains almost the same today: are there possible political solutions that would allow for self-determination? And if such political solutions are not possible, is a different approach necessary?

Based on the analysis in the previous chapter, it appears highly unlikely that anyone will be able to improve significantly on the Baker Plan II as a political solution that allows for the self-determination of the people of Western Sahara. It should be recalled that this plan was already a compromise arrived at after the breakdown of the original 1991 Settlement Plan, which in important ways curtailed the exercise of the right to self-determination by the Sahrawis (particularly through its establishment of an interim period of limited self-rule that, given the dispute’s history, would likely have been fraught with difficulties). It may simply not be possible to reach a political solution that allows for self-determination, on the basis of the Security Council’s current definition of ‘political solution’ as consensus. Given the positions the parties continue to take, any solution that is acceptable to Morocco is unlikely to be viewed as legitimate by the

²⁰⁹ Solarz, "Arms for Morocco?" *Foreign Affairs*, Winter 1979/80, V.

POLISARIO, and any solution viewed as legitimate by the POLISARIO is unlikely to be viewed as acceptable by Morocco. The Security Council certainly seems comfortable enough continuing on its present course of renewing MINURSO's mandate every year and calling on the parties to negotiate. But this is exactly what the Council has done every year since at least April 2004, following Morocco's rejection of the Baker Plan II, when Kofi Annan mooted the idea of returning the issue to the General Assembly, before mistakenly reverting to script and suggesting that the Council try one last time to find a political solution.²¹⁰ Assuming briefly that this is no longer acceptable, it is worth looking at what other options are available.

Coercive action

The Council could decide to depart from its practice of operating under Chapter VI of the UN Charter and instead operate under Chapter VII. This of course could go one of two ways – the Council could either decide to impose an autonomy arrangement, or it could decide to impose a re-worked version of the plans for a self-determination referendum laid out in both the 1991 Settlement Plan and the Baker Plan II. Either of these routes would require enormous amounts of political will and consensus within the Security Council (and the avoidance of a likely French veto in one case), which given the history of the handling of the dispute, are highly unlikely to materialize.

²¹⁰ See U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/2004/325)*, 23 April 2004, Paragraph 37: "Given this history and these facts, in my view and in the view of my Personal Envoy, this realistically leaves only two options for the Security Council to consider. Option one would be to terminate MINURSO and return the issue of Western Sahara to the General Assembly, thereby recognizing and acknowledging that, after the passage of more than 13 years and the expenditure of more than \$600 million, the United Nations was not going to solve the problem of Western Sahara without requiring that one or both of the parties do something that they would not voluntarily agree to do. Option two would be to try once again to get the parties to work towards acceptance and implementation of the Peace Plan."

Imposing a self-determination process would be particularly problematic, because even where the Council has operated under Chapter VII to impose a political arrangement that had been previously anathema to the state in question (for example Resolution 1244 in relation to Kosovo), the UN claimed to have the consent of that state (in the specific case mentioned, the Federal Republic of Yugoslavia). It is also questionable whether the Security Council could even impose an autonomy arrangement. It would be a highly unusual use of the Council's Chapter VII powers, despite having the likely consent of the Moroccan government. It would also contradict every single Security Council resolution on the subject of either Spanish Sahara or Western Sahara dating back to 1975, all of which have supported the application of the right of self-determination consistent with the Charter. It is only conceivable that such a scenario would occur if, following renewed violence, the Council were to define the situation in Western Sahara as a threat to international peace and security.

The Security Council therefore appears boxed in to its current approach. And as Bosco notes, "international law privileges the Security Council, and altering that hierarchy would require a massive diplomatic initiative with very uncertain prospects. There is no getting around the Council."²¹¹ While this is doubtless true as it relates to the systemic challenge of Security Council reform, on the much narrower issue of how to resolve the Western Sahara dispute, the claim may be open to question. If the POLISARIO, politically the weaker of the two parties, wishes to advance its interests, the Security Council may no longer be the best venue in which to do so.

²¹¹ Bosco, *Five to rule them all: the UN Security Council and the making of the modern world*, 253.

A UN Trust

There is a strong case to be made that in the absence of an administering power for Western Sahara, the UN itself is responsible for the territory under the terms of the UN Charter. It will be recalled that Article 73 of the Charter says that “Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government [...] *accept as a sacred trust* the obligation to promote to the utmost [...] the well-being of the inhabitants of these territories, and, to this end [...] to develop self-government [...]”²¹² One possible interpretation of this is to say that since Morocco has *de facto* control of much of the territory, it is for all intents and purposes the administering power and is under an obligation to promote self-government. However, this might put the UN in the awkward position of legitimizing Spain’s February 1976 declaration as well as Morocco’s annexation.

It is an open question as to whether, in the absence of the obligation being accepted by specific *members*, the obligation reverts to the UN at large and also to the UN as an organization. Francesco Bastagli, a former Special Representative of the Secretary-General in Western Sahara believes this is the case, stating during a recent conference that “Contrary to all other territories, *de facto* for Western Sahara there is no legitimate administering Power to fulfill the “sacred trust” cited in the Charter. Pending self-

²¹² United Nations, *Charter of the United Nations, Chapter XI: Declaration Regarding Non-Self-Governing Territories*, Article 73, emphasis added.

determination, the United Nations is duty-bound to make this sacred trust its own.”²¹³

The unpublished 2006 report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf goes much further in establishing responsibility. It states, “Realization of the right to self-determination of the people of Western Sahara is the responsibility not only of Morocco as administrative authority but also of the international community. [...] In accordance with international obligations with respect to the question of Western Sahara, the international community should take all necessary measures to ensure the right of self-determination of the people of Western Sahara.”²¹⁴

Regardless of whether Morocco is or is not the “administrative authority” – an undefined term that may or may not have been intended to convey the notion of an “administering authority” as defined in Article 81 of the UN Charter²¹⁵ – it remains the case that no country or entity is officially the *administering power* today, according to the UN’s own list of NSGTs cited above. However, in order for a UN trusteeship to be established, a responsible state is required. Article 77 of the Charter reads: “The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: [...] territories voluntarily placed under the system by states responsible for their administration.”²¹⁶

²¹³ Francesco M. Bastagli, “Statement” (speech, International conference on multilateralism and international law, with Western Sahara as a case study, Pretoria, South Africa, December 5, 2008), <http://www.arso.org/BastagliPretoria2008.htm> (accessed April 18, 2010).

²¹⁴ United Nations, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf, 15/23 May and 19 June 2006*, Paragraph 52, <http://www.arso.org/OHCHRrep2006en.pdf> (accessed March 4, 2010).

²¹⁵ United Nations, *Charter of the United Nations, Chapter XII: International Trusteeship System*, Article 81, <http://www.un.org/en/documents/charter/chapter12.shtml> (accessed April 18, 2010).

²¹⁶ *Ibid.*, Article 77(1c).

It is therefore possible to imagine a scenario in which the Fourth Committee of the General Assembly, acting on the basis of the international community's responsibility to ensure the realization of the right of self-determination, recommends to the GA that Spain be named as the *de jure* administering power of Western Sahara. Haugen, a proponent of the UN Trust idea, in fact believes that "Spain must be understood to still be the administering power in Western Sahara."²¹⁷ Since many people, including as cited in earlier chapters the former UN Legal Counsel, are also of this view, by choosing Spain the GA would simply be re-naming it as such and repeating the call first made in Resolution 2072 (XX) that Spain allow for the self-determination of the people of Western Sahara. Under Article 77(1c) of the Charter, Spain could then voluntarily hand the territory over to the UN to establish a trusteeship that would prepare for a referendum. Under Article 81 of the Charter, the UN itself could be the administering authority.

This approach may not be as far-fetched as it seems. First of all, the functions carried out by a UN Trusteeship would not be significantly more formal than some of the functions envisaged in the 1991 Settlement Plan, in which it was established that the UN would "monitor other aspects of the administration of the Territory, especially the maintenance of law and order, to ensure that the necessary conditions exist for the holding of a free and fair referendum."²¹⁸ Haugen argues that the fact that the Trusteeship Council is inactive is not an argument against the establishment of a UN Trust, since under Article 85 of the UN Charter, the Council operated under the

²¹⁷ Hans Morten Haugen, "The UN and Western Sahara - reviving the UN Charter," *Anuario de derecho internacional*, no. 25 (2009), Advance copy provided by author.

²¹⁸ U.N. Security Council, *Report of the Secretary-General on the situation concerning Western Sahara (S/21360)*, 18 June 1990, Paragraph 47(g).

authority of the GA.²¹⁹ Presumably Spain would come under enormous political pressure from Morocco not to acquiesce to the arrangement. If that issue could be overcome (or simply ignored), the solution is not that far off from what was actually first proposed in late October 1975 by Spain itself, in which the UN “could be called upon to play an appropriate role that might include temporary administration of the Territory by the United Nations until such time as the wishes of the population could be ascertained.”²²⁰ A difficulty would result if the Security Council decided to assert its authority under Article 83 of the Charter, whereby “All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council.”²²¹ There is no working definition of a “strategic area,” and the Council has only designated once such area in the past (the Pacific Islands).²²² It is not inconceivable to think that France might try to have Western Sahara defined as a strategic area. Without such a designation, the GA would be free to declare Western Sahara as a UN Trust. Presumably if France did try to designate Western Sahara as a strategic area, this would at the very least create the need for some urgent negotiations, which might have the effect of moving the issue forward, even if it did not ultimately result in the declaration of a UN Trust.

²¹⁹ Hans Morten Haugen, “The UN and Western Sahara - reviving the UN Charter,” *Anuario de derecho internacional*, no. 25 (2009).

²²⁰ U.N. Security Council, *Report of the Secretary-General in pursuance of Security Council Resolution 377 (1975) relating to the situation concerning Western Sahara*, 31 October 1975, Paragraph 16(c), <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/11863&Lang=E> (accessed April 18, 2010).

²²¹ United Nations, *Charter of the United Nations, Chapter XII: International Trusteeship System*, Article 83(1).

²²² Hans Morten Haugen, “The UN and Western Sahara - reviving the UN Charter,” *Anuario de derecho internacional*, no. 25 (2009).

A human rights approach

A different approach altogether would be to conceive of self-determination for the Western Sahara outside the context of decolonization. In other words, there would be a formal acknowledgement that self-determination for Western Sahara would be dealt with in the context of the current understanding of that term, rather than creating an exception and treating Western Sahara under the old rules. This would be consistent with Hannum's notion of the "third stage in the evolution of the concept"²²³ of self-determination. He states, "As human rights norms expand to include political participation and protection of identity (within a larger context of continuing protection for the individual members of both minorities and majorities), self-determination can be more meaningfully and readily exercised through options short of secession."²²⁴ Applied to the Western Sahara case, this would presumably involve the aggressive promotion of human rights norms in Morocco, with a view to establishing "the exercise of what might be termed 'functional sovereignty'"²²⁵ by Sahrawis within their own territory but under Morocco's umbrella. This would require not only the protection of basic human rights norms, but also "the right of effective participation in the political and economic process."²²⁶

Ignoring for one moment the already-established point that the demand for self-determination for the Sahrawis does not constitute a demand for secession, presumably this option would still be applicable based on Hannum's belief that "Independence is

²²³ Hannum, "Rethinking Self-Determination," *Virginia Journal of International Law* 34 (Fall 1993): 67.

²²⁴ *Ibid.*, 66.

²²⁵ *Ibid.*

²²⁶ *Ibid.*, 62.

not necessarily an option in situations in which (1) forcible incorporation of adjacent territory has led to absorption or displacement of the former population, and the resulting exercise of sovereignty has been generally accepted by the international community; or (2) the colony in question is ethnically, historically, or culturally related to a large independent non-European neighbor."²²⁷

It is fair to say that Morocco's exercise of sovereignty in Western Sahara has not been generally accepted, as evidenced by the SADR's membership of the AU amongst other things. The 'human rights approach' scenario is therefore very difficult to imagine in the context of a Non-Self-Governing Territory. The respect of human rights expansively defined, while welcome, would be unlikely to diminish Sahrawis' desire to have a vote on their independence, as first documented by the UN Visiting Mission in 1975. The 'human rights approach' may well be appropriate in the context of current non-decolonization related claims for secession. However, the risk of applying it to the Western Sahara case is that it would require eventual legitimization by the Security Council of Morocco's annexation of the territory. Furthermore, it would presumably involve maintenance of the status quo until such time as autonomy in the context of a fully democratic system – which Morocco is far from achieving – could be genuinely offered to the Sahrawi people.

Furthermore, it is extremely hard to use coercive measures to force human rights reform on any country, so Morocco would need to be encouraged to institute its own reforms. An option akin to Hannum's human rights approach may be what is behind Morocco's recent announcement of an advanced regionalization initiative, using the parts of the

²²⁷ Ibid., 33

Western Sahara under its control as the test case.²²⁸ But if anything, Morocco's human rights record appears to be going in the opposite direction from that which would be needed for this option to be viable. Negotiations in the UN Security Council over a human rights monitoring capacity for MINURSO, the UN mission, are stalled. Morocco, supported by France, has successfully positioned any attempt by the UN to monitor the human rights situation on the ground as putting the negotiation process at risk. Any move by the UN Security Council, unlikely as it is given the political dynamics in that body, to monitor human rights would be painted by Morocco as an attack on its sovereignty, despite the fact that it is not recognized as being sovereign over the territory. For example, during his speech marking the 34th anniversary of the Green March in November 2009, King Mohamed said: "I shall see to it that Morocco remains committed to the rule of law and the advancement of democratic values. But we will not allow respect for human rights and the freedoms enjoyed in our country to be exploited in a shameful way, anywhere, in order to conspire against the homeland's sovereignty and unity, or against our sacred values."²²⁹

Achieving 'functional sovereignty' for the Sahrawis would therefore require a different attitude on the part of the Moroccan authorities to human rights, which they currently see as a threat to Morocco's sovereignty and a political tool used by the POLISARIO to gain international sympathy for its cause.²³⁰ Morocco has chosen in recent months to demonstrate its strength and imperviousness to outside pressure by initiating a

²²⁸ See for example *Agence Maghreb Arab Presse*, "Royal speech on regionalisation 'clear message to Morocco's enemies', Moroccan press says," January 5, 2010, http://www.map.ma/eng/sections/general/royal_speech_on_regi/view (accessed January 6, 2010).

²²⁹ King Mohammed VI of Morocco, "HM the king's speech on occasion of 34th anniversary of the Green March" (speech, Ouarzazate, Morocco, November 6, 2009).

²³⁰ See for example *Agence Maghreb Arab Presse*, "Morocco calls on other parties involved in Sahara issue to show realism," February 15, 2010, http://www.map.ma/eng/sections/politics/morocco_calls_on_oth/view (accessed February 15, 2010).

crackdown on freedom of movement and freedom of speech in the territory.²³¹ There is a vicious circle effect - the more Morocco sees the protection of human rights as antithetical to its designs on the territory, the less incentive it has to care about the protection of human rights in the territory. The more Morocco violates human rights, the less incentive it has to ever hold a referendum, even on an autonomy solution, as to win a vote would require the support of many people whose rights today are routinely violated by the Moroccan state. Morocco is therefore a long way off from being a country where a domestic autonomy regime could plausibly be put in place which allowed the Sahrawis "a full measure of self-government."

Conclusion

None of the options presented above is easy to implement, and given the slow pace of events at the UN, the discussion is in any case highly speculative. The UN Trust route is attractive, but the most likely change of direction would come about either through a clear decision by the Council to force Morocco to hold a referendum, or one to impose autonomy within the context of Moroccan sovereignty. As noted, these are still quite unlikely. Currently the rather benign security context favors inaction. From the Council's perspective, the cost of acting is too great and the cost of not acting is too small. Absent a breakthrough engineered by Ambassador Ross, the current Personal Envoy, the chance for a political solution that involves the consent of the parties has probably run its course, but few other viable avenues seem achievable without a much

²³¹ "Re: Human Rights Monitoring in Western Sahara and in Camps in Tindouf, Algeria," Monika Kalra Varma and Sarah Leah Whitson to UN Secretary-General Ban Ki-moon, April 13, 2010, <http://www.hrw.org/en/news/2010/04/13/letter-ban-ki-moon> (accessed April 18, 2010).

greater degree of political engagement either in the General Assembly or the Security Council.

6. Conclusion: the impact of the dispute on the norm of self-determination

The dispute over Western Sahara has dragged on through a period when the norm of self-determination has come to mean something less expansive than it once did. Self-determination no longer means independence, although it may never have meant something that clear, but rather have implied merely the possibility of independence. Be that as it may, even if self-determination only ever meant having the chance to choose independence, the notion of sovereignty now clearly trumps even this more limited definition. Western Sahara is a victim of this transition – Morocco has used the power of delay strategically and to its advantage, and now its privileged relationships and geopolitical importance mean that its sovereignty concerns cannot and most likely will not be ignored by the P5. The impasse in Western Sahara illustrates and further confirms the relegation by the international community of the right to self-determination.

The status quo and the direction that resolution efforts appear to be taking suggest that the concept of self-determination may have lost much of its meaning. If states determine that there can really be self-determination through a “political solution” that may not even include a vote on the territory’s future, then self-determination no longer means what it says – rather, it suggests that peoples can determine their future subject to the prior agreement of the P5 to allow them to do so. For the right to be meaningful, self-determination should not be subject to veto by the P5.

That said, no reading of current international thinking on self-determination in the post-decolonization era could argue that self-determination is a limitless process. In theory, it

should be possible for the UN to see that Western Sahara is an anomaly – a leftover from a bygone era that needs to be handled under the old rules. As time has passed, however, this is harder to justify. Given the current practice of states, it may no longer even be the case that any countries currently on the list of Non-Self-Governing Territories should be independent states, as was once thought to be desirable. Certainly, at this stage, there are no clear rules to determine which entities should become states. While lamenting the failure of the UN and its Members to act in ways that strengthen and refine the rules, the individual case of Western Saharan statehood remains unresolved and is hard to argue against. Unfortunately the UN has chosen to frame the self-determination process in Western Sahara as one that in effect requires the consent of the state that is in *de facto* control of the territory seeking independence, making the demand akin to a demand for secession, when legally it is no such thing.

If self-determination in the context of decolonization is to be abandoned, though, but a political solution that is consistent with self-determination is desired, then the political organ that is charged with the resolution of the dispute must actually make a decision. There are many precedents in this dispute of the UN giving itself the authority to act unilaterally without Morocco's consent, such as on the issue of voter identification. But having given itself the final say, the UN did not do anything when Morocco didn't agree with its proposals, and the Security Council did not intervene to reinforce the rules that it had itself established. In the face of a weak Secretariat, the exercise of self-determination in Western Sahara now hinges on a consensus within the P5. If the referendum were to take place, statehood would also ultimately depend on recognition by the P5.

Much of the problem results from a purposeful blurring for political purposes of the concepts of decolonization and secession. Having successfully framed the POLISARIO as a secession movement that threatens Morocco's territorial integrity and internal stability, it has been relatively easy for Morocco to persuade powerful UN Security Council members to stick with the status quo. A realist approach might be to leave the status quo unchanged, and encourage democratic development in Morocco, including extensive rights for the Sahrawi minority. A realignment of self-determination in favor of a focus on the promotion of human rights – what lies beneath the claim for self-determination – within the context of existing territorial boundaries is attractive, and certainly makes sense given the shift in the understanding of self-determination that has taken place in the post-decolonization era. That Morocco has come close to achieving this is in fact a testament to the international community's inconsistent application of the rules regarding territorial integrity. This approach would also be a bitter pill to swallow for the Sahrawis, however, promised a self-determination referendum in 1991, for which they gave up their arms.

Apart from France, no UN member seems to favor this approach outright. Instead, the charade of UN mediations continues, with no visible progress except at the margins. The second Baker Plan of 2003 represented a well thought-through compromise. A King with more legitimacy than the current one rejected that plan, and a mediator with a lot of political clout could not see a way forward. To continue with the current process seems an exercise in futility, since one of the basic elements of success in any type of

mediation “is the parties’ perception of a mutually hurting stalemate, which makes it possible for the mediator to be welcome with his offer of a way out of the conflict.”²³²

It is hard not to conclude that there exists a small set of legally ‘correct’ solutions that are just politically inconvenient for certain countries that have enough power to stop one of them from being implemented. These countries are not completely impervious to legal arguments – if the law had no impact, the status quo would already have been codified somehow in the Western Sahara. The law has had enough of an impact to delay an outcome based purely on *realpolitik*. But the law of self-determination does not deal well with difficult cases, and provides no straightforward answers. Though the Security Council cannot agree on a solution that conforms with a shared understanding what self-determination is, it is at least concerned enough about the risk of legitimizing the use of force to hold off on doing anything decisive. The sad reality is that as the history of the origins of the dispute fades from memory, few would raise an eyebrow if the Sahrawis were not given an opportunity to have a vote on independence. The slide towards an acceptance of the status quo and away from the once-clear norms on self-determination in the context of decolonization suggests both that the law is losing relevance in the decision-making calculus, and that the law means something different than it once did. This also has political consequences, reflecting poor judgment and massive complacency on the part of the P5, who assume that the dispute is unlikely to flare up again into violence. Instead of demonstrating the usefulness of peaceful mechanisms for addressing threats to international peace and security, the Security Council proves that it can only act somewhat decisively when violence is a factor or

²³² I. William Zartman, "Mediation by Regional Organizations: the OAU in Chad and Congo," in *Studies in international mediation*, ed. Jacob Bercovitch (Basingstoke: Palgrave Macmillan, 2002), 92.

perceived as an imminent possibility, and even then this is subject to the ever-present threat of veto. It would be a sad reflection on international law and the UN if a resolution was imposed because the parties had taken up arms once again.

Today, the impasse is a failure of both law and politics. The law has failed because it has not encouraged compliance, and politics has failed because those with political power in the current system have chosen not to act. The rules lose their salience, and the system loses credibility. We are left to contemplate an ongoing human tragedy, and to conclude that every future case of self-determination will likely be dealt with as just another one-off.

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