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BEHIND CLOSED DOORS:
"AUTONOMOUS COLONIZATION" IN POST UNITED NATIONS ERA—THE CASE FOR WESTERN SAHARA

PAMELA EPSTEIN

... The Arabs who have been treated worst of all are the people of Western Sahara, who have had their country stolen out from under them. Morocco has occupied Western Sahara – a former Spanish colony – treated its people barbarously, defied the International Court of Justice and tried to annex the territory for its natural resources. Yet hardly any Arabs or Westerners have ever championed their cause...¹

INTRODUCTION

The current situation in Western Sahara begs the question "what use is it to have the support of the United Nations (hereinafter "U.N.") when powerful countries such as the United States, France, and Spain are either indifferent or actively oppose the Sahrawi’s legitimate right to self-determination."² The decolonization of the Western Sahara has become a permanent fixture on the U.N.’s agenda since 1963 when the General Assembly labeled it as a non-self-governing-territory

¹ Nicholas D. Kirstof, excerpts from article in The International Herald Tribune, 26 Feb 2004.

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Located in northwestern Africa, Western Sahara borders Morocco on the north, Algeria on the northeast, Mauritania to the east and south with 600 miles of Atlantic Ocean coastline on the west. To paint an accurate picture of the 102,703 square mile size, it is roughly proportional to New Zealand or Colorado. Western Sahara’s struggle to enforce the right of self-determination for its people has silently flown under the radar of the public masses for decades. Ironically, this small, remote part of the planet has been classified as one of the most contentious, protracted, yet straightforward cases of decolonization and self-determination the U.N. has ever encountered. The U.N. General Assembly, the U.N. Security Council, and the International Court of Justice all have unambiguously recognized the legal right of the people of Western Sahara to engage in self-determination.

Complexity surrounds the unresolved situation raising issue of the territory’s legal status, the implementation of the right to self-determination as well as the legitimate expansion to include human rights and natural resource protection. The stability of the region can be characterized as highly volatile. Yet, the conflict rages on never nearing a resolution. The success or failure of the U.N. to implement a free and fair referendum will either strengthen or severely cripple the credibility of the current international legal system and the U.N.’s role within it. As the world marked the 60th anniversary of the Universal Declaration of Human Rights in December of 2008, it was not just a time for joyous celebration, but rather a time of reflection and action. If the U.N. is to remain progressive and endure another 60 years of human rights victories, it must no longer allow the atrocities of the past to continue. There is no greater injustice than ignorance. Western Sahara can no longer be forgotten in the shadows or swept under the rug.

The continuous denial of Western Sahara’s exercise of the right to self-determination finds its roots in Morocco’s 1975 invasion and with time has been marginalized by the international community at large. The Moroccan government has engaged in a systematic violation of human rights while illegally prospering from the exploitation of Western

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4. See http://flagcounter.com/factbook/eh

Sahara’s natural resources. The illegal annexation of Western Sahara by force must be recognized for what it is and Morocco should no longer be rewarded for their ‘bad behavior’. The sheer fact that it has been over thirty years since Spain withdrew from the territory and the issue of sovereignty remains unresolved is a tragic testament to the failure of present day international institutions and international law to generate a proper mechanism to enforce the universally espoused principles of decolonization, dispute settlement mechanisms, and the right to self-determination of indigenous peoples. In addition illuminating serious concerns regarding the policy of the United States and other members of the Security Council with respect to these issues and the future role of the U.N. in upholding its mission to guarantee the international peace and security, while enforcing the hallowed principle of a people’s right to self-determination.

This paper’s central objective is to highlight, through a critical assessment of the conflict, a compelling case for the independent State of Western Sahara. Part I provides a snapshot of the conflict from the time of Spanish colonial rule, paying particular attention to the International Court of Justice Advisory Opinion on Western Sahara, the Moroccan invasion and subsequent illegal occupation of Western Sahara, the U.N. attempted referendum under MINURSO, concluding with the most recent extension of the U.N. mandate. Part II articulates the argument for statehood by evaluating Western Sahara’s claims under the binding authority of the 1933 Montevideo Convention on the Rights and Duties of States (hereinafter “Montevideo Convention”).


7. These principles have a place of prominence in Article 1 of Chapter I of the U.N. Charter which is entitled “Purposes and Principles” and states: The Purpose of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Part III discusses the legal principle of self-determination. The normative evolution of this principle is highlighted through a historical accounting of its American origins with Thomas Jefferson and Woodrow Wilson to the current customary international law principle as defined by U.N. resolution 1514 (XV). This section will bring to light the irony that, while the U.N. supported the granting of a fully independent East Timor to its people, there is a clear attempt to adopt a completely different and contradictory approach to an identical situation in Western Sahara. Part III concludes with a discussion of the normative progression of the right to self-determination, highlighting the incorporation of a human rights component as demonstrated by Kosovo’s declaration as an independent state, as well as the right to natural resources.

Part IV seeks to expose the role power politics has played in the thirty-plus year delay of the U.N. mandated referendum. This section will critically examine the ineffective role the U.N. Security Council has played in resolving the conflict, focusing on the actions of France and the U.S. Part V dissects the 2007 Autonomy Plan (hereinafter the “Plan”) offered by Morocco and the continued failure to recognize the Saharawi’s people’s right to self-determination in a fair, free, and democratic manner. If any other solution besides this fundamental tenant of international and human rights law is utilized, it will only lead to further instability and conflict in the region, which may ignite a catastrophic spark that could potentially lead to a third world war. Finally, this paper will conclude with a policy argument for the use of Chapter 7 powers by the U.N. Security Council.

PART ONE: A SNAPSHOT OF A CONFLICT – WESTERN SAHARA

A. FROM THE PRE-SPANISH COLONIZATION IN THE 1880S TO SPANISH WITHDRAWAL IN 1974

“Spanish Sahara,” Western Sahara’s former moniker, was colonized by Spain in 1884. The indigenous people date back to the 12th century, when Arab tribes from Yemen migrated into the region. They mixed with the local Berber population and African groups from south of the Sahara. During this time, the Kingdom of Morocco was a colony of France, which achieved its independence in 1955. In the 1960s, Spain began taking advantage of the abundant phosphate resources in Western

9. Id.
Sahara for their own economic benefit. Other natural resources often exploited in the region are oil and fish stocks. The 1960s also saw the emergence of Saharawi nationalism, as nomadic Saharawi’s settled in the region. The Frente Popular para la Liberacion de Saguia el Hamra y Rio de Oro (hereinafter “Polisario Front”) was created on May 10, 1973 by Sahrawi students in the city of Rabat. The Polisario Front established itself as the representative of the people of Western Sahara and the government-in-exile, the Saharan Arab Democratic Republic (“SADR”).


In 1966, the U.N. General Assembly adopted its first resolution regarding Western Sahara. It requested Spain, as the administering power, to engage in a referendum on self-determination for the people of Western Sahara. As Spain began to make arrangements for a referendum, Morocco and Mauritania began to make bids for the territory, even threatening military violence if a referendum with independence appeared on the ballot. Tensions reached a boiling point, resulting in the U.N. General Assembly’s adoption of a resolution requesting Spain to postpone its planned referendum, in order to obtain an advisory opinion from the ICJ. Two questions were posed to the Court: (1) whether Western Sahara had been a terra nullis at the time of Spanish colonization and if not, (2) what was the legal relationship between Western Sahara and Morocco and Western Sahara and Mauritania [prior to Spanish colonization]. According to the ICJ

15. Western Sahara supra note 7, at para 162. Defined as land belonging to no one.
17. Western Sahara, 1975 I.C.J. 12 (Oct.16). In a resolution dated 13 September 1974, the General Assembly of the United Nations asked the ICJ to issue an advisory opinion on the following questions: (I) Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)? (II) If the answer to the first question is in the negative, what were the legal ties between the territory and the Kingdom of Morocco and the Mauritanian entity?
determination, a sovereign nation must include a specified territory and jurisdiction\textsuperscript{18}

The crux of both Morocco and Mauritania’s arguments for control rely on circumstances occurring prior to Spanish colonization, the claims themselves are divergent and will be analyzed separately for their merit. Morocco submitted it had maintained a “continued display of authority” through its historical and political ties.\textsuperscript{19} Morocco emphasized the alleged religious allegiance owed by the Saharawi’s to its Sultan, claiming it was tantamount to territorial sovereignty.\textsuperscript{20} Further supporting its contention, Morocco offered evidence rooted in traditional Islamic legal principle of Bayya which asserts an allegiance amounting to a “contractual agreement whereby the Muslim community offered a conditional loyalty to the leader in response to their recognition of obligation under the Sharaia.”\textsuperscript{21} Morocco sought to reinforce its claim through the use of \textit{uti possidetis juris}, a principle adopted by the ICJ in the case of Burkina Faso v. Mail, requiring nations to respect pre-established territorial borders and frontiers.\textsuperscript{22} Morocco continues to assert its alleged right to exercise continued sovereignty over “its territory” (including the Western Sahara), having its borders remain unchanged, and maintaining its territorial integrity.

The Court in its analysis acquiesced Morocco by finding a "legal tie of allegiance" between the Sultan and some of the Saharawi tribes.\textsuperscript{23} Yet, despite what the Court conceded as “legal ties,” (the cultural and social links), it rejected Morocco’s overall territorial claims, stating that the appointment of caids (local administrators) and various taxes merely confirmed the existence of Sahrawian tribal leaders’ authority.\textsuperscript{24} The Court also found that the sultan’s sherifian religious status did not


\textsuperscript{19} Western Sahara, 1975 I.C.J. at 42. Morocco referred to Legal Status of Eastern Greenland, which established the continued display of authority as the criterion for establishing title to a territory. Legal Status of Greenland (Den. v. Nor.), P.C.I.J. (ser. A/B) No. 53 (Ap.5). See also Brierly, \textit{The Law of Nations} (6th ed. 1963). The author notes that "effective occupation," involves both the exercise of sovereignty and the intention to act as sovereign, is required in order to create title to territory. \textit{Id.} at 162-73. In addition to Hanaur, \textit{supra} note 5 at 162.

\textsuperscript{20} Western Sahara, 1975 I.C.J. at 42-22 (describing Morocco’s Islamic arguments); also see Ricciardi, \textit{supra} note 7 at 420. (Analyzing Morocco’s Islamic legal arguments.); also see Hanaur, \textit{supra} note 5 at 162.


\textsuperscript{23} Western Sahara, 1975 I.C.J. at 45. See also, Hanaur \textit{supra} note 5 at 162.

\textsuperscript{24} \textit{Id.} at 39
represent an exercise of territorial sovereignty. The Court ultimately held that the evidence Morocco produced did "not establish any tie of territorial sovereignty between Western Sahara and Morocco. Specifically, Morocco failed to display any effective and exclusive State activity in Western Sahara." The Court's determination mandated that only ties of a formal, traditional political and legal nature between the state and the colony could overcome the application of the principle of self-determination, not the cultural and religious ties, or vague oaths of allegiance.

At the time of Spain's colonization of Western Sahara, Mauritania, had not yet achieved state sovereignty. Therefore, Mauritania could not act with legitimate international legal personality and was subsequently barred from arguing the "legal ties of State sovereignty" as Morocco. As a result the Court focused its analysis on what it characterized as "other legal ties" that existed between Western Sahara and the Mauritanian entity, specifically those of a "racial, linguistic, religious, cultural and economic nature." The Court conferred some credence to Mauritania's claim by finding certain ties of a legal character between the tribes of Western Sahara and those of neighboring regions of the Bilad Shinguittie [the Mauritian entity]. [T]he nomadic peoples of the Shinguitti, in the view of the Court, could be considered as possessing in the relevant [Spanish colonial] period rights, including those relating to the lands through which they migrated. These rights, the Court determined constituted a legitimate legal tie between Western Sahara and the "Mauritanian entity"... and were believed to be vital to the very essence of life in the region.

The Court held that Mauritanian, at the time did not possess sovereignty in the region, despite the cultural links discussed previously because the "entity" was unable to manifest a character distinguishable from the tribes that comprised it. Simply, it was not "an entity capable of availing itself of obligations incumbent upon its members."

Regardless of the ICJ having recognized some legal ties between all the three entities, in the end the Court determined that "those ties did not
involve territorial sovereignty or co-sovereignty or territorial inclusion in a legal entity ....”33 Having found no territorial legal connection, the Court based their decision on the fact that the legal relationship was not of such sufficient strength to establish a territorial sovereign connection that would affect the decolonization of Western Sahara, especially the right to self-determination through an authentic and free manifestation of the Western Saharan people’s will.34 In conclusion, the Court found no relevant international legal doctrines in 1975 to maintain the right of Morocco (and for a period Mauritania) to occupy or claim sovereignty over the territory of Western Sahara, and no subsequent actions have come to pass which would alter this assessment.35 The fact that no state since 1975 has legally recognized Morocco’s claims as legitimate highlights the strength of the Court’s determination. Furthermore, U.N.’s classification of Morocco as an “occupying power” has remained unchanged over the past 30 years, as such it should be afforded only limited legal rights over Western Sahara’s population and natural resources.36


Two days after the ICJ denied Morocco’s claim over Western Sahara, it invaded the territory in the now infamous “Green March.” Adding insult to injury the “Green March” commenced on the eve of Western Sahara’s planned independence from Spain.37 After Spanish colonial forces departed in 1976, Morocco took control of the northern two-thirds of Western Sahara while Mauritania took the southern third.38 It was at this time a clandestine treaty, now referred to as the “Madrid Accords,” took

33. Id. at 67.
34. Id. at 12. The court “not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory." (Emphasis added.)
35. Those who legally support Morocco’s position contend that Spain legitimately transferred sovereignty of the Western Sahara territory to Morocco and Mauritania in 1975, via the “Madrid Accords” (a treaty between the three parties). However, this is not the case as the Court pointed out Spain at the time of the accords did not possess “sovereignty” over Western Sahara because it was then only an “administering power” which could not confer sovereignty over Western Sahara a designed NSGT to Morocco, Mauritania or any other state. Id. at
36. The recent affirmation of Morocco’s “occupational” status can be found in the opinion of Hans Corell, Undersecretary General for Legal Affairs of the United Nations on 29 January 2002, regarding the denial of Morocco to enter into oil exploration contracts this will be discussed further in section three.
place, partitioning Western Sahara between Morocco and Mauritania. \(^39\) To justify their military invasion and for partitioning off the territory, Morocco and Mauritania attempted to manipulate the Madrid Accords into legal title superior to that of U.N. resolutions and the principle of self-determination found within its Charter. \(^40\) Conflict erupted in 1976 involving Mauritania, Morocco, and the Polisario Front receiving support from Algeria. \(^41\) Mauritania ended its active role in the conflict in 1979, making peace with the Polisario Front and abandoning its control over Western Sahara in favor of Morocco. \(^42\) From 1979 until today, the sovereignty over Western Sahara has been the impetus of a bitter battle between the Polisario Front and Morocco, whose forces have been fighting off and on from 1975 until the U.N.-brokered cease-fire in 1991. \(^43\)

In reaction to Morocco’s forced occupation of Western Sahara, \(^44\) the U.N. Security Council in late 1975 passed hollow Resolutions 379 \(^45\) and 380, \(^46\) which requested the immediate withdrawal of the “Green March” from Western Sahara. \(^47\) Effectually, these resolutions seemed to coddle Morocco’s insubordination, lacking authority, and simultaneously undermined of the overarching mission of decolonization set forth by Resolution 1514. Morocco ignored these resolutions and has continued to ignore them to this day by maintaining illegal occupation over Western Sahara. Morocco began to erect a series of defensive walls in 1981, six years into the 16 year armed conflict. \(^48\) This resulted in the “berms” \(^49\) six walls, twelve-foot high, ranging in length from 750 \(^50\) to 1375 \(^51\) miles or more \(^52\) (depending on the sources). The “berms” pose a

\(^40\) *Id.*
\(^43\) *Id.*
\(^44\) Williams & Zunes, *supra* note 25.
\(^46\) *Id.*
\(^47\) *Id.*
\(^48\) Williams & Zunes, *supra* note 25.
\(^52\) According to Fatimetou Mofdh Sidi, of the International Youth and Student Movement for the United Nations, Morocco’s electric fence is 1562 miles long. See Press Release, United Nations Commission on Human Rights, *Commission on Human Rights Adopts Resolutions on Self-Determination in Western Sahara, Palestine* (April 6, 2001) (referring to the fence as “2,500 kilometers long.”).
nearly insurmountable barrier reinforced with an estimated two to three million anti-personnel and anti-task landmines forming "the world’s largest landmine field."  

It is important to note during the entire discussion and deliberation process at the U.N. regarding the "berms," Morocco’s actions were never condemned. As it stands today Morocco controls over ninety percent of Western Sahara, referring to the area as "the Sahara provinces." Even more disturbing is the fact that the area under Moroccan control is rich in natural resources, which Morocco has been able to illegally exploit to its own advantage.

In April of 1991, the U.N. established the United Nations Mission for a Referendum in Western Sahara (hereinafter "MINURSO"). MINURSO’s initial mission was to be brief—implement a peace plan as outlined by Security Council resolution 1495. In September 1991 an U.N.-brokered ceasefire was officially declared. The referendum was supposed to be held in 1992 allowing Western Saharans a choice between independence and integration with Morocco. The ceasefire has been the only successful objective of the initial mission. A key point of contention was the "identification process," which determined what constitutes an eligible voter in the referendum.

D. THE FLY IN THE OINTMENT: IDENTIFICATION OF VOTERS

Initially, voters were supposed to be identified by a census carried out by Spain in 1973, because the Polisario did not want Moroccans who had intentionally settled in Western Sahara after the "Green March" to be identified as eligible voters. However in May 1996, the U.N.

53. Landmine Monitor Report, supra note 37. Morocco has an additional thirty-five to forty heavily armed military soldiers stationed every three or four miles at observation posts with tanks ready to deploy at a moment’s notice. Id. See also, Federal Research Division, Library of Congress, A Country Study: Mauritania Glossary (n.d.), http://lcweb2.loc.gov/frd/cs/mauritania/mr_gloss.html


56. William and Zunes supra note 25.

57. Id.


60. Id. See, next section for additional information on the referendum and voter identification process.

61. Id.
suspended the identification process and recalled most MINURSO civilian staff. Allowing minimal military personnel to stay behind to oversee the ceasefire. Initial attempts to revive the process floundered over Morocco’s worries that a referendum would not best serve its interests. The Polisario had a “restrictive view” with a strong desire to use the 1973 Spanish census as the framework for the identification process. In contrast, the Moroccan government desired to employ an “expansive view,” which would include tens of thousands of applicants of Saharan origin now living in Morocco.

E. U.N. PERSONAL ENVOY TO WESTERN SAHARA: BAKER TO VAN WALSUM

In an effort by the U.N. Secretary General Kofi Annan to revive and reinvigorate negotiations between the parties, he appointed James A. Baker III as his personal envoy to Western Sahara. Their goal was to direct the parties to a “political solution” outside of the “winner-take-all” approach. Under the auspices of the U.N. Special Envoy, negotiations were held between Morocco and the Polisario on several occasions, which ultimately led to the Houston Agreement in September of 1997. The Agreement covered many aspects of the original settlement plan, including voter identification, refugee repatriation, troop confinement, release of prisoners, freedom to campaign, access for international observers, and the U.N. authority to ensure a free and fair referendum process.

In 2000, after an assessment of the current situation revealed a referendum would not be in Morocco’s favor, Morocco decided to revisit an autonomy approach. In 2001, Baker submitted the “Framework Agreement” to the Security Council. In 2002, four options for resolution without the consent of the parties were submitted to the Security Council by Baker. Later the Security Council adopted resolution 1429, which rejected all four options and tasked Baker to provide a proposal for self-determination. Baker’s final attempt prior to his resignation was his Peace Plan for the Self-Determination of the Western Sahara.

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62. Id. There was an overwhelming consensus that if a referendum was to proceed where independence was on the ballot the people of Western Sahara would choose it.
64. Theofilopoulou, supra note 50.
65. Id.
66. Id.
67. Id.
People of Western Sahara in 2003. In an unlikely turn of events, the Polisario agreed to the terms of the plan and the Security Council unanimously adopted resolution 1495 in support of the peace plan. Nevertheless Morocco rejected the resolution, resulting in Bakers resignation. Peter van Walsum filled Baker’s shoes as the new personal envoy to Western Sahara. His conclusion regarding the situation was that there were only two options: continuation of the current stalemate, which he called “a recipe for violence,” or “negotiations without preconditions.” He then led the fourth round of negotiations in March 2008 under the idiom, “negotiations without preconditions.” At the most recent round of negotiations, “there was hardly any exchange that could be characterized as negotiations,” despite the parties “dynamically interacting with each other.”

F. CURRENT STATE OF AFFAIRS

November 2007 marked the thirty-second anniversary of both the illegal invasion and subsequent occupation after the “Green March” by Morocco, as well as the establishment of Western Sahara’s government-in-exile, SADR. MINURSO mandate was extended on April 30, 2008 for another year. By all accounts, it seems that the case of Western Sahara will continue to be a permanent fixture on the U.N.’s unfinished business list.

PART TWO: MAKING THE GRADE, A CASE FOR STATEHOOD

A. CRITERIA FOR OBJECTIVE STATEHOOD ARE SATISFIED

A “legal person” possesses the capacity to have and maintain certain rights, and is required to perform specific duties. Such “legal persons”
are said to be subjects of the law. International personality is held to rest on recognized acceptance and participation in the international community. As widely-recognized international legal scholar Hersch Lauterpacht has said of states: "... the orthodox positive doctrine has been explicit in the affirmation that only states are subjects of international law."\footnote{Johan D. van der Vyver, Sovereignty and Human Rights in Constitutional and International Law, 5 Emory Int'l L. Rev 321 (1991).}

The 1933 Montevideo Convention is the most widely accepted sources defining the term statehood.\footnote{Joshua Castellino, Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools, 33 BKNJK 502 (2008).} According to Article One of the Montevideo Convention, there are four elements that serve as gateway requirements to assert statehood: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other states.\footnote{Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19, 28 Am. J. Int'l L. (Supp.) 75 (1934). (reprinting text of Montevideo Convention) (ART 1) Statehood is equitable to having legal personality within the international community.} The requirements of a permanent population and defined territory provided the physical basis for the existence of a state, while the government and capacity to enter into international relations requirements indicate the legal order necessary for a state to function within the international framework. Although the Montevideo Convention was created as a regional treaty,\footnote{Subin Nijhawan, The Criteria for Statehood in International Law are Based on the Principle of Effectiveness not Legitimacy. School of Oriental and African Studies Centre for International Studies and Diplomacy. (Dec. 2003) p. 2 View at http://www.tamilnation.org/selfdetermination/03_criteria_for_statehood.pdf Formulated at the Seventh International Conference of American States} it has developed into customary international law and the criteria have become a touchstone for the definition of a state, evidenced by Article 38.1(b) of the ICJ Statute.\footnote{I.C.J. Statute 38.1(b) refers to "international custom" as a source of international law, specifically emphasizing the two requirements of state practice plus acceptance of the practice as obligatory or opinion juris.}

1. Permanent Population

A population indigenous to the territory of Western Sahara has been legally recognized by both the ICJ and Spanish authorities. According to the 1974 Spanish census, there are 73,497 indigenous Sahrawi's.\footnote{Malcom Shaw, The Western Sahara Case, 49 Brit. Y.B. of Int'l L. 121 (1979).} The size of a population is not determinative of whether a population is to be considered permanent, take for example the state of Nauru, it has been accepted as a state with a population of 6,500. Furthermore, the international community has accepted that a population need not be
restrictively defined in order to be considered permanent, nor does it need to be located in one designated place for any specific duration of time. Consequently, regions inhabited by wandering nomads, such as the Western Sahara, will still be considered a permanent population and not a terra nullis (a territory belonging to no one). Western Sahara with its nomadic ancestry and relatively small numerical population size equivocally satisfies the first of two physical markers of statehood.

2. Defined Territory

The defined territory of a State is judged not solely by size or its precisely defined boundaries. As a result, border disputes between states, will not cast doubt on the territorial status of a state. Western Sahara consists of a defined territory with internationally accepted boundaries (set during the colonial period) that have served to establish Western Sahara as a separate geographical entity from Morocco, Algeria, Mauritania, and Spain. Nevertheless, it is only important that a state has a clear core territory in order to be considered a state. As the case of Western Sahara exemplifies, the denial of certain groups and states (in this case Morocco) about its existence and the resulting conflict do not terminate its status as a state.

It is not required by international law that a state have clearly defined and undisputed borders. In North Sea Continental Shelf cases: "[t]he appurtenance of a given area, considered as an entity, in no way governs the precise determination of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and

82. Id. Specifically not organized under European conception of statehood. However, the ICJ in its Western Sahara Advisory Opinion analyzed nineteenth century theories of territorial acquisition and determined that lands in northwest Africa acquired by the Spanish during the 1880's did not amount to terra nullius. See also, Western Sahara, supra note 7. This is important because it highlights that even at the height of European colonial expansion, not all territory was viewed as "no man's land." It may be that viewing territory as terra nullius was the exception rather than the rule.
85. The General Assembly established the "salt-water test" for determining which territories are to be considered Non-Self-Governing according to Article 73(e) of the UN Charter. Territories that are "geographically separate and are distinct ethnically and or culturally from the country administering them" are considered Non-Self-Governing-Territories according to this provision. G.A. Res. 1541, S/Res/1541 April 29 2004 at 28. Thus, the boundaries of the Western Sahara, under this provision, give the territory a separate geographical identity form that of metropolitan Spain.; See also, Hanauer supra, note 5 at p.168
87. North Sea Continental Shelf cases supra note 73, at 32.
often in various places and for long periods they are not...". 88 What is required is that there be a consistent band of territory that is undeniably controlled by the government of the alleged state. 89 The Polisario has significant influence over the inhabitants of living in occupied Western Sahara and forced refugee camps. 90 Yet, those who oppose Western Sahara's rights counter with the argument that there can be no defined territory when Morocco controls nearly ninety percent, including all of the major population and economic centers. Thus, the Polisario is prevented from exercising any significant control. 91

This argument is defeated in that the failure of the Polisario and exiled-government SADR to control its territory can be absolutely attributed to an illegal occupation by Morocco. "States are not extinguished by an annexation resulting from an illegal use of force and ... a territory occupied or annexed illegally by force must not, prima facie, be denied statehood if ... if proclaimed its independence, as long as some of the criteria of statehood are capable of fulfillment." 92 The genesis of Western Sahara's clearly defined territorial boundaries emerged in the traditional manner of many African nations during its colonization. These territorial boundaries have and will continue to exist regardless of Morocco's illegal occupation and have solidified the second physical mark of statehood.

3. and 4. Government and Capacity to enter into relations with other States

The elements of effective government and capacity to enter into relations with other states are not as clearly defined. Both elements can be viewed within the context of Article 31(1) of the Vienna Convention on the Law of Treaties. 93 Article 31(1) highlights the need for a government to be sovereign over its territory and its citizens in order have the capacity to

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88. Id.
89. See generally, Deutsche Continental Gas, supra note 84.
91. The S.A.D.R. could be said to have achieved de facto government status in the limited amount of territory that it does control, however, based on the precedent of The Arantzazu Mendi, 1939 App. Cas. 256 (1939). Other issues, such as economic viability and actual independence, also deserve consideration.
act legitimately within the international community. In this context, the government of a state should be the supreme authoritative body in terms of creating and enacting laws within the state, with the capability to act independently when governing its international affairs. Having exclusive control of international affairs has been commonly referred to as "external sovereignty."

In an opinion by Judge Anzilotti he noted:

Independence...is really no more than the normal condition of States according to international law; it may also be described as sovereignty (suprema ptesas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law. The idea of dependence therefore necessarily implies a relation between a superior State and an inferior or subject State; the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law. It follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do no place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.

In order for Western Sahara to prove some form of government it must demonstrate effective control over its territory, independent of any other authority. Western Sahara has an elected government-in-exile, the SADR, which obtained popular support to govern the region. Strengthening the resolve of the governing entity, the SADR overtly challenges the legitimacy of the Moroccan government. SADR has

94. Id.  
95. Castellino, supra note 73  
96. The state since the time of Westphalia in 1648 has been the chief holder of external sovereignty. Interference in other states' governing prerogatives has since become illegitimate. Sovereignty in international is synonymous with external sovereignty. International law scholar, Alan James similarly 'conceives of external sovereignty as constitutional independence -- a state's freedom from outside influence upon its basic prerogatives.' Dan Philpott (ed.) Stanford Encyclopedia of Philosophy Sovereignty rev. June 18, 2003. Citing to Alan James, The Practice of Sovereign Statehood in Contemporary International Society. Political Studies 47, no. 3 (1999) p. 462-4

97. Van de Vyver, supra note 64. citing Austro-German Customs Union (Advisory Opinion), 1931 P.C.I.J (ser. A/B) No. 41
taken the appropriate steps in fashioning a strong governmental blueprint. It has formed a cabinet, has a bureaucracy, directs a military liberation struggle alongside of the Polisario Front, represents the Sahrawi people to the international community, and administers the refugee camps.98

The criterion to enter into relations with other states is evaluated by the “capacity” of the State. In this context capacity is defined as the “theoretical ability to enter international relations.”99 It is in this instance that recognition by other countries is invaluable. Western Sahara, and by extension its government-in exile SADR, possess the ability to enter into relations with other States, as evidenced by its recognition by sixty plus states and its acceptance as a full member of the Organization of African States (now the African Union).100 The Charter of the African Union only extends membership to “independent sovereign African state[s]).”101 This form of international recognition under the current international structure has been a key factor in attributing or prohibiting statehood.102 In the case of Austro-German Customs Union103 of 1931 citing to Article 88104 of the Treaty of Saint-Germain the Court held:

... the independence of Austria ... must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that independence is violated, as soon as there is any violation there, either in -the economic, political, or any other field, these different aspects of independence being in practice one and indivisible. .... By “alienation”, as mentioned in Article 88, must

99. Nijhawan, supra note 66 at p. 3
100. Franck, T., The Stealing of the Sahara, 70 AJIL 694 at 698 (1976) Summarizing the position of the United Nations and the OAU as: “...a territory wishing to join with one or several neighboring states, it should have the right to manifest that preference in the process of decolonization, but it must be the free choice of the majority in that particular colony, and a territory with recognized boundaries may neither be absorbed nor dismembered against the will of its inhabitants.” See also, Zunes, supra, note 93.
101. O.A.U. Charter, art. 4
102. Thomas D. Grant, Defining Statehood: The Montevideo Convention and its Discontents, 37 Colum. J. Transnat'l L. 403, (1999) Take Taiwan as an example, Taiwan as a state, scholars have argued it satisfies the criteria for statehood under the Montevideo Convention, but, due to its political situation with the People's Republic of China, most state have refused to recognize it as such.
103. Vyver supra note, 92.
104. Id. “The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence....”
be understood any voluntary act by the Austrian State which would cause it to lose its independence or which would modify its independence in that its sovereign will would be subordinated to the will of another Power or particular group of Powers, or would even be replaced by such will.\textsuperscript{105}

The international community has recognized Western Sahara as having a role within international politics as a result of its ability to portray all the trappings, of a state-- a self-appointed foreign minister placed into power following a democratic election, an official flag, and a collective sense of nationalism.\textsuperscript{106} Western Sahara has satisfied the four foundational requirements of statehood. Its physical characteristics are manifested through a permanent population and clearly defined borders. SADR, Western Sahara’s government in-exile has been able to conduct its international affairs in the ways befitting a legally recognized state thereby overcoming the complex and interpretative requirements of government and international personality. Western Sahara has achieved and thus, has been rightly owed statehood status for over 27 years.

PART THREE: THE RIGHT TO SELF-DETERMINATION

A. THE ROAD TO SELF-DETERMINATION

The origins of the right to self-determination can be accredited to a variety of sources. This section focuses on the perspective of its American origins. The Declaration of Independence, written by Thomas Jefferson, alluded to numerous principles of self-determination:

\begin{quote}
...in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, ... all men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. To secure these rights, Governments are instituted among Men, .... Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government laying its foundation on such principles and organizing its power in such form.... When a long train of
\end{quote}
abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.\textsuperscript{107}

The Declaration of Independence was based upon the ideal that the people, and not the King, ought to be the foundation of a legitimate government.\textsuperscript{108} The conclusion of World War II saw the next defining moment in the evolution of self-determination with President Woodrow Wilson and his now famous Fourteen Points. In 1918, Wilson championed the concept that "every people have a right to choose the sovereignty under which they shall live."\textsuperscript{109} He continued by suggesting that, "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed..."\textsuperscript{110} At that time the concepts he promoted were unprecedented. There had never been a notion that an "uncivilized" (non European) people had any legal rights to determine their future; it had always been "conquer and colonize." "The evolution of the right to self-determination has been one of great normative narratives of the past century...Ever since the words of self-determination left the lips of Woodrow Wilson; the wider meaning of the words has exited the moral, political, and legal imagination of oppressed peoples around the world."\textsuperscript{111}

The right to self-determination was given international status after 1945, when it was included in the U.N. Charter.\textsuperscript{112} This right continued to develop with the 1960 U.N. Declaration on the Granting of Independence to Colonial Peoples, when the term became synonymous with decolonization as a major tenant in the U.N.'s mission.\textsuperscript{113} Subsequently, it was not until the 1970s that another shift occurred modifying the viewpoint towards the right of a people as opposed to the right of a territory. It was at this time that the U.N. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation

\begin{itemize}
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Michelle Pomerance, \textit{The United States and Self-Determination: Perspectives on the Wilsonian Conception}, 70 AM.J.Int'l L. 1, 2 (1976).
  \item \textsuperscript{110} Id.
  \item \textsuperscript{112} It is important to note that at this time it only applied to existing states, not to people or national societies. Falkowski, supra note 92.
  \item \textsuperscript{113} Press Release, U.N. Security Council, Res. 1263, supra note 45.
\end{itemize}
Among States (hereinafter "Friendly Relations Declaration") defined the right of "all people...freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."\(^{114}\)

From Jefferson and Wilson to the League of Nations, U.N. resolutions to multinational treaties and conventions,\(^{115}\) and numerous other legal documents, a rich eighty year progeny has emerged. Its widely-accepted nature perpetually strengthened the precedent of self-determination.\(^{116}\) From the recognition by numerous legal instruments and ongoing state practice, a set of norms emerged and the right to self-determination achieved customary international law status.\(^{117}\) Customary law is defined by Article 38(1)(b) of the ICJ-- a "general practice accepted as law."\(^{118}\) The ICJ's declaration in its advisory opinion on Namibia, Resolutions 1514, 1541, 2625, and others, to represent, "the subsequent development of international law in relation to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."\(^{119}\) Expressing his agreement with this position, Justice Dillard stated in his opinion in the case of Western Sahara that:

the cumulative impact of many resolutions similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinion juris* and thus constitute a norm of customary international law.... [T]his is the precise situation manifested by the long list of resolutions which, following in the wake of resolution 1514 (XV), have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self-governing-territories.\(^{120}\)

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115. The common Article I of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights states that all peoples have the right to self-determination.


118. I.C.J. art 38(1)(b) supra note 67.


120. Western Sahara, supra, note 7 at p.121 (separate opinion of Dillard, J.)
The right to self-determination as it is defined within the Declaration on Granting Independence to Colonial Countries and Peoples, in the 1960 General Assembly Resolution, advances the strongest evidence to declare the principal as customary international law. The resolution stating self-determination is a right, giving a people freedom to determine their political status, and to pursue their economic, social and cultural development. Resolution 1514 achieved special status by being unanimously adopted. The U.N. Office of Legal Affairs has since expressed that "[i]n view of the greater solemnity and significance of a declaration, it may be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules biding upon States."

Moreover, the 1971 ICJ advisory opinion on the legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) stated, "...the last fifty years...have brought important developments. These developments leave little doubt that the cumulative objective of the sacred trust ... was the self-determination and independence of peoples concerned. In this domain, as elsewhere, the corpus juris gentium has been considerably enriched, and this Court, if it is faithfully to discharge its functions, may not ignore."

The notion of state practice presents a precursory barrier to a principle obtaining customary international law status, supported by the ICJ, which articulates that "the material of customary international law is to be looked for primarily in the actual practice and opinion juris of states." The right to self-determination as developed by U.N. institutions has been supported by state practice. Well over seventy territories and former colonies have been decolonized since 1946, with

122. Id.
many of them choosing to become sovereign states and members of the U.N.126

The General Assembly has outlined three possible outcomes in Resolutions 742 and 1541 when the right to self-determination has been exercised on behalf of NSGT: (1) emergence as a sovereign, independent state; (2) free association within an independent state; or (3) integration with an independent state.127 Resolution 1541 states free association “should be the result of a free and voluntary choice by the peoples of territory concerned, expressed through informed and democratic process”128 with integration that is “the result of the freely expressed wishes of the territory’s peoples...their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.” Justice Dillard, in his advisory opinion, articulated the ideal of a free choice concisely by “self-determination is satisfied by a free choice, not by a particular consequence of that choice or a particular method of exercising it.”129

The I.C.J. Western Sahara Case addressed “the principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, where enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514. ... The above provisions, in particular paragraph two, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of people concerned.”130

B. EAST TIMOR

The cases of Western Sahara and East Timor are the two most prominent failures of decolonization. Morocco’s annexation of Western Sahara and Indonesia’s invasion and occupation of East Timor were both carried out in 1975 by former colonies seeking their own territories to colonize. Both were categorically illegal.131 Indonesia occupied East Timor for twenty-five years after the withdrawal of Portugal, tirelessly waging war against those fighting for East Timorese independence. Indonesia, unlike

129. Western Sahara, supra note 7, at 115 (separate opinion of Dillard, J.)
130. Western Sahara case, supra note 7.
Morocco, allowed for a referendum in 1999 and permitted a choice between independence and autonomy. Following a vote establishing independence, those loyal to Indonesia began massacring the East Timorese, resulting in an intervention by international peacekeeping forces. The result was U.N. Security Council Resolution 1272, which provided U.N. Administration of East Timor for a two-and-a-half-year period. Meanwhile, there was shared sovereignty between the U.N. and East Timor, providing the time necessary for East Timor to build the required institutions for an independent self-government. Upon successful completion of established benchmarks, East Timor was recognized in May of 2002 as an independent nation and granted member status at the U.N.

Conversely, in the case of East Timor, Indonesia committed gross violations of international human rights law by killing roughly one-third of the population, thereby thrusting the conflict onto the international stage. While Western Sahara has had its fair share of human rights violations, it has not yet reached the extent of the East Timor "genocide." Tragically, without enough human slaughter for the U.N. to act upon, there are no world news headlines and without world headlines there is no outpouring of support for the cause of Western Sahara or its people. Furthermore, the U.N. sent thousands of troops to aid in the

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133. Martin, supra note 112.


135. Id. See also, Tania Voon, Closing the Gap between Legitimacy and Legality of Human Intervention: Lessons from East Timor and Kosovo, 7 UCLA J. Int'l L. & Foreign Aff. 31 (2002).

136. Id.

137. Id.

138. Id.

139. Id.


140. See, William Reisinger, Beyond "De-Nile" The United Nations' Genocide Problem in Darfur 23 Touro L. Rev. 685 (2007). Take for example the failure of the U.N. to act until significant amounts of blood was shed during the Darfur conflict. There was evidence of increased tensions noted by U.N. peacekeeping troops i.e. the making of hatches and manipulative paraphernalia. However, the U.N. pulled all peacekeeping troops out of the area which, has been cited as a contributing factor in the complete deterioration of the situation and the subsequent genocide. After
East Timor conflict, whereas the U.N. only sent hundreds of troops with no direct mandate—especially regarding human rights into Western Sahara. As of March 31, 2008, the military component of MINURSO totaled 216 personnel, including administrative and medical officers.141 The ability to hasten the entitled freedom to Western Sahara, like that of East Timor, is in the hands of the U.N. Security Council. The Council could advance the overdue freedom simply by vigorously implementing resolutions for a free and fair referendum.142 Part IV will discuss the adoption of a different approach from that of East Timor regarding self-determination for the people of Western Sahara based on the geopolitical interests of the Security Council members.

C. RIGHT OF SELF-DETERMINATION IS LINKED PROPORTIONALLY TO HUMAN RIGHTS VIOLATION

This note has highlighted the right of people to self-determination as one of the cornerstone principles of the international framework. The progeny of the principle has lead to its incorporation as a fundamental tenant in the U.N. Charter, enshrined as a fundamental right in all of the U.N.'s ancillary documents which comprise the international bill of rights.143 As discussed above the consistent repetition of the principle right of self-determination has been heightened to the status of jus cogens. The right to self-determination is unique, unlike other human rights, it is not an individual right, rather it is a right of the "people" collectively. This section will examine self-determination as it is affected by human rights violations to the collective. The right will be strengthened by the inherent need to preserve and protect the collective right of a state to govern itself in accordance with its own cultural norms, free from outside interference. The incorporation of the human rights element will server to bolster the case for Western Sahara.

Article 21 of The Universal Declaration of Human Rights implicitly recognizes the principle of self-determination stating, "[e]veryone has the right to take part in the government of his country ... [t]he will of the people shall be the basis of the authority of the government expressed in

which the U.N.'s reemerged presences was met with a stronger mandate backed by the global conscious in light of the genocide.


143. U.N. Charter Articles 1 para. 2, 55, and 56;
the periodic and genuine elections. The preamble to the declaration states: "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Similarly in the Declaration of Independence Thomas Jefferson expressed the ideal that it is the inalienable right of the people to "alter or abolish any government that does not recognize these rights." The European community adopted guidelines on recognition of new states in Eastern Europe and the Soviet Union which underlined the need to respect the rule of law, democracy and human rights, and, specifically, guarantees for the rights of minorities. 

The conflict in Western Sahara is one of the most tragic and obvious illustrations of the reasons why human rights issues cannot be treated separately from the broader context of international law. The new working definition for self-determination must include customary human rights standards and the right of an appropriate body to enforce those standards. Article 55 of the Charter requires its member States to promote human rights and fundamental freedoms. In addition, various other human rights doctrines identify the right to self-determination. The International Covenant on Civil and Political Rights specifically mentions the right of self-determination. Article One states that "[A]ll Peoples have the right of self-determination," signifying that human rights are not only exercised once but are permanent and continuous. The International Covenant on Economic, Social and Cultural Rights expressed the standpoint that "territorial integrity of a state cannot dominate over the right of all peoples to self-determination,

145. Id., at Preamble, para 3.
146. Falkowski, supra note 92.
149. U.N. Charter, Art. 55; Universal Declaration of Human Rights, Article 21; and International covenant on Civil and Political Rights, Article One (1976); International Covenant on Economic, Social and Cultural Rights, Article One (1976). The word of Article one for both Covenants is the same:
All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
150. Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the U.N. General Assembly in 1960; the International covenant on Civil and Political Rights 1976; the International Covenant on Economic, Social and Cultural Rights also 1976; the U.N. Friendly Relations Declaration unanimously adopted by the U.N. General Assembly in 1970; and the opinions of the I.C.J.
because it is not compatible with the nature of the right, in fact it would destroy it.”152

D. KOSOVO: THE CASE FOR HUMAN RIGHTS AS SELF-DETERMINATION

Kosovo’s situation regarding the right to self-determination is distinguishable from that of Western Sahara in that Kosovo is seeking to secede from Yugoslavia as a minority within an existing State. Kosovo’s desire to secede stems from massive human rights violations as opposed to the Sahrawis’ colonially imposed rule. The Yugoslav and Serbian administrative powers have been practicing institutionalized systematic discrimination of the Kosovar ethnic Albanians since 1919.153 During this same period, the Kosovars’ have been strengthening their resolve towards self-governance.154 There is an obvious pattern of “methodical discrimination” by the Yugoslavian government against the minority Kosovars, spanning an eighty year period.155 Practiced discriminatory policies have included colonization programs and ethnic cleansing.156 Legal scholars have highlighted that this pattern of systematic discrimination has risen to the level of a gross violation of fundamental human rights, tantamount to a viable threat on the Kosovars existence.157

The prospect for lasting peace only exists with Kosovo declaring its independence, due to the fact ethnic Albanians are expected to continue to suffer horrific persecution at the hands of the Serbian leadership. As a result, on February 17, 2008, Kosovo’s parliament declared “Kosovo to be an independent and sovereign state.”158 Kosovo’s declaration of independence has since been formally recognized by the U.S. and several European countries.159 The U.N.’s involvement with Kosovo’s path

154. Id.
155. Id.
156. Id.
157. Id. Due to the killing and displacement of thousands of civilians throughout 1998-1999.

U.S. Recognizes Kosovo as Independent State, statement of Secretary of State Condoleezza Rice Washington D.C. (Feb 18 (2008), available at http://www.state.gov/secretary/rm/2008/02/100973.htm U.S. Secretary of State Condoleezza Rice announced the following day on February 18, 2008 the U.S. “formal recognition of Kosovo as a sovereign and independent state.”
toward independence began after NATO’s intervention in 1999 with Security Council resolution 1244, which established the international oversight of Kosovo in order to resolve its legal status.\(^{160}\) Similar to the case with Western Sahara, the U.N. Secretary General appointed Special Envoy, Martti Ahtisaari. Ahtisaari mediated negotiations between the parties for fifteen months, at which time he submitted the Comprehensive Proposal for the Kosovo Status Settlement ("the Ahtisaari Plan").\(^{161}\) The Ahtisaari Plan is much like its counterpart, the Baker Peace Plan for Western Sahara. It outlined a framework for independence, calling for a period of international supervision.\(^{162}\) The plan was received in the same manner as the Baker Peace Plan. It was endorsed by the Kosovar leadership and was rejected by Serbia. Subsequently, the Troika commission was created to revive the stalled negotiations process. The commission found that, "[T]he parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo."\(^{163}\)

The operative language of Security Council Resolution 1244 calls for (1) the commencement of demilitarization of armed groups in Kosovo; (2) the establishment of an international civilian presence under the auspices of the U.N. to assist in interim administration; (3) the commencement of international financial assistance to Kosovo; and (4) setting out ongoing reporting requirements.\(^{164}\) This Resolution ensures the progression of a new era of self-determination and succession. Kosovo’s path to self-determination, like that of East Timor, is embedded in eradicating human rights violations which threaten the extinction of a population. Resolution 1244 called it a "grave humanitarian situation" and a "threat to the international peace and security."\(^{165}\)

What are the implications of extending a human rights component to the principle of self-determination for Western Sahara? First, it highlights the inconsistencies of the U.N.’s Security Council’s power in how it

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\(^{161}\) Id.

\(^{162}\) Id.

\(^{163}\) Id.


\(^{165}\) Resolution 1244 *supra* note, 105.

\(^{166}\) Id.
applies self-determination to a people affected by human rights violations. In Kosovo's case, the Security Council recognized a declaration for independence that was not based on international legal standards. However, in the case Western Sahara the Security Council opposed the right to self-determination which the international legal standards clearly favor. The true and lasting impact of Kosovo's declaration of independence is what matters most. At the end of the day, is what best suits the Western powers interests.

E. THE NORMATIVE EVOLUTION OF THE RIGHT TO NATURAL RESOURCES

In focusing this section on the expansion of the right to self-determination to include a resource dimension this article will be able to concurrently reinforce the case of Western Sahara. By sheer virtue of the right to self-determination, all peoples possess the right to advance their own economic, cultural and social development including the freedom to govern their own natural resources. The 1982 U.N. Convention on the Law of the Sea states that "coastal States have sovereign rights over natural resources on the continental shelf outside of their own land territory." Morocco has no sovereignty over Western Sahara as developed above and therefore, no right to explore and exploit Western Sahara's resources. Article 73, of the U.N. Charter further stipulates that the economic exploration of natural resources in NSGT may only take place given express consent of the local population and must be in accordance with their economic interests.

Trade agreements by countries without permission from Western Sahara which involve their natural resources are a direct violation of international law. Morocco as an occupying power, "...can only use property to the extent that it is necessary for the administration of the occupied territory [Western Sahara] and to cover the needs of the soldiers and never to cover the occupying State's own needs or to improve their own economy." France, alongside the European Union,

169. U.N. Charter Article 73, supra note 3.
171. Id.
has aided Morocco in perpetuating the pillaging conspiracy against Western Sahara’s right to self-determination, including control over their natural resources when they entered into the European Fisheries Agreement. The Agreement contracted for 144 million Euros to be paid to Morocco in exchange for 119 European fishing boats to fish along the Atlantic coastal waters of Western Sahara. Again in 2001, an American energy company, Kerr McGee, and a French Oil Company, TotalFinaELF, entered into contracts with Morocco for oil exploration off the coast of Western Sahara. In January of 2002, the U.N. Under-Secretary-General for legal affairs stated, “.... if further exploration and exploitation activities were to proceed in disregard of their interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing-Territories.” The right to self-determination encompasses the right to protect and control natural resources, as they are the life blood of nations and frequently the catalyst to war and geopolitical agendas.

PART FOUR: RELIANCE ON POWER POLITICS OVER THE LAW

_Those who make peaceful revolution impossible will make violent revolution inevitable._

John Fitzgerald Kennedy (March 12, 1962)

A U.N. INEFFECTIVE MECHANISM OF THE SECURITY COUNCIL DUE TO POLITICALLY BASED DECISIONS

In dealing with the case of Western Sahara, the U.N. has allowed itself to be a geopolitical pawn in the maneuverings of two minor regional powers: Morocco and Algeria. “Every State has the duty to refrain from organizing, instigating assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territorial directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.” Member states are under a duty to bring about a speedy end to

173. _Id._
176. Falkowski, _supra_ note 92, quoting from John Barlett, _Familiar Quotations_ 1073 (14th ed. 1982).
colonialism, including due regard for the freely expressed will of the peoples concerned. 178 States’ attitudes toward self-determination shift and change depending on the impact it could have on a State’s self-interested agenda. Under the U.N.’s Friendly Relations Declaration, “strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.” 179

As two of the five permanent members with vetoing power of the U.N. Security Council, France and the U.S. have blocked the Council from enforcing its resolutions in regard to Western Sahara. 180 Both countries have perceived a historical need to strengthen the Moroccan monarchy as a barrier against Communism and radical Arab nationalism during the Cold War. 181 More recently, Morocco has served as an important ally in the battle against Islamic extremism. 182 The U.N. has been an abysmal failure in regard to Western Sahara. The resolution should have been tailor-made for the U.N. — hold a referendum to allow the people of Western Sahara to decide whether to be free or integrate with Morocco. Yet, after the cease-fire, and MINURSO with a staggering operational budget of six hundred million dollars, the referendum has gone nowhere. 183 It is an ironclad stalemate. Moreover, the referendum process as whole has been met with gross irregularities and improprieties. The chief setback relates to the misuse of administrative control, on paper this task is assigned to MINURSO, on the ground a different story emerges, the referendum or lack thereof has been strictly controlled by the Moroccan government. 184

The U.S. has not made any attempt to distinguish itself by setting a higher standard. From the beginning U.S. power politics affected its duty under international customary law. U.N. Ambassador Daniel

179. U.N. Friendly Relations Doctrine, supra note 99.
180. The Permanent Five members of the Security Council with vetoing power are the U.S., France, the United Kingdom, China, and Russia. The Security Council is comprised of fifteen total members’ ten rotating members from the General Assembly all lacking vetoing power.
184. See, Bhatia supra note 38 at 801.
Moynihan recounted his job during the Cold War years, as a duty to oppose an independent state for the Saharawi’s.185 “No new Angola on the west coast of Africa186 was his instruction from then Secretary of State Henry Kissinger. According to declassified White House documents, Kissinger is cited as saying in reference to Morocco’s unsanctioned and illegal entry into the Western Sahara during the 1975 “Green March,” “if we had prevented it we would have destroyed our relationship with Morocco.”187 The U.S. has proven by its actions, they are not abiding by the principles enumerated within the Friendly Relations Declaration cited above. Despite the termination of the Cold War, the U.S. still refuses to use its favored relationship with Morocco or its position as a vetoing member on the Security Council to ensure Sahrawi people are provided the right of self-determination, one of the most important and basic human rights the U.N. was created to protect. This U.S.’s behavior is in stark contradiction to its origins as a colony breaking away from its colonial master, England, in its inalienable right to freedom through self-determination.

As indicated above, both the U.S. and France have attempted to utilize their close relationship with Morocco to exploit Western Sahara for its resources: oil and fish stocks. France, as a vetoing member on the U.N. Security Council, has close political ties to Morocco as its foremost trading partner and provider of developmental aid. France’s close relationship to Morocco has led France in successfully preventing condemnation by the Security Council of the human right violations committed by Morocco.188 Their relationship has additionally prevented the expansion of the MINURSO mandate to include human rights monitoring in the occupied territories, thereby forcing MINURSO to stand idly by as a silent witness to the continuing human rights violations.189

Furthermore, Spain unlike its neighbor Portugal, who played a leadership role in supporting the liberation of East Timor from Indonesian
occupation as the former colonial power has played no such role and, in fact, has done quite the opposite. Spain has placed a higher value on maintaining good neighborly relations with Morocco. A strong motivator behind the controversial 2006 fishing agreement, previously mentioned, between the European Union and Morocco was the advancement of friendly relations and monetary gain. From these incidents alone it is enough to conclude that the duties and responsibilities of member states of the U.N., the principles and norms of international customary law, and the right to self-determination have taken a back seat to power politics and nation-state self-interest.

PART FIVE: MOROCCO'S 2007 PLAN AND FUTURE CONSEQUENCES

A. MOROCCO'S 2007 PLAN

"The Moroccan autonomy plan aims at legitimatizing the occupation..."\(^{190}\) Falling well below what is required to bring about a peaceful resolution to the conflict is Morocco's 2007 Autonomy Plan supported by the U.S. and France was cited as "serious and credible" and a "constructive contribution to finding a solution to the conflict."\(^{191}\) Irreparable damage will occur if the proposal is implemented, as it stands the plan would categorically alter the foundation of the post-World War II international legal system. The autonomy plan, which re-legitimizes colonization through military occupation, is premised on the notion that Western Sahara is part of Morocco--a view strongly contested by the U.N. Charter, the ICJ, the African Union, and various other international sources. Acceptance of the autonomy plan would be the first time since the founding of the U.N. and the ratification of its Charter more than sixty years ago, the international community would be endorsing the expansion of a country's territory by military force, resulting in a dangerous and destabilizing precedent.\(^{192}\)

Further complicating the situation is the lack of an enforcement mechanism provided in the proposal, and Morocco has a history of breaking its promises to the international community in regards to the U.N.-mandated referendum for the Western Sahara.\(^{193}\) Upon closer

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\(^{190}\) M.S. Ould Salek, SADR Foreign Affairs Minister during a press conference held in Algiers, June 11, 2007.


\(^{192}\) Jacob Mundy, *Western Sahara: Against Autonomy* Foreign Policy in Focus John Feffer (ed.) (24 April 2007) available at http://www.fpi.org/fpixtu/4172

\(^{193}\) *Id.* See also, Mundy, *supra* note 162.
inspection, the proposal is offering limited autonomy at best, particularly in regards to natural resources and law enforcement beyond local matters.\(^{194}\) According to Article 19 of Morocco’s constitution, the Sultan (King) of Morocco is ultimately vested with absolute authority and, therefore, the autonomy proposal insist Moroccan “keep its powers in the royal domains, especially with respect to defense, external relations and the constitutional and religious prerogatives of His Majesty the King.”\(^{195}\) Unmistakably giving the monarch considerable leeway in interpretation of the plan and control over its autonomous “colony” Western Sahara.

B. CONSEQUENCES OF NOT GRANTING FULL INDEPENDENCE

Further aggravation and acceleration of human rights violations, the destabilization of an already unstable region with global implications, as well as setting a bad legal precedent as described above is just the tip of the iceberg if self-determination of Western Sahara is not advanced. It is time to heed the lessons from the past which clearly demonstrate that any solution against or ignoring the right of self-determination and reinstitution of colonization is not built for longevity. The tragic and bloodstained universal truth is that not granting a people’s right to self-determination is a major cause of wars and revolutions.\(^ {196}\) Historically, centralized autocratic governments seldom ever respect the autonomy of regional jurisdictions, which classically lead to violent conflict and genocides.\(^ {197}\) For example, in 1952 the U.N. granted the British protectorate and former Italian colony of Eritrea autonomous status federated with Ethiopia.\(^ {198}\) Ethiopia’s emperor in 1961 revoked Eritrea’s

\(^{194}\) Id.

\(^{195}\) Id.

\(^{196}\) Falkowski, supra note 92 quoting from John Barlett, Familiar Quotations 1073 (14th ed. 1982). In the words of President Kennedy, “for the development of this organization (the UN) rests the only true alternative to war, and war appeals no longer as a rational alternative. Unconditional war can no longer lead to unconditional victory. It can no longer serve to settle disputes. It can no longer be of concern to great powers alone. For a nuclear disaster, spread by winds and waters and fear, could well engulf the great and the small, the rich and the poor, the committed and the uncommitted alike. Mankind must put an end to war or war will put an end to mankind. So let us resolve that Dag Hammerskjold did not live, or die, in vain. Let us call a truce to terror.”

\(^{197}\) Lego Kuper, Genocide, 183 (1981). “Some of the most destructive and genocidal conflicts have been waged precisely in the repression of claims for greater autonomy or for independence by large, distinctive, regionally separate peoples. And one has to ask whether the slaughter of millions of Bangladesh, Biafra, the Sudan, and now in Eritrea can possibly be justified by the interest of the Territorial State in relative unrestrained exercise of its internal sovereignty and in the preservation of domains it has conquered or inherited? Or is there a need for the United Nations to abandon a dehumanized scale of values which effectively condemns the sacrifice of human victims to the Territorial State?”

autonomous status, annexing it as his empire's new province. The result was a thirty-nine year battle marked by death and violence.

Western Sahara is a clear cut case of self-determination for a people struggling against foreign military occupation. The Polisario Front has already offered guarantees to protect Moroccan strategic and economic interest if allowed full independence. To insist that the people of Western Sahara give up their moral and legal right to a genuine and free referendum, is not a formula for conflict resolution, but rather a recipe for a far more serious conflict in the future. Now is the "most opportune time to break the cycle of compromise and accommodation, of realpolitik and to adopt a no-nonsense attitude to the issue."

CONCLUSION: AN ARGUMENT FOR CHAPTER 7 USE OF FORCE

The subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security, convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality.

Any attempt aimed at the partial or total disruption other than national unity and territorial integrity of a State or country or in regard to political independence is incompatible with the purposes and principles of the U.N. Charter.

199. Id.
200. Id.
202. Friendly Relations Doctrine, supra note 96. Codifying the following principles:
   (a) Principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN.
   (b) State shall settle their international disputes by peaceful means in such a manner than international peace and security and justice are not endangered.
   (c) Duty not to intervene in matter within domestic jurisdiction of any State, in accordance with the Charter.
   (d) Duty to cooperate with each other.
   (e) Principle of equal right and self-determination of peoples.
   (f) Sovereign quality of states
   (g) States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.
203. See, Vance Jr. supra, note 118.
Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes.\(^{204}\) Every Member State, including Morocco, has a duty to refrain from any forcible action which deprives other peoples’ rights of equality and self determination synonymous with their freedom and independence.\(^{205}\) Furthermore, as members of the U.N., each state is obligated to promote the realization of self-determination and to respect that right in accordance with the provisions of the U.N. Charter.\(^{206}\) All obligations that deal with preemptory and customary law, such as the right to self-determination, are applied \textit{erga omnes} in relation to all—not just between parties.\(^{207}\) All states must then do what is in their power to make the parties respect their obligations. In light of the articles on state responsibility, individual states have a “duty of non-recognition” of gross violations of international law. The lack of political will and nation-state self-interest has corrupted the foundational Charter of the U.N. and made it possible for Morocco to continue denying the Sahrawi’s their right to self-determination.

The U.N. Security Council’s involvement in using force to implement the referendum and its outcome is restricted to its powers of collective security found in Chapter 7 of the U.N. Charter.\(^{208}\) In order to call upon this power, the Council must first satisfy Article 39, indentifying either a salient threat to the peace, a breach of the peace or an act of aggression.\(^{209}\) A mounting salient threat has been established-by occupying Western Sahara and blocking the referendum from allowing any choice of independence, Morocco actions are identical to the role of a colonial power. Morocco has also violated international law by invading Western Sahara by force in the 1975 “Green March.” This one action translates to a cognizable breach of international peace and security, violating the U.N. Charter invoking Chapter 7 Security Council powers.\(^{210}\) To further support the “Green March” as an act of aggressive

\(^{204}\) U.N. Charter, \textit{supra} note 3.

\(^{205}\) Id.

\(^{206}\) Id.


\(^{208}\) U.N. Charter, \textit{supra} note 3, Chap VII.

\(^{209}\) Id.

\(^{210}\) U.N. Charter art 2, para 4 stating that “all members shall refrain in their international relations form the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.” Morocco will argue that since the Western Sahara does not meet the technical definition of an independent state, they have not violated this provision. However, the Green March and subsequent illegal occupation of Western Sahara by Moroccan troops does clearly violate the provision, and both events contradict the main tenants of the United Nations.
force on the part of Morocco, Special Rapporteur Cristescu states, "The use of force against another State may take various forms: for instance, actions conducted by regular or irregular forces; by forces of volunteers or by armed bands; acts of reprisal; invasion; or pressure or coercion of various kinds." 211

In U.N. resolution 1783, 212 which again extended the mandate of MINURSO, the U.N. Secretary General noted there was a conspicuous increase in violence in Western Sahara not seen in years past. 213 The U.N. has been denied access to Morocco's military installations within the occupied territory of Western Sahara. 214 This lack of access traditionally has been associated with rising tensions as a precursor to violence. 215 The Security Council has previously utilized its Chapter 7 powers to terminate conflicts which are not forthcoming and where the situation is classified as threat to international peace and security. 216 For example, the case of Iraqi occupation of Kuwait in 1990 when the Security Council invoked Chapter 7 and went to the military defense of Kuwait. Since 1990, over 1000 resolutions have been adopted by the Security Council in accordance with Chapter 7. However, the Security Council is unwilling to do the same for Western Sahara. Ultimately, unless war breaks out, no international actor in the current situation seems able, or willing to initiate a lasting resolution to the conflict. Another outbreak of war is not implausible. In fact, it is highly probable, carrying with it the ability to further destabilize the Northern Africa region and involves the U.S., France, and other countries providing the potential for a world war scenario.

Morocco must no longer be allowed to place itself above international law and the U.N. to shirk the fundamental tenant of its Charter. Res ipsa loquitur, "the thing speaks for itself" is a recognized legal doctrine within the American legal system. 217 The doctrine is applied to clear-cut

214. See, Yahia supra note 181 at p. 190-192
217. Honorable Frank Ruddy, former Deputy Chairman, Referendum for Western Sahara (MINURSO Peacekeeping Operation) Res Ipsa Loquitur: The Thing Speaks for Itself, Statement
situations where a simple recitation of the facts is sufficient, without more, to presume culpability of the accused. This is the case of Western Sahara. Judging from a purely international legal standpoint, Western Sahara has satisfied the Montevideo criteria for statehood— it has a permanent population, a defined territory, based on Spanish colonial boundaries; and a government, that, on the relative scale, has achieved order, stability and importantly recognition by a clear majority of its fellow state actors. Western Sahara is a budding nation at the crossroads of the legal and practical struggles between territorial integrity, self-determination, and unresolved issues regarding what to do when political actors operate in accordance with catastrophic ambivalent behaviors in order to advance their own egocentric interests.

The people Western Sahara presently enjoy a right under international law to self determination. Not only has the ICJ affirmed this right in its 1975 advisory opinion, but it is clear that Western Sahara falls within the category of “nations” who enjoy this right under the U.N. Charter and the many General Assembly resolutions that define self-determination— in particular resolution 1514, the “Declaration on the granting of independence to colonial countries and peoples”— as well as the two U.N. human rights covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), both carrying the weight of binding law according to Article 38(1)(a) of the ICJ statute. Moreover, as mentioned above, the General Assembly and the Security Council have explicitly recognized the legal right of Western Sahara to self-determination in a consistent sequence of resolutions which, collectively, establish a verifiable right under international law for the case of Western Sahara.


218. Id.

219. Hanaur, supra note 5, citing to I/1/A/19 vol. VI, at 704, quoted in the U.N. right self-determination: Historical and current development on basis of U.N. Instruments (Aurelie Cristes, special rapporteur), U.N. Doc. E/CN.4/sub/2/404/Rev 1 (1981), at para. 262 The term “nation” under the U.N. is to be determined “broad and general enough to include colonies, mandates, protectorates, quasi-states as well as states.”


222. I.C.J. statute, Article 38(1)(a)