



The Legal Issues Involved In The Western Sahara Dispute

The Principle of Self-Determination and the Legal Claims of Morocco

COMMITTEE ON THE UNITED NATIONS

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INTRODUCTION

Western Sahara, known as Spanish Sahara when it was a colony of Spain, is a territory roughly the size of Colorado situated between Morocco to the north, Mauritania to the south, and Algeria to the east. It is mostly desert and the ancestral home of nomadic tribes. For more than thirty years, sovereignty over this territory has been in dispute and the process of its decolonization has raised serious implications for the application of principles of international law and United States policy.

In 1975, Spain agreed to withdraw from the territory and permit Morocco and Mauritania to occupy it, igniting a war between those two countries and members of the native population, called Sahrawis, led by an independence movement called the Polisario Front, or “Polisario,” that persisted until Mauritania withdrew its forces from the territory in 1979 and Morocco agreed to a cease-fire agreement in 1991. Under this cease-fire agreement, known as the “Settlement Plan,” sovereignty over the territory would be determined by a referendum conducted under the auspices of the United Nations and the African Union. By the time of the cease-fire agreement, Morocco was in control of approximately two-thirds of the territory and the Polisario controlled the other third. For reasons that will be discussed later in this report, this referendum has not yet taken place and sovereignty over the area remains in dispute.

Three years ago, the United Nations Committee of the Association of the Bar of the City of New York (the “Committee”) began a study of the legal issues involved in the dispute over Western Sahara in order to give United States policy makers some guidance on these issues when framing their policies towards the dispute. In April 2011, the Committee issued its first report, addressing whether Morocco has a right under international law to utilize the natural resources of the portion of Western Sahara it controls pending a resolution of sovereignty over

the territory.¹ The present report addresses the issue of sovereignty itself, in particular, by examining the claims to self-determination of the peoples of Western Sahara and the territorial claims of Morocco under principles of international law.

The report will refer to “Sahrawi Arab Democratic Republic” or the abbreviated form “SADR” as well as to the Polisario. The Polisario is an independence movement and political organization of Sahrawis who have advocated for the independence of Western Sahara since the Spanish occupation of the territory and whom the United Nations recognized as the representative of the people of Western Sahara in 1979.² The SADR is the government formed by the Polisario in 1976, currently headquartered in Tindouf, Algeria; it claims to be the government in exile of an independent Western Sahara. The United Nations, the United States and the League of Arab States do not recognize the SADR as the government of an independent state; however, the SADR is a member of the African Union and has been recognized as the government of an independent state by that organization and by approximately one-third of the world’s countries. The report’s use of Sahrawi Arab Democratic Republic or SADR does not reflect any position on the part of the Association of the Bar of the City of New York on whether or not this entity is, or should be recognized as, the government of an independent state.

¹ Report on Legal Issues Involved in the Western Sahara Dispute: Legal Status of Morocco’s Use of the Natural Resources of Western Sahara, Association of the Bar of the City of New York, April 2011.

² See G.A. Res. 34/37, 34 U.S. GAOR, Supp. (No. 46) 203, U.N. Doc. A/34/46 (1979).

PART I: FACTUAL BACKGROUND³

Modern day Western Sahara comprises a land mass of approximately 103,000 square miles, about the size of the U.S. state of Colorado, consisting mainly of rocky desert flatlands, with few natural harbors, hazardous coastal waters, and with its major river, the Saguia el-Hamra, flowing seasonally to the Atlantic across the northern part of the territory. The geographical limits of present day Western Sahara extend 660 miles along the Atlantic, with borders of 276 miles with Morocco to the north, 25 miles with Algeria in the northeast, and 976 miles with Mauritania to the east and south. Western Sahara's natural resources consist mainly of phosphate deposits (used for commercial fertilizer but valued in particular for its uranium content), coastal fisheries, and more recently recognized, potential off-shore oil and gas reserves. The indigenous inhabitants are a people of mixed Arab-Berber heritage called Sahrawis, who trace their lineage to semi-nomadic tribes which settled in the region centuries before there were modern day "states" in North Africa and migrated within loosely defined and often overlapping territories throughout the region.

The arrival of Islam in the eighth and ninth centuries saw the conversion of most of the inhabitants of the region, including the Sahrawis, and the rise of the influence of succeeding Sultans, who could trace their lineage directly to Mohammed, in present day Morocco. It also saw the emergence of a trade route between the sub-Saharan traders of central and west Africa and the Sultans and Mediterranean Arab settlements through North Africa.

³ Much of the history of the territory in pre-colonial and colonial times is taken from the research on the subject of Tony Hodges and contained in his book "Western Sahara: The Roots of a Desert War" (Lawrence Hill & Co. 1983), ("Hodges") which in turn is based upon the research contained in earlier works such as the major Spanish treatise on the subject of Western Sahara written in 1955 by Julio Caro Baroja, entitled Estudios Saharianos (Instituto de Estudios Africanos, Madrid, 1955).

However, according to most scholars, neither of these developments had more than a cursory impact on the members of the Saharan tribal groups, who continued to live their daily lives in much the same manner as they had for centuries.

According to one noted scholar, in the Western Sahara areas:

[t]he limited and dispersed pastures required migrations in much smaller groups, so tribes were usually spread over huge distances in a large number of scattered encampments ... Outside times of war, political and judicial decisions were likely to be made at the level of the fraction or subfraction, rather than the tribe. Under such conditions of dispersal, in an exceptionally arid and hostile environment, no single group drew on sufficient power or resources to establish even a semblance of supratribal government . . . Even . . . limited forms of supratribal organization were unknown in the ultra-arid and thinly populated swath of desert between the Adrar and the Draa River. This was the domain of totally independent Sahrawi tribes who never submitted to the weak Mauritanian emirs, or . . . to the state to the north of the desert, the sultanate of Morocco.⁴

According to various scholars, by the arrival of the first Spanish and Portuguese explorers and traders on the African coast in the fifteenth century, the Sahrawi tribes had adopted their own language, Hassaniya, a dialect of Arabic, and the Europeans found these tribes of goat and sheep herders living their nomadic existence in much the same way as they had for centuries.

By this period, the Canary Islands had become an important trading center for Spain, and the Spanish began to cast their eyes upon the African coast. In 1476, a small Spanish fort was established at Santa Cruz de Mar Pequeña⁵ opposite the Canaries, but it was sacked in 1524, and the Spanish were not to establish another settlement on this coast until more than three and a half centuries later in 1884.

At the end of the nineteenth century, with European colonization advancing in Africa, Spain turned its attention once again to the Saharan coast, there being "... fears in Madrid

⁴ Hodges, pps. 14-15.

⁵ Hodges, p. 20, fn. 17.

that France, England or some other European powers might secure control of this coast so close to the Canaries.”⁶ In the 1870s, Spanish public support for Spanish colonial ventures in Africa grew, with expectations of commercial rewards from trade and exploitation of fishing resources. “So, by 1884, there was a formidable interlocking nexus of business interests and Africanist propagandists who ... could bring considerable pressure to bear on the Spanish government. Meanwhile, the Congress of Berlin was laying down the ground rules for the division of Africa.”⁷

In 1884 Emil Bonelli, under the auspices of the Spanish *Sociudad de Africanistas y Colonistas* (Society of Africanists and Colonialists) signed a treaty with certain nomadic tribes, giving over to the Spanish “... the territory called Madibu or Cape Blanc on the coast, so that this territory finds itself under the protection and government of His Majesty the King of Spain, Don Alfonso XII.”⁸ In 1885, Spain placed the entire coast between Cape Blanc and Bojador under the administrative responsibility of its overseas ministry, thus complying with Article 35 of the General Act of the Congress of Berlin (February 2, 1885) requiring “colonial powers to establish an effective administration of their colonies ...”⁹ In 1887, by decree, the area of the protectorate was extended 150 miles into the interior, while putting it under the administration of the “politico-military sub-governor.”¹⁰

From 1887 on, Spain’s success in administering what was then known as the Spanish Sahara was very modest at best. Constantly harassed by groups of Sahrawis resisting the

⁶ *Id.* p. 40.

⁷ *Id.* p. 42.

⁸ *Id.* p. 42, fn. 7.

⁹ Hodges, p. 43.

¹⁰ *Id.*

domination of the region by the Spanish and French, the Spanish remained content to limit their control to the coastal settlements until the mid-1930s. According to one observer, “The Spanish, who remained closeted in their tiny coastal settlements, did nothing to stop those *ghazzian* [Sahrawi resistance] and made no attempt to occupy the interior of their colony until after the French had broken the back of the Sahrawi resistance in 1934.”¹¹ The fall of the Spanish monarchy and the ensuing Spanish civil war “left almost no mark” on Western Sahara.¹²

The territory remained a Spanish colony, but Spanish rule waned with the general political developments and decolonization that followed World War II. In the 1950s and 60s the colonies of North Africa began one by one to assert their independence. Morocco gained its independence from France in 1956, followed by Mauritania in 1960 and, after a long and bloody war, Algeria in 1962. In order to forestall a similar movement in Spanish Sahara, in 1958 Spain, under the leadership of General Franco, designated Spanish Sahara a “province.” Then the combined armies of the French and Spanish quelled uprisings of the population, and except for isolated incidents, guerilla attacks ceased and were not to occur again until the early 1970s.¹³

However, Franco had less success on the diplomatic front. The ploy of designating the territory a Spanish “province” did little to discourage the calls within the international community for self-determination for the people of the region, and in 1963 Spanish

¹¹ *Id.* p. 55, 63. From the dawn of the twentieth century to the mid-1930s bands of Sahrawis had systematically attacked both Spanish garrisons in Western Sahara and French outposts in Morocco, Algeria and Mauritania in a campaign to rid the region of European influence. Beginning in 1930 the French stepped up measures to stamp out the centers of dissidence. In February-March of 1934 a French campaign flushed out the last pockets of Berber resistance in the anti-atlas and then swept through the lower regions of Morocco, western Algeria, and Mauritania, surrounding Western Sahara and establishing an outpost in Tindouf, Algeria, from which they could control the movements of Sahrawi resistance fighters.

¹² *Id.* p. 68.

¹³ Hodges, pps. 73-83.

Sahara was placed on the U.N.'s list of "Non-Self-Governing Territories."¹⁴ By 1966, Western Sahara remained the only "Non-Self-Governing Territory" left in the region, and both the United Nations and the Organization of African Unity (now the African Union) began to exert considerable pressure on Spain to withdraw from the territory and permit the native inhabitants to determine their political future through a referendum.¹⁵

Franco also faced increased resistance during this period from the Sahrawi population. A group of young "freedom fighters" on May 10, 1973, formed the Frente Popular para la Liberacion de Saguia el Hamra y Rio, or Polisario, and immediately launched a guerilla campaign against the Spanish whose major achievement was the sabotage of the Fosbucraa conveyor belt, which temporarily halted all phosphate deliveries to the coast, in 1974.¹⁶

¹⁴ Since the U.N. General Assembly proclaimed in 1960, in its "Declaration on the Granting of Independence to Colonial Countries and Peoples" (Resolution 1514) that "all peoples have a right to self-determination," Resolution 1514 has been invoked as the justification for the decolonization of numerous colonial territories. A year later, in Resolution 1654, the General Assembly set up a special committee, the Special Committee on the Granting of Independence to Colonial Countries and Peoples (often referred to as the "Committee of 24" or the "Special Committee on Decolonization") to monitor the decolonization effort. At the present time, there remain 16 Non-Self-Governing Territories to which Resolutions 1514 and 1654 apply.

¹⁵ In 1966, the General Assembly called for Spain to organize a referendum under the auspices of the United Nations, under which the Sahrawis would be able to vote on the territory's political future. Resolution 2229(XXI), 21 GAOR Supp. (No. 16) 72, U.N. Doc. 6316 (1966). After reaffirming the "inalienable right" of the peoples of the territory to self-determination, the General Assembly invited Spain to, "at the earliest possible date," determine the procedures for the referendum under the following conditions:

- (a) To create a favorable climate for the referendum to be conducted on an entirely free, democratic and impartial basis, by permitting, inter alia, the return of exiles to the Territory;
- (b) To take all the necessary steps to ensure that only the indigenous people of the Territory participate in the referendum;
- (c) To refrain from any action likely to delay the process of the decolonization of Spanish Sahara;
- (d) To provide all the necessary facilities to a United Nations mission so that it may be able to participate actively in the organization and holding of the referendum.

The Resolution also requested the Secretary-General to immediately appoint a special mission to the territory to recommend practical steps on the preparation and supervision of the referendum. The essential elements of Resolution 2229 (XXI) were reiterated by the General Assembly in six additional Resolutions adopted between 1967 and 1973. G.A. Res. 2354 (1967); 2428 (1968); 2591 (1969); 2711 (1970); 2983 (1972); 3162 (1973).

¹⁶ Hodges, *supra*, pps. 160-161.

The stated aims of the Polisario reflected the social and political revolutions that had characterized the 1960s in other parts of the world. They declared a rejection of the tribal allegiances of old and the aim of establishing a union of all Saharans in a modern day “state.”¹⁷

Spain finally succumbed to the pressures exerted by the liberation movement within the territory and the international community. The first census of the inhabitants of the territory was prepared in 1974¹⁸ and in August of 1974, eight years after first being urged to do so by the U.N. General Assembly, the Spanish government announced that it would hold a referendum under U.N. auspices during the first six months of 1975.¹⁹

However, Morocco and Mauritania—which had asserted claims to the territory based upon alleged ties between the inhabitants of the region and their countries prior to the Spanish colonization—requested that the international community postpone the referendum while they had their claims adjudicated by the International Court of Justice.²⁰

Morocco’s claims to the territory dated as far back as the mid-1950s, when the Istiqlal party of Morocco advanced the theory of “Greater Morocco,” that the borders of Morocco should rightfully include all the lands that were under the dominion of the Sultans of

¹⁷ In a manifesto adopted at their second congress, in August of 1974, the group defined their goals for the first time, declaring that “the Sahrawi people have no alternative but to struggle until wresting independence, their wealth and their full sovereignty over their land.” *Manifeste politique, adopte par le deuxieme congres*, in *Le peuple Saharoui en lutte* (Polisario Front, 1975) at 50; cited in Hodges, *supra*, p. 163. The program of national action they adopted indicated a rejection of domination by religious figures. There was a commitment to the principle of women’s emancipation and a democratic form of government. In addition, there was a call for a “fair distribution of resources, to overcome the differences between the countryside and the towns,” the provision of adequate housing and health facilities, the incorporation of Arabic in education and the provision of free, compulsory schooling at all levels and for all social layers. *Programme d’action nationale, adopte par le deuxieme congres*, in *Le peuple Saharaoui en lutte* (Polisario Front, 1975), at 42. Cited in Hodges, *supra*, p. 164.

¹⁸ According to this census the population numbered 73,497 indigenous Sahrawis.

¹⁹ Letter dated August 20, 1974 from the Permanent Representative of Spain to the United Nations to the Secretary-General, U.N. Doc. A/9714.

²⁰ Morocco and Mauritania first persuaded the members of the Fourth Committee of the U.N. General Assembly to request the postponement of the referendum. The General Assembly acceded to this request in Resolution 3292 (XXIX), 29 GAOR Supp. 31, at 103-104, U.N. Doc. A/9631 (1974).

Morocco prior to the Western colonization of the region.²¹ The supporters of this theory claimed that these lands encompassed, besides Spanish Sahara, all of Mauritania and a large slice of Algeria. The Kings of Morocco – first Mohammed V and then his son Hassan II – embraced this theory, laying claim to the territory of Spanish Sahara in speeches dating back to the late 1950s. Although they backed a number of United Nations Resolutions calling for the self-determination of the people of the region during the 1960s and 1970s,²² they never renounced this claim. They also laid claim to what is present day Mauritania, and Morocco tried, unsuccessfully, for a year after its independence from France in 1960 to block its admittance to the U.N. as an independent state.²³ In addition, Morocco inaugurated in the late 1960s an unsuccessful bid to occupy part of Algeria by force,²⁴ leading to friction between the two states that has persisted to this day. In

²¹ In the period following the end of the French protectorate, Moroccan independence in 1956, and the installation of a constitutional monarchy, nationalist fervor was stirred by the principal nationalist party and nationalist movements such as the Army of Liberation, and trade unions, arguing that the historic empire must regain its pre-colonial lands. “The Greater Morocco cause was officially embraced by the Moroccan government toward the end of 1957. At the United Nations, Morocco laid claim to Mauritania, Ifni, and Spanish Sahara.” Hodges, p. 89. By 1960, some of the more extreme territorial claims were dropped, such as claims to parts of Mali, and Saint-Louis in Senegal. “But the Moroccan government continued throughout the sixties to lay claim to Western Sahara, Mauritania and much of the Algerian Sahara, as well as Ifni, and the Spanish presidios on the Mediterranean coast.” *Id.* p.88.

²² Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 21 GAOR, Annexes, Addendum to Agenda Item No. 23, 603, U.N. Doc. A/6300/Rev.1 (1966). Morocco voted in favor of all but one of the Resolutions of the General Assembly calling for a referendum passed between 1967 and 1973.

²³ Days before Mauritania’s independence from France the Rabat government published a “white book” spelling out in detail the historic grounds for its claim to Mauritania. Neither these arguments nor any of the diplomatic efforts of Morocco during this period had any effect on President Charles de Gaulle’s decision to grant independence to Mauritania, or dissuade other African nations from supporting the fledgling government of Mokhtar Ould Daddah. Next, Morocco in 1960 persuaded the U.N. General Assembly to examine the dispute over Mauritania. M’hammed Boucette, an Istiqlalian who represented Morocco, argued that France was trying to create an artificial state in Mauritania that would be dominated by powerful French companies intent on exploiting its mineral reserves. Morocco denied recognition to the government of Mauritania for nine years and persuaded the political committee of the Arab League to support its claim. *See* Hodges, p.90. It also briefly succeeded in postponing Mauritania’s admission to the U.N. for one year. However, Mauritania was finally admitted to the U.N. on October 27, 1961, after gaining the backing of the Western powers and the Soviet Union. *Id.* p. 91.

²⁴ Hodges, p. 88. Morocco launched a border war in October 1963 involving Tindouf and other disputed border areas. *Id.*, pps. 94-95. With the OAU mediating, a cease-fire took effect on November 1, 1963. The border problem remained unresolved until 1972 despite the OAU’s efforts.

1974, when Spain declared that it would withdraw and permit a referendum to determine Western Sahara's future, King Hassan II convinced the Mauritanian government (which had also asserted a claim to part of the territory)²⁵ to join Morocco in pursuing their claims before the International Court of Justice.

On December 13, 1974, the General Assembly issued a Resolution postponing the referendum.²⁶ However, in addition to mandating the postponement of the referendum and requesting the International Court of Justice to issue an advisory opinion on the claims of Morocco and Mauritania, the General Assembly dispatched a U.N. visiting mission to the Sahara, charged with obtaining "first hand information on the situation . . . including . . . the wishes and aspirations of the people."²⁷

The report of this mission was released on October 15, 1975. The mission concluded that the indigenous peoples of the territory wished to be independent not only of Spain, but also of Morocco and Mauritania.²⁸

In the words of the Mission:

Owing to the large measure of co-operation which it received from the Spanish authorities, the Mission was able . . . to visit virtually all the Main population

²⁵ As with the rise of Moroccan nationalism, as early as 1957, there was a call to create a "Greater Mauritania" to stretch from the Draa Valley to the Senegal River. *See*, Hodges, p. 101. However, despite the official claim to the territory there was a policy of support for self-determination and in December 1966, Mauritania voted in favor of the General Assembly's Resolution calling for a referendum in Western Sahara on self-determination under United Nations auspices, as well as for all six almost identical Resolutions offered between 1967 and 1973.

²⁶ Resolution 3292 (XXIX), 29 GAOR Supp. 31, at 103-104, U.N. Doc. A/9631 (1974).

²⁷ Report of the United Nations Visiting Mission to Spanish Sahara, 1975, in *The Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/100023/Add.5, Annex, at 26 (1975).

²⁸ In addition to interviews with indigenous Sahrawis in Western Sahara, the mission met in Tindouf with the Polisario leadership and toured three Sahrawi settlements, at Hassi Abdallah, Oum el-Assel and Tindouf, in each of which, the mission later reported, it "was met by large and vociferous demonstrations of several thousand people in which the flags of the Frente Polisario were prominently displayed." Report of the United Nations Visiting Mission to Spanish Sahara, *supra*, p. 95.

centres and to ascertain the views of the overwhelming majority of their inhabitants . . . From all of these, it became evident to the Mission that there was an overwhelming consensus among Saharans within the Territory in favour of independence and opposing integration with any neighboring country.²⁹

The Mission also concluded that the Polisario, which had organized mass demonstrations of support wherever the mission visited, enjoyed considerable support among the population.³⁰ It concluded with the recommendation that “the General Assembly should take steps to enable those population groups to decide their own future in complete freedom and in an atmosphere of peace and security. . . .”³¹

On the day after the publication of the Mission’s report, the International Court of Justice rendered its opinion.³² The question referred to the Court was to determine whether the territory, prior to the Spanish colonization, was *res nullius*, or without legal tie to a sovereign, or whether such ties existed, and if they existed, whether such titles vested in either Morocco or Mauritania, or both. After an examination of evidence of political, military, religious, and economic ties between the claimants and the inhabitants of the territory before Spain’s arrival, the judges found that “the information before the Court does not support Morocco’s claim to have exercised territorial sovereignty over Western Sahara.”³³ The Court explained that while the evidence showed that the Sultan exercised “some authority” over “some, but only some,” of the nomadic tribes of the region, it “does not establish any tie of territorial sovereignty between

²⁹ *Id.* p. 48.

³⁰ In many of the towns, the mission reported, the demonstrations in favor of the Polisario “appeared to represent the majority of the Saharan residents.” Report of the Special Committee, *supra*, at 66. The mission reported that in the manifestations in the north the “overwhelming majority” of the demonstrators carried the flags and emblems of the Frente Polisario, and that on May 13 in El Ayoun, the Polisario had amassed at least 15,000 demonstrators. Report of the Special Committee, *supra*, at 67. In 1979 the United Nations recognized the Polisario as the representatives of the Sahrawi people in diplomatic discussions over the future of the territory. See G.A. Res. 34/37, 34 U.N. GAOR, Supp. (No. 46) 203, U.N. Doc. A/34/46 (1979).

³¹ Report of the Special Committee, *supra*, at 11.

³² *Advisory Opinion on Western Sahara*, International Court of Justice Reports 12 (1975) (“Advisory Opinion”).

³³ *Id.*, at 48.

Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in the Western Sahara.”³⁴ The Court’s response to Mauritania’s claim was essentially the same.³⁵

Two days later, Morocco announced that there would be a march of 350,000 civilians from Morocco into Western Sahara to gain recognition of Morocco’s right to national unity.³⁶ On November 6, 1975, the Moroccan march amassed at the frontier. That same day, Morocco informed Spain that the march into Western Sahara would continue unless Spain agreed to bilateral negotiations concerning a transfer of sovereignty over Western Sahara to Morocco.³⁷ In reality, Moroccan troops had already entered the territory by the time of the Green March and the first armed conflict between these troops and the Polisario occurred on October 31, 1975, near the outposts of Jdiriya, Haousa and Farsia near the border with Algeria, abandoned days prior by Spanish troops.³⁸

On November 14, the governments of Morocco, Mauritania and Spain issued a joint communique, notifying the world of certain agreements – later called the “Madrid Accords” – that had been reached as a result of negotiations on the Western Sahara issue.³⁹ According to the communiqué, Spain had agreed to a “temporary” joint administration of the territory with

³⁴ *Id.*, at 49.

³⁵ The Court found that although there were some legal ties between present day Mauritania and the Territory, “the materials and information presented to it do not establish any tie of territorial sovereignty.” Advisory Opinion at 68.

³⁶ Letter from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council dated October 18, 1975. U.N. Doc. S/11852 (1975).

³⁷ 30 U.N. SCOR, Supp. (October-December 1975), U.N. Doc. S/11871 (1975); *see also*, R. T. Vance, “Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara,” 7 Yale J. World Pub. Ord. 45 (1980-1981) (“Vance”) p. 58.

³⁸ *See* Hodges, *supra* p.220.

³⁹ Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania, Annex II to U.N. Doc. S/11880, November 19, 1987, in Security Council Official Records, 30th Year, Supplement for October, November and December 1975, p. 41.

Morocco and Mauritania, in consultation with the *djemma*, the Spanish-appointed council of Sahrawi tribal elders. By the end of February 1976, Spain would withdraw completely and there was no mention of what would take place at that time. Following the issuance of the Madrid Accords, the infiltration into the territory of Moroccan and Mauritanian troops intensified and within weeks the major towns of the territory were encircled.

Throughout this period, the indigenous population of Western Sahara had never been given a voice in any of the discussions at the United Nations or in the case before the International Court of Justice.⁴⁰ By the time of the Green March, however, the Polisario had won the diplomatic support of a number of key African states,⁴¹ most prominently among them Algeria. Algeria, which shares a twenty-five mile border with Western Sahara, had become alarmed by King Hassan II's decision to launch the Green March and by his reassertion of the principle of "Greater Morocco" – a principle which had already led to bloodshed between the two countries. By the end of 1975, Algeria had begun aiding the Polisario and voicing strong opposition to Moroccan policy.⁴² Libya, too, denounced the Moroccan move and championed the right of Sahrawi self-determination. The elderly tribal leaders of the *djemma*, rather than

⁴⁰ The Sahrawis were not accorded the right to be heard by the International Court of Justice, which can only receive evidence from "states" and "international organizations."

⁴¹ The Organization of African Unity ("OAU"), now the African Union ("AU") had been championing the right to self-determination of the people of Western Sahara from the mid-sixties. After Morocco's occupation of the territory it tried for several years to negotiate a solution to the conflict that would preserve this right. Finally, in 1983 it voted to admit the SADR as a member, causing Morocco to repudiate the organization in protest. Following the SADR's admission to the organization a number of African states granted recognition to it, most prominently South Africa under the leadership of Nelson Mandela. In 1988 its proposal for a referendum formed the basis for the eventual agreement of Morocco and the Polisario designated the "Settlement Plan."

⁴² Among other things, in 1975 Algeria sponsored a U.N. Resolution (3458A) deploring the Madrid Accords and reaffirming the right of the Sahrawis to self-determination and a referendum. In a memorandum sent to the U.N. Secretary-General on November 19, 1975, the Algerian Government stated that it "does not recognize any right of the Governments of Spain, Morocco and Mauritania to dispose of the Territory of the Sahara . . . It therefore regards as null and void the 'declaration of principles' presented by Spain and accords no validity to the provisions contained therein." Annex to Letter Dated November 19, 1975 from the Representative of Algeria to the Secretary-General, U.N. Doc. S/11881, November 19, 1975, *cited in* Hodges, p. 225, fn. 100.

acquiesce in the Madrid Accords, voted to dissolve the council⁴³ and on February 27, 1976, one day after the formal termination of the Spanish administration pursuant to the Madrid Accords, the Polisario announced the formation of the Saharan Arab Democratic Republic (“SADR”).⁴⁴

Morocco refused to recognize the legitimacy of the SADR or to negotiate at all with the group. Rather, it accused the Polisario of being a group of “communist sympathizers”⁴⁵ who were mere pawns of Algeria.⁴⁶

Within days of the issuance of the Madrid Accords communiqué, the fighting between the Moroccan troops and the Polisario escalated and thousands of Sahrawi citizens began to flee the cities and towns of the territory to avoid the advancing Moroccan and Mauritanian armies. The Polisario eventually convinced Algeria to permit the civilians to locate in refugee camps in Algeria,⁴⁷ where many of them remain to this day.

⁴³ On November 28, 67 of the Assembly’s members and over 60 tribal sheikhs signed a proclamation stating that “. . . the General Assembly, not being democratically elected by the Saharan people, cannot decide upon the self-determination of the Saharan people” and that it “decides, by unanimous vote of its members present, upon its final dissolution.” It went on to declare its “unconditional support” for the Polisario, “the sole and legitimate representative of the Saharan people.” See Hodges, *supra*, pps. 234-235.

⁴⁴ The relevant documents and memoranda relating to the founding of the SADR can be found in T. Hultman, *Democratic Arab Republic of the Sahara*, in 5 *Constitutions of Dependencies and Special Sovereignities* (1978). The documents include the Constitution of the Provisional National Saharan Council, Proclamation of the Democratic Arab Republic of the Sahara, a Frente Polisario Memorandum, and the Constitution of the Democratic Arab Republic of the Sahara.

⁴⁵ The Moroccan government asserted that the Polisario were “trying desperately to open the door to international communism in our occupied Sahara.” *Reuters*, dispatch from Rabat, September 2, 1975; *cited in* Hodges, p. 201, fn. 23.

⁴⁶ From the beginning of the conflict until the present day, Morocco has maintained the position that this dispute is really between itself and Algeria, who has been supporting the Polisario, militarily, economically and politically, for its own political aims.

⁴⁷ Although it is difficult to estimate precisely the number of Sahrawis who had fled the territory in 1975-76, according to an article in *The Times* (London), April 2, 1976, at 7, some 60,000 Sahrawis had by that time become refugees. See also Thomas M. Frank, *The Stealing of The Sahara*, 70 *Am. J. Int’l L.* 694, 695 (1976) (“Frank”). Since the census conducted by the Spanish in 1974 only counted 73,497 Sahrawis, this would have constituted the majority of the civilian population. Spanish journalists in El Ayoun were reporting that by the end of February, 1976, barely more than one-fifth of the 29,000 who had been registered there during the 1974 census had remained and that the other Sahrawi towns were starting to “look like ghost towns.” The International Red Cross and the League of Red Cross societies announced in Geneva that 40,000 Sahrawis had fled their

The war between the Polisario, Morocco and Mauritania dragged on for several years. Finally, in 1979, Mauritania agreed to withdraw from the territory and renounce its claims. The Polisario, which by that time controlled more than one-third of the territory, was able to direct its full force against Moroccan troops both within Western Sahara and in Morocco itself. Morocco, aided by the United States⁴⁸ and France, stemmed the Polisario's advances somewhat but was not able to win a decisive battle against them. In 1988, the war between the Polisario and Morocco reached a stalemate. Later that year, the United Nations and the OAU persuaded the parties to agree to a cease-fire and a plan, known as the Settlement Plan.⁴⁹

The Settlement Plan, a joint proposal of the U.N. and the Organization of African Unity ("OAU") – which is now called the African Union ("AU") – called for a cease-fire and a "transitional period" that would be followed by a referendum. According to this Plan, the

homes. When the Algerian government presented a memorandum on relief needs to the executive committee of the UNHCR in 1978 it reported that 50,000 Sahrawi refugees had settled in its territory in 11 scattered camps. See Hodges, *supra*, pps. 232-233.

⁴⁸ Between 1975 and 1988, the United States provided to Morocco more than \$1 billion in arms, in addition to \$1.3 billion in security and economic assistance programs. U.N. General Assembly, Special Committee Records, 1337th Meeting, August 9, 1988, pps. 2-16, report from John Zindar, Center for Defense Information. According to Hodges, President Carter's arms agreements with Morocco in 1979 and 1980 were twenty times what they had been in 1978. Although Carter had restricted the use of such weapons in Western Sahara, this restriction was removed by Ronald Reagan when he took office. Shortly after taking office in 1981, Reagan announced additional arms sales to Morocco worth \$182 million, as well as the lifting of the restrictions placed by Carter on the delivery of some other goods. See Hodges, *supra*, pps. 358-359.

⁴⁹ On August 11, 1988 the Secretary-General of the U.N. and a representative of the President of the OAU presented an outline of a plan to both parties, which was accepted in principle by both parties on August 30, 1988. On June 18, 1990, the Secretary-General issued a report outlining further details of the Settlement Plan agreed with the parties. S/21360/1990 (June 18, 1990). The Report of the Secretary-General confirmed the agreement in principle of the parties that the future of the territory would be determined by a referendum conducted under the auspices of the United Nations and the OAU, in which the indigenous population, defined as "all Sahrawis included on the Spanish census of 1974 eighteen years of age or older" would be allowed to vote. *Id.* at 5. The terms of the Settlement Plan were further delineated in the next Report of the Secretary-General, issued on April 19, 1991, S/22464/1991 (April 19, 1991), again confirming the parties' agreement in principle to a referendum in which all Sahrawis listed on the Spanish census who were 18 years or older would be allowed to vote between independence and integration with Morocco. On April 29, 1991, the Security Council, in Resolution 690, approved the Settlement Plan, established MINURSO, and established an estimated timetable for the transitional period preceding the referendum, which was expected to last no more than 20 weeks. On September 6, 1991, the cease-fire went into effect.

referendum would “enable the people of Western Sahara, in the exercise of their right of self-determination, to choose between independence and integration with Morocco.”⁵⁰

The proposal was presented to and accepted in principle by both Morocco and the Polisario in August 1988.⁵¹ The report of the General Assembly established that the “transitional period” between the cease-fire and the proclamation of the results of the referendum was contemplated to last no more than 20-26 weeks.⁵² On April 29, 1991, the Security Council issued Resolution 690, which declared “full support” for the plan, established a peacekeeping mission to conduct the referendum, MINURSO, and called upon the parties to “fully cooperate” with the Secretary-General to carry out the Settlement Plan.⁵³

The plan provided for an Identification Commission which would create a voters list based on the express agreement of the parties, as follows:

[A]ll Western Saharans to whom the 1974 census undertaken by the Spanish authorities related and who are aged 18 years or over will have the right to vote, whether they are currently present in the Territory or living outside it as refugees or for other reasons. The Commission’s mandate to update the 1974 census will include (a) removing from the lists the names of persons who have since died and (b) considering applications from persons who claim the right to participate in the referendum on the grounds that they are Western Saharans and were omitted from 1974 census.⁵⁴

⁵⁰ S/21360/1990 (June 18, 1990), at 4.

⁵¹ S/21360/1990 (June 18, 1990), at 4; S/RES/690 (1991).

⁵² S/22464/1991 (April 19, 1991), at 4.

⁵³ S/RES/690 (April 29, 1991).

⁵⁴ S/22464/1991 (April 19, 1991), at 6.

These criteria were expanded in a proposal by the Secretary-General in December 1991, which allowed for additional criteria to be applied by the Identification Commission, but noted that “the link with the Territory by people absent in 1974 be solid and demonstrable.”⁵⁵

Once the identification process commenced, however, difficulties in implementing the provisions of the Settlement Plan began to emerge. Disputes between the parties about the interpretation of the voter identification criteria and their application, as well as other problems,⁵⁶ hampered progress and dragged the identification process out for years.⁵⁷

By 1996, the Secretary-General acknowledged that the voter identification process was at a virtual standstill.⁵⁸ On March 17, 1997, the Secretary-General appointed James Baker III as his Personal Envoy for Western Sahara, the voter identification process under the terms of the Settlement Plan was resumed, and the eligibility of all but a tiny fraction of remaining applicants determined. However, the process soon ran into another problem. An initial provisional voters list was published on July 15, 1999 and on January 15, 2000, a second

⁵⁵ S/23299/1991 (December 19, 1991), at 9-10. The Secretary-General proposed including in the voters list not only individuals on the Spanish census who were 18 years or older (Category I), but also persons who could prove that they were living in the territory as members of a Saharan tribe at the time of the 1974 census but were not counted (Category II), persons who were members of the immediate family of individuals in Categories I or II (Category III), persons born of a Saharan father born in the territory (Category IV), and persons who were members of a Saharan tribe and who resided in the Territory for six consecutive years or intermittently for 12 years prior to the Spanish census (Category V).

⁵⁶ One of the problems contributing to the delay was the fact that the bulk of the applications came from the parties themselves rather than from individuals, and that the Commission received a much larger than expected number of applications, particularly from the Moroccans.

⁵⁷ S/24462/1992 (August 20, 1992); S/25170 /1993(January 26, 1993); S/25818/1993 (May 21, 1993); S/25185/1993 (July 28, 1993); S/1420/1994 (December 14, 1994); S/779/1995 (September 8, 1995).

⁵⁸ By that time the total number of persons identified was 60,257 out of 76,992 interviewed, with some 174,000 applicants remaining to be convoked. The Secretary-General noted in his Report “that even if the identification were to be immediately resumed and accelerated, the earlier forecast calling for a referendum to be held in May 1996 is no longer realistic.” S/43/1996 (January 19, 1996), at 4-5. By May 29, 1996, the voter identification process had been completely suspended, at which time 77,058 applicants had been convoked, and 60,112 of them had been identified. Subsequently, a further 163,980 files were prepared for convocation. S/674/1996 (August 20, 1996).

provisional voters list was published.⁵⁹ Out of 250,000 applicants, 86,426 were deemed by the Identification Commission to be “eligible voters.” The majority of applicants denied by the Commission were submitted by Morocco. Following the publication of these lists, Morocco first lodged 131,000 appeals on behalf of applicants it had submitted, but in 2003 decided to withdraw from the referendum process completely.⁶⁰

Following Morocco’s refusal to continue with the plans for a referendum under the terms of the Settlement Plan, Baker proposed several different plans for dealing with the sovereignty question, each of which would involve some sort of referendum, and the Secretary-General, for the first time, began to suggest a “political” solution to the problem.⁶¹ In May 2001, Baker proposed the “Framework Agreement,” under which Morocco would be recognized as the “Administering Power” in the territory and would delegate certain governance powers to the “inhabitants” of the territory for a period of five years, after which a referendum would be held. Two key differences from the Settlement Plan were the expansion of the voters who would be

⁵⁹ S/2000/131 (February 17, 2000).

⁶⁰ “Milestones in the Western Sahara Conflict” <http://minurso.unmissions.org/LinkClick.aspx?fileticket=JaHM1%2fa%2fAww%3d&tabid=3959> (accessed on January 29, 2012). Baker later observed that “[t]he closer we got to implementing the Settlement Plan – got quite close, in fact, got a code of conduct for the election agreed to . . . the more nervous I think the Moroccans got about whether they might not win that referendum.” (interview of August 19, 2004 on *Wideangle* (PBS), http://www.pbs.org/wnet/wideangle/printable/transcript_sahara_print.html).

⁶¹ For the first time, in a report from February 2000, the Secretary-General emphasized the lack of means to enforce the result of a referendum, suggested that it was time to consider “other ways” of resolving the dispute over self-determination, and started placing pressure on the parties to accept a settlement based on “quasi autonomy” for the territory. Noting that the developments over the last nine years constituted a “real source of concern and raise doubts about the possibility of achieving a smooth and consensual implementation of the Settlement Plan” and that “even assuming that a referendum were held . . . no enforcement mechanism is envisioned by the Settlement Plan, nor is one likely to be proposed, calling for the use of military means to effect enforcement . . .” Annan announced his intention to ask Baker “to explore ways and means to achieve an early, durable and agreed resolution of their dispute . . .” S/2000/131 (February 17, 2000) at 10; The lack of any enforcement mechanism in the Settlement Plan was repeated in the Secretary-General’s next report, S/2000/461 (May 22, 2000) and emphasized again in his report of July 12, 2000 (S/2000/683), after attempts to persuade the parties to negotiate on the basis of a political settlement failed. In late 2000, in response to the Secretary-General’s suggestions, the Security Council adopted a Resolution that – although it professed full support for the Settlement Plan and the holding of a referendum on independence or integration – directed the parties to work out a “political solution.” S/RES/2000/1309 (July 25, 2000); S/RES/1324/2000 (October 30, 2000).

entitled to vote in the referendum; and the implied addition of an option for semi-autonomy of Western Sahara within the sovereign state of Morocco to the previously-established referendum options of independence or integration.⁶² The expansion of the voters list would allow all people living in the territory for one year prior to the referendum to vote – thus ostensibly including the hundreds of thousands of non-Sahrawis who had come to reside in the territory since the Moroccan occupation.

In June, the Secretary-General endorsed the plan, and officially proposed that the Settlement Plan be abandoned in favor of the Framework Agreement.⁶³ In reaching this conclusion, the report observed that it was “doubtful whether any other adjustments to the Settlement Plan would resolve [implementation-related] problems, since the endgame would still produce one winner and one loser.”⁶⁴ It also observed that “any substantial adjustments to the Settlement Plan, such as changes to the two referendum options under the plan of integration or independence, or a specific United Nations mandate to deal with the post-referendum situation, would require the mutual agreement of the parties and an enforcement mechanism approved by the Security Council.”⁶⁵ The professed goal of the new proposed agreement was to provide a plan for an immediate change in the status quo providing for increased autonomy, while not foreclosing self-determination rights. However, the Framework Agreement was completely rejected by the Polisario.

In early 2003, Baker put forward a second and final proposal, the “Peace Plan,” which was based on a goal of allowing each side a fair chance to win a referendum on self-

⁶² Referred to in an Annex to the Report of the Secretary-General, S/2002/41 (January 11, 2002).

⁶³ S/2001/613 (June 20, 2001).

⁶⁴ *Id.* p. 9.

⁶⁵ *Id.*

determination after a period of self-governance by Western Sahara.⁶⁶ While it was similar in structure to the Framework Agreement, there were key differences in the details which affected how the right to self-determination was proposed to be addressed. First, the Peace Plan expressly detailed the ballot questions for the final referendum, explicitly requiring that the referendum would include an independence option as well as a “third” option – i.e., continuation of the semi-autonomous “Western Sahara Authority” that was to govern the territory in a four-to-five year transitional period leading up to the referendum.⁶⁷ Second, it modified the electorate for the referendum; to be eligible, a voter would have to be on the provisional voters list published by MINURSO, or on a repatriation list drawn up by the UNHCR on as of October 31, 2000, or to have resided in the territory continuously for a set period prior to December 30, 1999 (the date of the provisional voters list).⁶⁸ Finally, it specified in greater detail the authority that would be exercised by the local inhabitants in the territory during the transitional period.

In May 2003, the Secretary-General publicly announced his support for the Peace Plan.⁶⁹ In July, the Security Council unanimously voted to “support strongly” what it described as “an optimum political solution on the basis of agreement between the two parties,” and called upon the parties to work with the U.N. toward acceptance and implementation of the Peace Plan.⁷⁰

The Peace Plan was completely rejected by Morocco and accepted by the Polisario, but only with some important qualifications. With respect to the options for the final

⁶⁶ S/2003/565, Annex II, at 14.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ S/2003/565 (May 23, 2003).

⁷⁰ S/RES/1495 (July 31, 2003).

status of the territory after the self-determination vote, Morocco objected to having independence as an option,⁷¹ even if the voters list included the applicants that were rejected by the Identification Commission.⁷² Instead, Morocco eventually proposed a “negotiated” solution under which it would offer to integrate Western Sahara into Morocco as an “autonomous region.”⁷³

In April 2004, Baker resigned as Personal Envoy of the Secretary-General to Western Sahara. In April 2006, the Secretary-General recommended that the U.N. “step back” from its attempts to formulate a plan for self-determination in favor of direct negotiations on a political solution.⁷⁴ In April 2007, both parties made presentations to the Security Council which prompted the Council to issue Resolution 1754, calling upon the parties to “enter into negotiations without preconditions in good faith . . . with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for self-determination of the Western Sahara.”⁷⁵

The parties have held numerous formal and informal talks since 2007, and the Security Council has issued a series of Resolutions in which it calls for both the extension of

⁷¹ S/2003/565 at 10. On April 15, 2004 Morocco delivered its final response to the Settlement Plan, indicating that it would only agree to a plan that provided for “autonomy within the framework of Moroccan sovereignty,” that is, a plan which ruled out once and for all the option of independence for the territory. In his General Report in April of 2004 U.N. Secretary-General Kofi Anan confirmed that “Morocco does not accept the Settlement Plan to which it had agreed for many years. . . . It accepts nothing but negotiations about the autonomy of Western Sahara ‘in the framework of Moroccan sovereignty.’” U.N. Doc. S/2004/325.

⁷² As Baker later observed, the Peace Plan “. . . broadened the electorate so that everyone in Western Sahara would have the right to vote on the issue of self-determination in the referendum and not just the people who were identified in the Spanish census . . . [E]ven under that arrangement, the Moroccans concluded that they weren’t even willing to risk a vote under those circumstances.” *Wideangle, supra*.

⁷³ *The Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region*, April 11, 2007.

⁷⁴ Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/2006/249 (April 19, 2006).

⁷⁵ S/RES/1754 (April 30, 2007).

MINURSO's mandate, and for further "negotiations without preconditions."⁷⁶ However, these talks are at an impasse⁷⁷ since the Moroccans are willing to discuss only a plan for an autonomous region whereas the Polisario are unwilling to discuss any solution that did not permit the Sahrawis the option of choosing independence for the territory.

PART II: ENTITLEMENT OF THE PEOPLE OF WESTERN SAHARA TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

I. THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: GENERAL PRINCIPLES

The right to self-determination is a right of peoples to participate in their own governance, free from the undue influence of outside actors. In certain circumstances -- for example, when a territory is coming out of occupation or colonial domination, or, arguably, its people are subject to significant levels of oppression within their current state structure -- self-determination means the right of the people "to constitute an independent state and determine its own government for itself."⁷⁸ In other circumstances, a state's right to territorial integrity under international law may require that a people which currently exist within a recognized state exercise their rights to self-determination "internally," meaning within the existing state's

⁷⁶ S/RES/1783 (October 31, 2007); S/RES/1813 (April 30, 2008); S/RES/1871 (April 30, 2009); S/RES/1920 (April 30, 2010); *see also* Report of the Secretary-General on the situation concerning Western Sahara, S/2011/249 (April 1, 2011).

⁷⁷ A lack of progress in these talks is reflected in all the reports of the Secretary-General since 2008. *See, e.g.*, Report of the Secretary-General, S/2010/175, issued in 2010, at 4 ("It was clear to my Personal Envoy 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.").

⁷⁸ A. Cobban, NATIONAL SELF-DETERMINATION, (Oxford U. Press 1945) pps. 45-46.

governmental framework. The following sections will discuss in detail the development and contours of the right to self-determination, in general and as applied to Non-Self-Governing Territories.

A. Historical Development of the Right to Self-Determination

In the late 1800s, European countries raced to establish their influence in Africa, building economic and political outposts. To establish their authority, they signed treaties and agreements with local chiefs, sheikhs and other indigenous rulers providing security guarantees against other European states, in exchange for exclusive rights to economic resources within the colonial territory. European states used the treaties for political purposes while regarding them as having dubious legal significance.⁷⁹ The prevailing legal reasoning at the time was that “uncivilized” nations could not be subjects of international law, and therefore the treaties had little legal significance.⁸⁰

At an international conference in Berlin in 1884, the colonial powers convened to legitimize their acquisition of territory in Africa. They recognized the need for the African rulers’ consent in order to render valid a cession of territory or the granting of rights, thus treating, for the first time, African nations as subjects of international law.⁸¹ The resulting

⁷⁹ M. Shaw, *The Western Sahara Case*, 49 Brit. Y.B. of Int’l L. 119 (1979) p. 133. Shaw also points out that international law later accorded these treaties the status of agreements between entities with equal international legal personality. *Id.*, p. 134. As later affirmed by the International Court of Justice in the *Western Sahara Case*, these treaties confirmed that Europe recognized the legitimacy of African rulers and accorded them the status of an equal sovereign according to international law. Advisory Opinion p. 12. The agreement rose to the level of documents crucial in determining the legal acquisition of sovereignty over territory.

⁸⁰ L. Hanauer, *The Irrelevance of Self-Determination Law To Ethno-National Conflict: A New Look At The Western Sahara Case*, 9 Emory Int’l L. Rev 133 (1995) (“Hanauer”) p. 138.

⁸¹ *Id.*

agreements, however, allowed each European power free rein to annex its existing protectorates without consulting the affected African state.⁸²

Following the end of World War I, when the victorious Allied powers faced the challenge of how to govern the culturally varied territories of the two defeated empires, primarily the German and the Ottoman empires, U.S. President Woodrow Wilson arrived at Versailles armed with the notion that all peoples had the right to “self-determination.”⁸³ The unprecedented idea that “uncivilized” people had any real legal rights to determine their own political future was primarily conceived of as a political and moral idea, as a means to attain peace and security in order to prevent the recurrence of the nationalistic outbursts that had predicated World War I.⁸⁴ Thus, the victorious nations were forced to create a new system to manage colonial territories while allowing, to a degree, for the exercise of the newly-articulated right to self-determination.

In order to achieve this goal, at least with respect to the colonial territories under the control of the defeated states of World War I, the League of Nations, which was to be the primary post-war institution charged with maintaining international peace and security, created the Mandate System. Article 22 of the League’s Covenant provided:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

⁸² *Id.*, citing C.H. Alexandrowicz, *The Role of Treaties in The European-African Confrontation in the 19th Century*, in *AFRICAN INTERNATIONAL LEGAL HISTORY* 27, (A. Mensah-Brown Ed., 1973), pps. 46-47.

⁸³ Hanauer, p. 133.

⁸⁴ *Id.*, pps. 133, 138.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.⁸⁵

Although Article 22 did not explicitly mention self-determination, it did make a significant leap forward as regards the treatment of colonies and colonial people. For the first time, the Covenant accorded colonial peoples some legal rights and protections; for example, guarantees of freedom of religion and prohibitions of the slave trade.⁸⁶ Further, at least with respect to the former Turkish territories, the League recognized that the “wishes of these communities must be a principal consideration in the selection of the Mandatory.”⁸⁷ By making colonies, which had no prior independent legal standing, subject to international law, the Mandate system thus represented a significant advance in the development of the law of decolonization.⁸⁸ Importantly, the Mandate System was predicated on the understanding that the “well-being and development” of the colonial populations was an obligation of colonial powers, implying logically, at the very least, that at some point the development of such peoples may allow for some form of self-government.

In the post-World War II era, the formation of the United Nations ushered in a drastic change in the legal position of the peoples of colonies and other oppressed populations under international law. For the first time, international law recognized the importance of the principle of self-determination. Article 1 of the United Nations Charter (the “Charter”) described

⁸⁵ League of Nations Covenant, Article 22(1-2).

⁸⁶ League of Nations Covenant, Article 22(5).

⁸⁷ *Id.*, Article 22(4).

⁸⁸ C. O. Quale, *LIBERATION STRUGGLES IN INTERNATIONAL LAW* (Temple U. Press, 1991) (citing A. Brooks and J. Brickhill- *WHIRLWIND BEFORE THE STORM: THE ORIGINS AND DEVELOPMENT OF THE UPRISING IN SOWETO AND THE REST OF SOUTH AFRICA FROM JUNE TO DECEMBER 1976* [London: International Defense and Aid Fund for Southern Africa (1980)] p. 169.

“[t]he principle of equal rights and self-determination of peoples,” as a measure that “strengthens universal peace.”⁸⁹ Similarly, Article 55 recognized that respect for the principle of self-determination is necessary for the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.”⁹⁰

For the remainder of this section we will discuss the right to self-determination as it has evolved in the United Nations era, both under the Charter of the United Nations and as a principle of customary international law.

B. The United Nations Charter and Non-Self-Governing Territories

Chapter XI of the Charter contained a Declaration on Non-Self-Governing Territories, defined as territories in which the people “have not yet attained a full measure of self-government.”⁹¹ This Declaration was intended to refer primarily to the “Third World” colonies of Western powers.⁹² Colonial powers who were members of the United Nations were asked to assume responsibilities for the administration of such territories and were required, *inter alia*, to develop their self-government, taking “due account of the political aspirations of the peoples.” At the same time, the United Nations established a “trustee” system, granting certain political rights to other population groups.⁹³

⁸⁹ U.N. Charter Article 1 (2).

⁹⁰ *Id.*, Article 55.

⁹¹ U.N. Charter Article 73.

⁹² General Assembly Resolution 1541, also adopted in December 1960, and which was intended to complement Resolution 1514, declared that “The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type.” It further made it clear that territories which are geographically separate and distinct ethnically and/or culturally from the country administering them are *prima facie* territories subject to the obligations of Chapter XI of the Charter.

⁹³ The United Nations, in Article 77 of the Charter, established a trustee system as the primary mechanism for the international supervision of (1) territories formerly held under mandate by the League of Nations; (2) territories formerly part of the defeated states of World War II; and (3) territories voluntarily placed under the system by states responsible for their administration. The members of the United Nations were required to “promote the

The application of a right to self-determination to the people of such Non-Self-Governing Territories was not explicitly stated, however, until December 1960, when the U.N. General Assembly adopted Resolution 1514(XV), the “Declaration on the Granting of Independence to Colonial Countries and Peoples.” This Declaration noted the need for the creation of conditions of peaceful and friendly relations among states based on “respect for the principles of equal rights and self-determination of all peoples.” It considered as “important” the role of the United Nations “in assisting the movement for independence in Trust and Non-Self-Governing Territories,” and declared that “all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

General Assembly Resolutions 1514 and 1541 make it clear that geographically separate territories, whose people share a distinctive geography, culture or ethnicity yet are subordinate to another state, are considered to be, *prima facie*, Non-Self-Governing Territories. While the right to self-determination of other population groups may vary according to the circumstances of each case and the application of other principles of international law, Resolutions 1514 and 1541 make it clear that the people of such Non-Self-Governing Territories are entitled to this right.

C. Status of Right as Customary Law and a Peremptory Norm

The right of the peoples of Non-Self-Governing Territories to self-determination is widely accepted today as customary international law. This right has been recognized and

political, economic, social, and educational advancement of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned.” A. Cristescu (Special Rapporteur of the of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *The Right To Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1, paras. 31, 46 (1981) (“Right to Self-Determination Study”), para. 262.

affirmed by the United Nations and other international bodies, including the International Court of Justice, as the principal right at stake in decolonization.⁹⁴ The contours of such customary rules can be seen in U.N. General Assembly Resolutions, International Court of Justice advisory opinions, and state practice during the decolonization period.⁹⁵ The right of colonial peoples to self-determination is a peremptory principle (*jus cogens*) of international law.⁹⁶ Article 53 of the Vienna Convention on the Law of Treaties specifically invalidates any agreement concluded in violation of a *jus cogens* rule.⁹⁷

Individual General Assembly Resolutions, like those discussed above, and advisory opinions of the International Court of Justice, are not binding. Collectively, however, in combination with the Charter and other human rights conventions, and after years of evolving state practice, the principles they state can achieve the status of customary international law,⁹⁸ defined by Article 38(1)(b) of the Statute of the International Court of Justice as a “general

⁹⁴ See Advisory Opinion p. 33. See also G.A. Res. 1514 (XV).

⁹⁵ Hanauer, p. 134.

⁹⁶ Vienna Convention on the Law of Treaties *opened for signature* May 23, 1969, Art. 53, U.N. Doc. A/CONF.39/27 (1969). See also U.N. Special Rapporteur of the Sub. Comm. on Prevention of Discrimination & Prot. of Minorities, “The Right to Self-Determination: Implementation of United Nations Resolutions,” 12, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980) (prepared by Hector Gros Espiell) (“[N]o one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*.”); *Legal Consequences for States of the Continued Presence of South Africa & Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. Rep., 16, 64 (June 1971) (separate opinion of Judge Ammoun, recognizing the *jus cogens* nature of the right to self-determination); I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (3rd ed. 1979), p. 83 (arguing for high protections for combatants seeking self-determination because of the *jus cogens* nature of the right being sought) *cited in* Karen Parker, “Understanding Self-Determination: The Basics,” n. 6, Presentation to First International Conference on the Right to Self-Determination, United Nations, in Geneva (August 2000), <http://www.humanlaw.org/determination.html>.

⁹⁷ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 53, U.N. Doc. A/CONF.39/27 (1969).

⁹⁸ Hanauer, p. 152 (“Collectively . . . in combination with the Charter and human rights covenants, and after years of evolving state practice [General Assembly Resolutions] have developed a set of norms of self-determination that have achieved the status of customary international law, defined by Article 38(1)(b) of the I.C.J Statute as a “general practice accepted as law.”).

practice accepted as law.” Justice Dillard, in his separate opinion in the Western Sahara Case, referred to the position espoused by many scholars that:

The cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio 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-governing territories.⁹⁹

A determination that the right to self-determination is a principle of customary international law has formed the basis of a number of opinions and decisions of the International Court of Justice both prior to and following the *Western Sahara Case*. It was emphasized in the Court’s Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.¹⁰⁰ It was also cited and applied to another Non-Self-Governing Territory in the Judgment

⁹⁹ Advisory Opinion, *supra*, at 121 (separate opinion of Dillard, L.). Some scholars disagree with the proposition that the mere repetition of Resolutions by the General Assembly can create a principle of international law. However, most scholars agree that when coupled with the application of the principle by states and the International Court of Justice over a period of time (particularly when coupled with similar principles announced in Resolutions of the Security Council and the application of these principles by the Security Council in different contexts over a period of years), the principles enunciated by such Resolutions can acquire the status of customary international law. *See, for instance*, Thomas de Saint Maurice, *Sahara Occidental 2001: Prelude d’un Fiasco Annonce* (Actualite et Droit International, February 2002) at 2 – 3, citing the decision of the International Court of Justice in the case of *East Timor (Portugal v. Australia)*, June 30, 1995, par. 29. The United States Government Response to the International Committee of the Red Cross Study “Customary International Humanitarian Law,” Vol. 89, No. 866 (June 2007) suggested that “customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation or *opinio juris*,” and while such norms cannot be distilled from Resolutions of the U.N. General Assembly, they can be derived from state practice that is “extensive and virtually uniform,” “sufficiently dense,” and has due regard to the “practice of specially affected States.” (pps. 444-445) Although directed principally at issues involving armed conflict, the conditions outlined by the paper may reflect the position of the U.S. Government with respect to the development of international legal norms in other contexts.

¹⁰⁰ Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53.

of the International Court of Justice in *Case Concerning East Timor (Portugal vs. Australia)*, June 30, 1995.¹⁰¹

The principle enunciated by these cases was reflected most recently in the Advisory Opinion of the Court in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004) (“Opinion on Construction of Wall”).¹⁰²

In that case the Court declared that Article 1, common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, reaffirmed the right of all peoples to self-determination, and laid upon the states parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.¹⁰³

It then recalled that in 1971 it emphasized that current developments in international law in regard to Non-Self-Governing Territories, as enshrined in the Charter of the United Nations, “made the principle of self-determination applicable to all [such territories],” concluding that “[t]hese developments leave little doubt that the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was self-determination . . . of the peoples concerned” (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security*

¹⁰¹ In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice, had an *erga omnes* (i.e., binding on all parties) character, was “irreproachable.” The Court noted that the principle of self-determination of peoples had been recognized by the United Nations Charter and in the jurisprudence of the Court (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; and *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, pp. 31-33, paras. 54-59) and stated that it was “one of the essential principles of contemporary international law”

¹⁰² *Opinion on Construction of Wall*, *I.C.J. Reports 2004*, p. 136.

¹⁰³ *Id.* paras. 89, 154-156.

Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, paras. 52-53). The Court further recalled that it “has referred to this principle on a number of occasions in its jurisprudence” (citing the *Western Sahara Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court finally made it clear that the right of peoples to self-determination is today a right *erga omnes* (citing its decision in *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.)¹⁰⁴

The existence of a right to self-determination under international law has also been recognized by state courts. In *Reference: Secession of Quebec*,¹⁰⁵ the Supreme Court of Canada declared that “[t]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law.”¹⁰⁶

There also exists a long line of General Assembly Resolutions asserting this right. Among these, Resolution 1514 (XV) makes the strongest contribution to the notion that self-determination has become customary law. As a “declaration” that was adopted without dissent, the Resolution has a special status. The U.N. Office of Legal Affairs has written 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 binding upon States.¹⁰⁷

¹⁰⁴ *Id.* para. 88

¹⁰⁵ Supreme Court of Canada [1998] 2 S.C.R. 217.

¹⁰⁶ *Id.* para. 114, citing A. Cassese, *Self-determination of peoples: A legal reappraisal (1995)*, pps. 171-172; K. Doehring, “*Self-Determination*,” in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (B. Simma, Ed., 1994), at p. 70.

¹⁰⁷ Memo of April 2, 1962 (quoted in *Right to Self-Determination Study, supra*, para. 148.)

D. People Entitled to Invoke the Right

As noted above, the Charter and the various United Nations Resolutions refer to the principle of self-determination that belongs to “peoples.” However, it is clear that not all groups enjoy the same “right” to self-determination under international law. In his study entitled *The Right To Self-Determination – Historical and Current Developments on the Basis of United Nations Instruments*, Aureliu Cristescu, a Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, surveyed the relevant U.N. documents and found no commonly accepted, clearly articulated, standards for determining what groups in general qualify as “peoples” entitled to exercise the right to self-determination without potentially resulting in the disintegration of the territorial integrity of established nation-states.¹⁰⁸ Cristescu concluded, “[t]here is no text or recognized definition from which to determine what is a ‘people’ possessing the right in question.” For that reason, Cristescu noted, “the United Nations has proceeded with caution in cases of political self-determination, although it has acted firmly in the matter of the elimination of colonialism.”¹⁰⁹

¹⁰⁸ In some United Nations documents the principle of self-determination seems to acquire a universal application, or a collective right belonging to all “peoples,” regardless of whether they inhabit Non-Self-Governing Territories or existing states. *See*, Right to Self-Determination Study, *supra*, paras. 31, 46 (1981). United Nations Charter Article I(2), for instance, refers to the “principle of equal rights and self-determination of peoples.” Article 55 of the Charter repeats this phrase, which appears to convey a universalist understanding of the right of all “peoples” to self-determination. Similarly, the International Covenant on Civil and Political Rights (“ICCPR”) has also adopted a universalistic concept of “peoples,” providing in Article 1 that, “[a]ll peoples shall have the right of self-determination.”¹⁰⁸ *See*, International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976, 999 U.N.T.S. 171. The U.N. General Assembly adopted a universalistic approach to the right of all “peoples” to self-determination in Resolution 637 A (VII), which provides that “The States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations.”

¹⁰⁹ Right to Self-Determination Study, para. 279. Numerous commentators have suggested that the right to self-determination applies only in the colonial context. *See, e.g.*, Hanauer, *supra*, at 145-146 (“By placing the right to self-determination firmly in the context of colonialism, [G.A. Res. 1514] defines self-determination as a right to decolonization. The law of self-determination, therefore, has become inextricably linked to the process of decolonization.”); Weller, *supra*, at 112-113 (“[G]overnments ... have simultaneously ensured that the legal right to self-determination, at least in the sense of secession, is strictly rationed and cannot ever be invoked against the state they represent. ... Hence, self-determination as a positive entitlement to secession has been applied only to classical colonial entities and closely analogous cases.”)

One thing is clear: the term “peoples” need not comprise the inhabitants of an existing state. The Charter uses the term “peoples” separately from its use of the term “state,” implying that each term has its own distinct meaning.¹¹⁰ The U.N. Secretariat confirmed this distinction in a memorandum in which the Secretariat described “peoples” as “groups of human beings who may, or may not, comprise states or nations.”¹¹¹ Consistent with the Charter’s separate use of the terms “peoples” and “state,” General Assembly Resolution 637 also used the terms “peoples” and “nations” separately.¹¹²

However, regardless of how the term “peoples” when applied to the right to self-determination can be applied in other contexts, as was noted above, state practice, supported by International Court of Justice Advisory Opinions and General Assembly Declarations, has led to the gradual formation of customary international laws providing all “peoples” inhabiting Non-Self-Governing Territories with this right.

Laurence Hanauer¹¹³ sums it up best: the Charter, Human Rights Conventions, General Assembly Resolutions, Opinions of the International Court of Justice and state practice have collectively defined the right to self-determination as the right to decolonization and attainment of self-government for peoples inhabiting Non-Self-Governing and Trust Territories, through a process that takes into account the freely expressed will of the people.

¹¹⁰ United Nations Charter, Chapter IX: International Economic And Social Co-operation, Article 55.

¹¹¹ H. Quane, “*The United Nations and the Evolving Right to Self-Determination*,” *The International and Comparative Law Quarterly*, Vol. 47, No. 3 (July 1998), p. 543.

¹¹² G.A. Res. 637 A (VII), 8 U.N. GAOR Supp. (No. 17), U.N. Doc. A/2630 (1953). This Resolution, adopted on December 16, 1952, was an early recognition that “every Member of the United Nations, in conformity with the Charter, should respect the maintenance of the right of self-determination.”

¹¹³ Hanauer, *supra*, p. 155.

E. Geographic Boundaries on the Right to Self-Determination

A consensus has emerged that there must be some link between the “people” entitled to self-determination in the decolonization process and a specific Non-Self-Governing Territory. In Article 73(e), regarding the colonial territories where peoples without self-government are living, Resolution 1541 links “peoples” to “territories.” It then goes on to define those territories according to the following characteristics: (1) geographically separate and (2) ethnically and/or culturally distinct from the colonial administering power.¹¹⁴

Similarly, the two primary United Nations human rights conventions, the International Covenant on Civil and Political Rights¹¹⁵ and the International Covenant on Economic, Social and Cultural Rights,¹¹⁶ primarily define self-determination on a territorial basis. According to these documents, ethnic, religious, cultural or historic ties without any association with the people inhabiting a territory do not create any binding legal rights to self-determination.¹¹⁷

In its Advisory Opinion regarding the status of Western Sahara, the International Court of Justice used such a territorially based concept of “peoples.” It concluded, “the

¹¹⁴ G.A. Res. 1541 (IV), *supra*.

¹¹⁵ International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976, 999 U.N.T.S. 171.

¹¹⁶ International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, entered into force January 3, 1976, 993 U.N.T.S. 3.

¹¹⁷ Right to Self-Determination Study, *supra*, at para. 147. Cristescu also arrived at a definition which avoided referring to specific characteristics along ethnic or cultural lines, concluding that the “term ‘people’ denotes a social entity possessing a clear identity and its own characteristics,” and that it “implies a relationship with a territory.” See Right to Self-Determination Study, para. 279. Other authors have suggested that the provisions of the United Nations Charter providing for self-determination are similarly limited. See, for instance, Hanauer, *supra*, at 141 “Chapters XI and XII clearly establish . . . the beneficiary of self-determination or self-government: ‘territories whose peoples have not yet attained a full measure of self-government’ . . . Article 76 further states that Member States undertake to ensure the development of the trust territories. Nothing in either chapter directly addresses obligations towards non-self-governing peoples; only peoples who inhabit distinct, bordered tracts of land are eligible for self-government.”

information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.”¹¹⁸ It was the territorial status of a people that mattered in determining whether the peoples had a right to self-determination. The Court concluded that the history and culture of a people have no legal bearing on the right to self-determination in the absence of a territorial connection, because such historical and ethnic characteristics have no bearing on territorial rights.¹¹⁹

(1) The Limitation of *Uti Possidetis Juris*

The principle of *uti possidetis juris* requires that the boundaries set by colonial rulers, regardless of how idiosyncratic, be respected in exercising self-determination in order to prevent the incessant disruptions to international order that would result if every ethnic minority within a territory were to claim this right. According to S. James Anaya,

[I]f international law were to fully embrace ethnic autonomy claims on the basis of historic sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international law an agent of instability rather than stability.¹²⁰

The practical necessity of retaining the boundaries of Non-Self-Governing Territories established by the colonial powers has been reaffirmed by the International Court of Justice. As the Court noted in its opinion on the *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (“*Frontier Dispute*”), such a doctrine is necessary to prevent the

¹¹⁸ Advisory Opinion, para. 81.

¹¹⁹ Advisory Opinion, paras. 66-68.

¹²⁰ S. J. Anaya, “*The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*,” 75 Iowa L. Rev. 837, 840 (1990). See also Frank, *supra*, p. 698.

decolonization process from threatening the stability of the international political order.¹²¹ The Court explained that the “obvious purpose [of the doctrine of *uti possidetis juris*] is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”¹²²

Even the African Union, despite the “absurdity and lack of legal authority of colonial boundaries in Africa,”¹²³ has adopted the doctrine of *uti possidetis juris* and the retention of colonial borders in order to make the decolonization process as orderly and peaceful as possible. The Prime Minister of Ethiopia declared at the Addis Ababa Summit Conference of 1963, at which the African Union was established, “[i]t is in the interest of all Africans today to respect the frontiers drawn on the maps, even though they were drawn by the former colonizers.”¹²⁴ As a result, the Addis Abba Summit made the principle of *uti possidetis juris* one of the cornerstones of the African Union Charter.¹²⁵ In 1964, in Cairo, Egypt, the African Union reaffirmed its commitment to the principle of *uti possidetis juris* in the Cairo Declaration, which declared that “the borders of African States, on the day of their independence, constitute a tangible reality” and that “all Member States pledge themselves to respect the borders existing on their achievement of national independence.”¹²⁶ As such, it is clear that the African Union accepts the legal validity of borders imposed by colonial rule¹²⁷ and recognizes the colonial

¹²¹ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (1986) I.C.J. 554.

¹²² *Id.* p. 565

¹²³ A. Allot, *Boundaries in Africa: A Legal and Historical Survey*, in *AFRICAN INTERNATIONAL LEGAL HISTORY* 69 (A. K. Mensah-Brown ed., 1975), p. 83; U.N. Doc. JX/1977/XV/ST9 (1975).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ A.U. Assembly Res. AHG/Res. 17(1), July 17-21, 1964.

¹²⁷ See A. G. Pazzanita, *Legal Aspects of Membership in the Organization of African Unity: The Case of Western Sahara*, 17 *Case W. Res. J. Int'l L.* 123, (1985) p. 138.

borders as the basis for claims of self-determination and state sovereignty, thereby rejecting claims to self-determination based solely on ethnic or historical claims or subgroups within a Non-Self-Governing Territory.¹²⁸

(2) Nature of Links to the Non-Self-Governing Territory

One final question must be resolved in order to ascertain the “peoples” entitled to claim the right to self-determination granted to the peoples of Non-Self-Governing Territories. This is the nature of the links to the territory which must exist. Is the right available only to the indigenous population of the territory or should anyone who inhabits the territory be entitled to exercise this right? There are innumerable instances in which citizens of a colonial power or other foreigners have resided in colonies during the period of colonial rule and thereafter until self-determination has been rightfully exercised. In almost all instances of decolonization through a U.N. approved referendum or other process, the people entitled to vote on their future have been limited to those who have been considered the indigenous inhabitants of the territory. Indeed, it would be inimical to the principle of self-determination of the peoples of colonies to permit people brought into the colony by the colonial powers to participate in the exercise of this right. It would be even more inimical to the principle of self-determination of the peoples of colonies to grant the right to people brought into the colony by a power occupying the colony illegally by force. Accordingly, although there may be difficulties in describing the criteria applicable to an indigenous group permitted to exercise the right to self-determination,¹²⁹ or in ascertaining whether a particular individual actually belongs to such a group, there is usually no

¹²⁸ *Id.*, p. 149.

¹²⁹ This may be particularly problematic where there are a number of ethnic minorities who have historically inhabited a territory or where the indigenous inhabitants have intermarried with members of other populations.

question that the right should be limited to legitimate members of the indigenous group unless they, themselves, wish to confer this right upon others.

F. Exceptions to the Right to Self-Determination

As always with regards to the development of a principle of international law, there have evolved certain exceptions to the application of the principle of self-determination as applied to Non-Self-Governing Territories. One of these exceptions is based on the principle of “integration.” The Committee notes that at least one author¹³⁰ has contested the *jus cogens* nature of the right to self-determination for people inhabiting such territories, at least in certain circumstances, by asserting that the right to self-determination may be protected by the *pacta tertiis* rule – that is, the principle of integration.¹³¹ However, as a principle of international law, integration has historically been deemed relevant only in the most limited circumstances, that is, to tiny territories ethnically and economically parasites of, or deriving from, that state, and that cannot be said in any legitimate sense to constitute separate territorial units.¹³² The prerequisites to integration as a mode of self-determination are set out in Principle IX of Resolution 1541 (XV). Thus far, four territories have been integrated with other states on grounds of national unity rather than self-determination; Goa and dependencies, and French Establishments in India

¹³⁰ See J. Crawford, *supra*, pps. 79-81, 366.

¹³¹ Ifni, the smaller of the two territories referred to in Resolution 2072(XX), was a small territory surrounded on all sides by an independent state, in this case, Morocco. U.N. practice with respect to such enclaves has varied; at times it has permitted the territory to be integrated into the surrounding state without obtaining the official approval of the inhabitants on the assumption that the territory had been detached from the surrounding state during the colonial period and could not survive independently of it. Integration on this basis is an exception to the principle applied to larger, more viable territories under which integration with another state must be through the “responsible choice through informed and democratic processes” and has historically been applied only in the most limited circumstances, that is, to tiny territories considered ethnically and economically a “parasite” of an adjacent state. See Resolution 1541(XV) Principle IX; R. T. Vance, “Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara,” *Yale Journal of World Public Order* (“Vance”) 7:45 (1980), p.48, fn. 17. See also A. Rigo-Sureda, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* (Leiden: Sijthoff, 1973) pps. 214-20.

¹³² Vance, p. 48.

(India); Ifni (Morocco); and São João Baptista de Adjuda (Dahomey, now known as the Republic of Benin).¹³³

A far greater exception to the applicability of the right to self-determination to Non-Self-Governing Territories is posed by the countervailing principle of territorial integrity as applied to larger, potentially viable territories, which shall be discussed in greater depth below.

II. THE COUNTERVAILING RIGHT TO TERRITORIAL INTEGRITY

As stated above, outside of the colonial context, a people's right to self-determination is more complicated because of the interplay with a state's right to territorial integrity. Both the right to self-determination and the principle of territorial integrity are foundational preemptory norms of the international legal order.¹³⁴ As a result, when a group of people that exists within an already established state seeks to exercise its collective right to self-determination, these two foundational principles come into direct conflict. The following section will address how international law has sought to reconcile these two competing rights.

A. The Principle of Territorial Integrity As Applied to the Rights of Subgroups of an Existing State

(1) Application of the Principle of *Uti Posseditis Juris*

The importance of the principle of territorial integrity is laid out in many different legal texts, including Article 2 of the United Nations Charter.¹³⁵ As discussed above, even in the

¹³³ J. Crawford, *supra*, p. 370.

¹³⁴ L. Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 Harv. Int'l L.J. 553 (Summer, 2010) pps. 567-577.

¹³⁵ U.N. Charter art. 2, para. 4 ("All Members 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 United Nations."); *see also*, Declaration on Principles of International Law Concerning

context of liberation from colonialism, the principle of territorial integrity plays a role through the principle of *uti possidetis juris*, denying to subgroups of a Non-Self-Governing Territory the rights that are applicable to the people as a whole.

The principle assumes even greater importance in the context of the rights of subgroups within an already existing state. The Badinter Commission, created in 1991 to address the issues in the former Yugoslavia, emphasized that this principle applied in all contexts, holding that “whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”¹³⁶ Indeed, in non-colonial situations, the primacy of territorial integrity is controlling.¹³⁷ Allowing the unlimited exercise of rights of self-determination by any group that constitutes a people could potentially lead to the fracture of many states within the international community. The result was the establishment of two understandings of the right to self-determination: (1) the right to external self-determination, available in cases where a people seeks relief from extreme forms of oppression, most commonly, colonialism (discussed in detail

Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, art. 1, G.A. Res. 2625 (XXV), Annex, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (October 24 1970) (“The territorial integrity and political independence of the State are inviolable.”) (“Declaration on Friendly Relations”); Convention on the Rights and Duties of States art. 11, December 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (“The territory of a state is inviolable.”) (“Montevideo Convention”); Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 October 2, 2007 (“Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”) (“Indigenous Peoples Declaration”).

¹³⁶ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 2, July 4, 1992, 31 I.L.M. 1488, 1498 (1992) (“Badinter Commission”).

¹³⁷ See, e.g., G.A. Res. 1514(XV) *supra* (“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”); Declaration of Friendly Relations, *supra*, (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”).

in the above section); and (2) the right to internal self-determination, which is available to all groups of peoples within existing states. This section will discuss the internal rights of self-determination that a population within an existing state possesses, as well as when, under international legal principles, those rights can manifest themselves as a right to secession¹³⁸ or external self-determination.

(2) Internal Self-Determination and the Savings Clause

As detailed above, in deference to the principle of territorial integrity, international law has proven resistant to recognizing a unilateral right of secession for all peoples.¹³⁹ The overriding fear is that the unilateral, unfettered exercise of self-determination on behalf of all “peoples” would lead to an unacceptable level of fragmentation and destabilization in the international system.¹⁴⁰ As a result, international law has provided for a more limited right of internal self-determination for peoples within existing established states, where the possibility of external self-determination or secession is only available when the “group is collectively denied civil and political rights and [is] subject to egregious abuses.”¹⁴¹

Internal self-determination, which applies to all groups that meet the definition of peoples under international law, provides for a set of respected rights within the central state, including the people’s right to the “pursuit of its political, economic, social and cultural

¹³⁸ Secession may be defined as “the separation of part of the territory of a State carried out by the resident population with the aim of creating a new independent State or acceding to another existing State.” Christine Haverland, “Secession”, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 354 (Rudolph Bernhardt ed., 2d ed. 2000).

¹³⁹ L. Seshagiri, *supra*, p. 573.

¹⁴⁰ R. Dickinson, *Twenty-First Century Self-Determination: Implications Of The Kosovo Status Settlement For Tibet*, 26 *Ariz. J. Int’l & Comp. Law* 547, 552 (Fall 2009).

¹⁴¹ M. Sterio, “*On the Right to External Self-Determination: ‘Selfistans,’ Secession, and the Great Powers’ Rule,*” 19 *Minn. J. Int’l L.* 137, 143 (Winter 2010).

development within the framework of an existing state.”¹⁴² It is a guarantee of autonomy and self-governance; in short, an “exercise in freedom.”¹⁴³ In practical terms, it is the right to effective political participation, including, ideally, the right to vote, petition the government, speak out and dissent against the government, and hold and run for office.¹⁴⁴ It includes the right “of national or ethnic groups within the state to assert some degree of ‘autonomy’ over their affairs, without giving them the right to secede.”¹⁴⁵

In a widely-cited decision, the Supreme Court of Canada addressed the right of internal self-determination under international law in relation to secessionist elements in Canada’s French-speaking province of Quebec. In 1995, the people of Quebec had narrowly voted in a referendum to remain in the union with Canada. The closeness of the vote led to a request for an advisory opinion from the Canadian Supreme Court to address the question of whether or not Quebec could unilaterally secede from Canada. The Court issued its opinion in 1998.¹⁴⁶ The Court ruled that the right to self-determination for peoples inhabiting a recognized state must “be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”¹⁴⁷ The Court did,

¹⁴² Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, 282 (Can.).

¹⁴³ L. Seshagiri, *supra*, p. 556.

¹⁴⁴ *Id.*, p. 557.

¹⁴⁵ P. Groarke, *DIVIDING THE STATE: LEGITIMACY, SECESSION AND THE DOCTRINE OF OPPRESSION* (2004), p. 84; *see also* A. Cassese, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1998), pps. 350-351.

¹⁴⁶ *Id.*

¹⁴⁷ Reference: Secession of Quebec, *supra*, [1998] 2 S.C.R. 217, para. 122. The Court was careful to differentiate the right to self-determination for a “people” inhabiting an existing state from the right to self-determination for a “people” inhabiting a Non-Self-Governing Territory. With respect to the latter, the Court considered that existence of the right to self-determination was indisputable, and included the right to independence. *See*, para. 114.

however, recognize that “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.”¹⁴⁸

Accordingly, under international law, there is no unilateral right to secession *per se*.¹⁴⁹ Although populations within states have at times tried to unilaterally secede, and despite the recent opinion of the International Court of Justice that provides that an independence declaration is not contrary to international law (at least in the Kosovo case¹⁵⁰), the international legal recognition of a “state” that has attempted to unilaterally secede is the exception, not the rule.¹⁵¹ As was stated in a report of a Special Rapporteur issued by the U.N. Economic and Social Council in 1980:

The express acceptance in [relevant U.N. Resolutions] of the principles of national unity and the territorial integrity of the State implies non-recognition of the right of secession . . . The right to secession from an existing State member of the United Nations does not exist as such in the instruments or in the practice followed by the Organization, since to seek to invoke it in order to disrupt the national unity and the territorial integrity of a State would be a misapplication of

¹⁴⁸ *Id.* para. 134

¹⁴⁹ C. Warbrick, “States and Recognition in International Law,” in *INTERNATIONAL LAW* 217, 227 (Malcolm Evans ed., 2nd ed., 2006) (State practice resists any claim to a right to secession “leading to statehood against the will of the present sovereign.”).

¹⁵⁰ Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, (July 22, 2010). In its recent advisory opinion on the legality of Kosovo’s unilateral declaration of independence, the International Court of Justice attempted to take a narrow view of the question before it, concluding that it need only decide whether “international law prohibited the declaration,” and not whether a “positive entitlement” to independence existed. (p 56). The Court looked at state practice and Security Council actions and determined that there was no prohibition on declaration of independence in international law. Importantly, the court noted that it was not deciding the ultimate question of whether the declaration should result in an independent state for Kosovo.

¹⁵¹ J. Crawford, *STATE PRACTICE AND INTERNATIONAL LAW IN RELATION TO UNILATERAL SECESSION, IN SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED* 31, 32 (Anne F. Bayefsky ed., 2000) (“Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede.”).

the principle of self-determination contrary to the purposes of the United Nations Charter.¹⁵²

Other than states that have been formed by the dissolution of their parent states, such as those that were carved out of the former Soviet Union or former Yugoslavia, we have identified only a few states – such as Eritrea, the Republic of South Sudan, and perhaps Bangladesh – that, subsequent to the formation of the United Nations, unilaterally seceded outside of the colonial context and were subsequently admitted by the U.N.¹⁵³ Although there does not appear to be a unilateral right to secession under international law *per se*, there does exist a *qualified* right that applies, in exceptional circumstances, to peoples who are part of an existing state. As the Canadian Supreme Court explained in the Quebec Reference opinion:

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g. the right of secession that arises in the exception situation of an oppressed or colonial people.¹⁵⁴

Thus, the Canadian Supreme Court recognized that international law has carved out an exception to the general denial of the right of unilateral secession when a population is “oppressed” or inhabits a “colony.” The availability of external self-determination when there is evidence of oppression is based on a principle known as the remedial rights theory and has some

¹⁵² U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, The Right to Self-Determination, Implementation of United Nations Resolutions, P 90. U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (prepared by G. Espiell Special Rapporteur).

¹⁵³ Following a civil war and secessionist movement, Eritrea asked for a U.N.-sponsored referendum on Eritrean independence and under U.N. General Assembly Resolution 47/144, the U.N. established an Observer Mission to oversee the referendum. U.N. GAOR, 47th Sess., 3d Committee, Agenda Item 97(b), Annex II at 4, U.N. Doc. A/C.3/47/5 (October 29, 1992). The vote took place in 1993 and the ballot was in favor of independence. Eritrea was subsequently admitted to the U.N. and the African Union. S.C. Res. 828, U.N. Doc. S/RES/828 (June 4, 1993).

¹⁵⁴ Reference re: Secession of Quebec, [1998] 2 S.C.R. 217 (Can.). Para. 112.

historical precedent.¹⁵⁵ In the *Åaland Islands Case*,¹⁵⁶ the inhabitants of a small island that was part of Finnish territory wished to join Sweden. Their claims were brought to the League of Nations, where the Second Commission of Rapporteurs issued an advisory opinion saying that the territorial integrity of Finland had to be respected, and that a right to secession from Finland would only exist for the Åalanders if Finland showed a manifest disrespect for the cultural and ethnic autonomy of the Åalanders.¹⁵⁷ The African Human Rights Commission came to a similar conclusion in assessing the secessionist claims of the Katangese people. The Commission observed that,

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by ... the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.¹⁵⁸

This principle is echoed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (hereinafter, “Friendly Relations Declaration”):

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-

¹⁵⁵ A. Cassese, *INTERNATIONAL LAW* 119 (2d Ed. 2005) [arguing that right to external self-determination might be appropriate where the central government persistently denies a people political participatory rights, grossly and systematically violates their fundamental human rights, and denies the peaceful settlement of any disputes through the institutions of the central state].

¹⁵⁶ The Åaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106 at 34 (1921) (“Åaland Islands Report”) [deciding that the Åalanders, a small island group belonging to Finland and seeking to reunite with Sweden, had the right to cultural and ethnic autonomy, but not the right to separate from Finland].

¹⁵⁷ M. Sterio, “*On the Right to External Self-Determination: ‘Selfistans,’ Secession, and the Great Powers’ Rule,*” 19 *Minn. J. Int’l L.* 137, 143-144 (Winter 2010).

¹⁵⁸ *Katangese Peoples’ Congress v. Zaire*, African Commission on Human and Peoples’ Rights, Comm. No. 75/92 (1995), para. 6.

determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹⁵⁹

The Friendly Relations Declaration thus makes upholding the territorial integrity of a state dependent upon the existence of a government that represents the entirety of a people, respects human rights, and does not discriminate against certain parts of its population based on race, creed or color, and this principle has been echoed by other human rights agreements and human rights bodies.¹⁶⁰

Remedial rights theorists argue that the people seeking to exercise external self-determination must demonstrate that they are pursuing a legitimate cause:

[A] group has the right to secede (in the absence of any negotiations or constitutional provisions that establish a right) only as a remedy of last resort to escape serious injustices... injustices capable of generating a right to secede consist of persistent violations of human rights, including the right to participate in democratic governance, and the unjust taking of the territory in question, if that

¹⁵⁹ Friendly Relations Declaration, para. 7.

¹⁶⁰ *See, e.g.*, Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities, U.N. Doc. E/CN.4/Sub.2/AC.5/2005/WP.3 (April 22, 2005) (holding that there is no right to secession provided that government respect and act in a manner consistent with the equal rights of peoples without regard to colour, race or creed.); Commission on Human Rights, Sub-Commission on Prevention of Discrimination & Protection of Minorities, "Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities," para. 84, U.N. Doc. E/CN.4/Sub.2/1993/34 (August 11, 1993) ("Only if the representatives of the group concerned can prove, beyond reasonable doubt, that there is no prospect within the foreseeable future that the Government will become representative of the whole people, can it be entitled to demand and to receive support for a quest for independence."); Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 51st Sess., Supp. No. 18, General Recommendation XXI at 125-26, P 11, U.N. Doc. A/51/18 (Sep. 30, 1996) ("The Committee emphasizes that, in accordance with the Declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or colour. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paras. 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.").

territory previously was a legitimate state or a portion of one (in which case secession is simply the taking back of what was unjustly taken).¹⁶¹

Although there is no universal consensus on the extent of the violations necessary to justify a right to external self-determination (i.e., secession), there is general agreement that it is only justified in extreme cases where “definite and substantial grievances” are present and “all other [means of resolving these grievances] have been exhausted or repudiated.” As such, in evaluating any claim of secession, the test of whether the secessionist claims are justified should look to the “the nature and extent of the deprivation of human rights of the subgroup claiming the right.”¹⁶² For example, gross violations of fundamental human rights norms (such as genocide) that occur within a given state over an extended period of time may be sufficient to justify secession.¹⁶³ Some prominent scholars have argued that a prolonged period of military occupation “is itself a condition of de facto unlawfulness that represents a continuing denial of the right to self-determination and gives rise to a right of resistance within the confines of international humanitarian law.”¹⁶⁴

Recent state practice has also supported the application of the remedial rights theory in cases of extreme oppression. The secessionist revolutions that led to the independence of Bangladesh from Pakistan and the formation of new states from the Former Yugoslavia (the

¹⁶¹ A. Buchanan, “Democracy and Secession,” in NATIONAL SELF-DETERMINATION AND SECESSION 1, 25 (Margaret Moore ed., 1998). Indeed, one of the principal exceptions to the non-violability of the principle of territorial integrity relates to the recovery of land that was lost due to the illegal use of force. International law recognizes the right of the occupants to overthrow the invaders and reestablish an independent state. See R. Dickinson, “*Twenty-First Century Self-Determination: Implications Of The Kosovo Status Settlement For Tibet*,” 26 Ariz. J. Int’l & Comp. Law 547, 558 (Fall 2009). See also, H. Hannum, “*Rethinking Self-Determination*,” 34 Va. J. Int’l L. 1, 44-4 (1993).

¹⁶² V. P. Nanda, “Self-Determination Outside The Colonial Context: The Birth Of Bangladesh In Retrospect,” in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 193, 204 (Yonah Alexander & Robert. A. Friedlander eds., Westview Press 1980).

¹⁶³ H. Hannum, *supra*, pps. 46-48.

¹⁶⁴ R. Falk, Agora, “*The International Court of Justice’s Kosovo Advisory Opinion: The Kosovo Advisory Opinion: Conflict Resolution And Precedent*,” 105 A.J.I.L. 50 (January 2011) p. 59.

republics of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia) and most recently the Republic of South Sudan, are arguably a recognition of the right to external determination of peoples consistently denied the right to effectively participate in their self-governance.¹⁶⁵ In some cases the people had been subject to horrific human rights abuses and ethnic violence by the central government, which only enhanced their claims.¹⁶⁶

Of course, the limitations on the right to self-determination derived from the above principles arose in the context of the right of a “people” to *secede* from an existing state – they presuppose that the territory occupied by the group seeking secession exists within the internationally recognized boundaries of the state from which they desire to secede.

B. The Doctrine of Historic Ties to Support a Claim to Territory under the Right to Territorial Integrity

The previous section outlined the right of territorial integrity as it pertains to groups that presently exist within an established and recognized state.

However, in a number of cases, states have argued that they have a right under international law to annex portions of a territory or other sovereign state (i.e., consider such portions within their territorial boundaries and therefore protected under the doctrine of territorial integrity) whose population is not within its currently recognized boundaries, on the basis of historic ties with those populations.

¹⁶⁵ J. Martinez-Paoletti, “Rights And Duties Of Minorities In A Context Of Post-Colonial Self-Determination: Basques And Catalans In Contemporary Spain,” 15 Buff. Hum. Rts. L. Rev. 159, n.49 (2009).

¹⁶⁶ M. Sterio, “On the Right to External Self-Determination: ‘Selfistans,’ Secession, and the Great Powers’ Rule,” 19 Minn. J. Int’l L. 137 (Winter 2010) p. 146.

Such arguments raise a number of legal and policy issues. At the outset it should be noted that this argument does not arise if the population of an already existing state voluntarily wish to consolidate its territory with that of another state; there is no principle of international law that prohibits independent states from freely agreeing to join in federations or to establish a joint sovereign state, and there are many examples throughout history when this has been done. Rather, it arises only if the annexation is against the will of the majority of the population of the other sovereign state, whose territorial rights are being challenged and who can invoke the principle of territorial integrity, or against the will of the inhabitants of the portion being annexed who can invoke the principle of self-determination. Likewise, as will be discussed in greater depth in the next section of this Report, the argument is only raised in the context of the annexation of a Non-Self-Governing Territory if such annexation is against the will of the people of the territory.¹⁶⁷

In the former case, such as when Iraq used the argument of “historic ties” to claim sovereign rights over the territory of its sovereign state neighbor, Kuwait, against the will of its people, the argument nearly always fails. In the case of Non-Self-Governing Territories in the process of decolonization, however, the situation is more complicated. Such a claim is not automatically discounted, but must be weighed against the conflicting claim to self-determination of the inhabitants of the territory. At the outset, the argument as a philosophical principle suffers from the fact that different governments can rely upon the principle to justify the annexation of the same territory depending upon how far back in time scholars are willing to

¹⁶⁷ The other context in which it can be raised is with respect to a territory that is unpopulated or *terra nullius*. This was the situation that presented itself in the case of *The Legal Status of Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53 (April 5) which will be discussed later in this report. In that context a stronger argument can be made for an evaluation of historic ties.

go¹⁶⁸ and that it is difficult to justify the exercise of power over an unwilling populace on the basis of what happened two hundred or more years prior. It is a principle that, if liberally applied by the international community, would inevitably lead to greater, rather than fewer, conflicts over international boundaries.¹⁶⁹

For these reasons, the argument has been disfavored under international law when it has been invoked, and in order to succeed it must meet stringent requirements. The clearest enunciation of the interplay between the right of a state to claim territory on the basis of historic ties and the countervailing right of the people of Non-Self-Governing Territories to self-determination is found in the decision of the International Court of Justice concerning Western Sahara. In the Advisory Opinion it issued in 1975, which will be discussed in depth later in this Report, the Court first recognized the right to self-determination as the principal right at stake in decolonization.¹⁷⁰ For that reason it stipulated that only ties of a formal, traditional political and legal nature between a state and a colony at a time just prior to its colonization could overcome

¹⁶⁸ For instance, the Algerian justice minister in 1976 observed: “Does Morocco demand the Sahara because some Moroccan traders transited through it to buy gold and slaves in what was then called the ‘Soudan’? In this hypothesis, the Sahrawis have the right to demand Morocco and Spain because their ancestors the Almoravids departed from this territory in the eleventh century to spread their authority over the whole region and Andalucia.” Bouale Be Hamouda, *La question du Sahara occidental et le droit international* (Algiers, 1976), p. 12; cited by Hodges, *supra*, at 195. The author cited arguments that prior to 1145, when Sultan Abd el Moumen definitively broke off relations with the Calif of Baghdad, the Calif ruled over Moroccan lands, so that under Morocco’s argument Iraq can legitimately claim Morocco as part of its territory. Following Morocco’s argument to its logical conclusion, according to this author, some historians have suggested that the states of the Persian Gulf would cease to have the right to exist and Morocco, most of Algeria, and all of Mauritania, should belong to one large Maghreb state.

¹⁶⁹ As Professor Thomas M. Franck noted in “*The Stealing of the Sahara*,” *Am.J.Int’l Law* Vol. 70, 694 (1976) p. 698: “This paramountcy of contemporary self-determination over historic claims and the alleviation of ancient wrongs is based on two considerations. First, there is the assumption that any other approach would lead to endless conflicts, as modern states found themselves under pressure to join a general reversionary march backward to a *status quo ante* of uncertain age and validity. Second, 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.”

¹⁷⁰ Advisory Opinion, paras. 12, 32. The Court, when asked by the General Assembly in Resolution 3292 to determine the legal ties between Morocco and Mauritania and Western Sahara construed the words “legal ties” in light of the purpose of Resolution 3292(XXIX) and the policy that should be adopted with respect to the decolonization of Western Sahara.

the application of the principle of self-determination, and that evidence of religious ties and vague oaths of allegiance between some groups of the population and the state were insufficient.¹⁷¹ To summarize, according to the International Court of Justice, a state must demonstrate ties between itself and the population of a colony *as a whole* and *over a continuous period* and *in a significant and formal fashion* immediately preceding its colonization in order to overcome the right to self-determination of the inhabitants of the colony.

C. Other Bases for Acquiring Territory Subject to the Right of Territorial Integrity

There are a number of other ways, sanctioned by international law, in which a state may expand its territorial limits. As noted previously, sovereign states may voluntarily cede all or portions of its territory to another sovereign state. However, since the United Nations creation of the category of Non-Self-Governing Territories as a process for the decolonization of territories controlled by Western powers it has been held that colonial powers do not have the right to sell or cede portions of Non-Self-Governing Territories to other states. Instead, colonial powers are designated as “Administering Powers” without sovereign rights over Non-Self-Governing Territories, and their rights are limited to granting the people of such territories a process whereby they can exercise their right to self-determination or ceding their administration of the territory to the United Nations. The U.N. General Assembly’s Friendly Relations Declaration (“Resolution 2625”) asserts that, under the U.N. Charter, the Non-Self-Governing Territory has a “status separate and distinct from the territory of the State administering it.” The

¹⁷¹ The Court was of the view that of decisive importance to addressing Morocco’s claim was “... not indirect inferences drawn from past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time.” [para. 93].

separate and distinct status continues to exist until the people of the Non-Self-Governing Territory “have exercised their right of self-determination in accordance with the Charter.”¹⁷²

As such, the administrator’s role is supposed to be temporary; it does not gain sovereignty over the territory or acquire the right to cede portions of it. Instead, it acquires the obligation to help the population of the territory achieve self-determination. Indeed, Resolution 1514 states: “*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 . . .”¹⁷³ (emphasis added). Each territory may advance towards the ability to exercise self-determination or self-government according to its own circumstance.¹⁷⁴ The administering authority is supposed to help advance, not impede, this process. If the administering authority attempted to assume for itself, or transfer to another state, sovereignty over the peoples of Non-Self-Governing Territories before they have had a full opportunity to freely express their will with regard to their political future, such action would have no legal effect and would be tantamount to eviscerating the peoples’ right to self-determination.

A state, under certain circumstances, may also be able to acquire territory that is in its possession and control, under the principle of “effective occupation” or, in French, “effectivites.” The principle of “effective occupation” postulates that a territory which tries to secede from an existing state may gain legitimacy as an independent state under law if its government exercises “effective” control over its territory for a sufficient period of time

¹⁷² G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

¹⁷³ G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (1960).

¹⁷⁴ Chapter XI of the Charter.

regardless of the legality of the secession. It also contains the notion that a state may acquire title to territory belonging to another state through its consistent, flagrant and unopposed exercise of dominion over the territory for a sufficient period of time. In the latter case it incorporates elements of the principle of “prescription”¹⁷⁵ considered by some scholars to be applicable to the actions of states.¹⁷⁶ Both principles attempt to regularize a *de facto* situation.

The principle of “effectivity” or effective occupation was discussed extensively by the Supreme Court of Canada in the *Reference on Secession of Quebec*. The Court noted that “an illegal act may eventually acquire legal status, if, as a matter of empirical fact, it is recognized on the international plane.” The Court went on to state that the law has recognized “through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status.”¹⁷⁷ Accordingly, the illegal annexation of a territory or part of a territory by a state may, after a long period of acceptance by the international community and acquiescence by the involved population, permit the state to acquire sovereign rights over the territory. As was noted by several eminent scholars, a “government which establishes itself and maintains a peaceful administration with the acquiescence of the people, for a substantial period of time” at some point gains the right to be recognized as the legitimate

¹⁷⁵ Noted international scholar Paul Fauchille labeled four conditions for acquisitive prescription in international law. First, possession had to be exercised *a titre de souverain*. Second, possession should be peaceful and uninterrupted. In its most extreme interpretation, this meant that the possession had to go unchallenged. Third, possession should be public. Fourth, it must persist. Fauchille took these conditions from the French *Code Civile*. See, R. Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,” *The European Journal of Int’l Law*, Vol. 16, No. 1, 25(2005), p. 50.

¹⁷⁶ This principle has its genesis in classical Roman law under which five methods of acquisition of territory were considered legitimate. These were: occupation of *terra nullius*, prescription, cession, accretion, and subjugation (or conquest). Both occupation and prescription relied essentially on the notion of “effective control.” Following the establishment of the United Nations conquest ceased to constitute an acceptable way of obtaining title. At least some scholars consider the principle of “prescription” to be subsumed within public international law and applicable to state action. See I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (4th ed. 1980) p. 131; Lesaffer, *supra*, p. 38.

¹⁷⁷ Reference re: Secession of Quebec, [1998] 2 S.C.R. 217 para. 140-146.

government of the people.¹⁷⁸ This principle was applied in the *Island of Las Palmas* arbitration (*Netherlands/United States*) where the sovereignty of the Netherlands over the Island of Las Palmas was recognized as against what was characterized by the arbitrator as “valid title” held by the United States because *de facto* the Netherlands had administered the island over a number of preceding years.¹⁷⁹

However, both the principle of “effective occupation,” and the principle of “prescription,” both of which incorporate elements of the principle of “adverse possession,”¹⁸⁰ require to one extent or another a flagrant, peaceful¹⁸¹ and accepted assertion of dominion over the territory by the involved government over the course of many years. The term “peaceful” means more than the mere absence of violence. In the *Chamizal* arbitration between the United States and Mexico in 1911, the United States claimed title to a disputed tract of land on the Mexican border on the basis of prescription, which it defined as its “undisturbed, uninterrupted, and unchallenged” possession since 1848. The arbitrators rejected the claim on the basis that diplomatic protest sufficed to prevent prescription; “peaceable” meant acquiescence by the opposing party.¹⁸² In the *Island of Las Palmas* case, the arbitrator stated that there is a common core in prescription and occupation, and that is peaceable possession. He based his decision on the fact that the Netherlands had exercised *de facto* sovereignty over the territory, in an

¹⁷⁸ Expert Opinion prepared in 1992 by T.M. Franck, R. Higgins, A. Pellet, M.N. Shaw and C. Tomuschat, “*The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*,” para. 85.

¹⁷⁹ *Id.*, para. 87, p. 338, citing the arbitral award by Max Huber in the *Island of Las Palmas Case (Netherlands/United States)* R.I.A.A., Vol. II (April 4, 1928) pps. 829-871.

¹⁸⁰ Reference re: Succession of Quebec, para. 146. The Court drew the analogy between the principle of “effectivity” and the principle of law which over time, grants “squatters” rights in property they possess through the failure of owners to assert their rights.

¹⁸¹ According to Lesaffer, *supra*, acquisitive prescription has been defined as “the *peaceable* exercise of *de facto* sovereignty for a very long period over territory subject to the sovereignty of another.” at 46 (emphasis added), and “effective occupation” involves the “*peaceful* and continuous display of State authority.” *Id.*, at 49.

¹⁸² *The Chamizal Arbitration*, R.I.A.A. (1911), at 309, 328.

unopposed manner, from 1677, declaring that this “continuous and peaceful display of territorial sovereignty” was “as good as title.”¹⁸³ The International Court of Justice has addressed claims based on the principle of effective occupation, under different names, in a number of cases.¹⁸⁴ Instead of using a strict definition of what actions constitute effective occupation it has adopted a policy of weighing the different factors present in each case, including whether or not the exercise of sovereignty has been peaceful, uninterrupted, and public.¹⁸⁵

When such dominion has evolved as a result of the use of force, some other policy considerations apply. The general rule is that a state may not acquire territory by the illegal use of force. On October 24, 1970, the General Assembly adopted Resolution 2625 (XXV), the Friendly Relations Declaration, in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” This principle was *cited in the Advisory Opinion of the International Court of Justice in “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”*¹⁸⁶ as well as its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.¹⁸⁷ In the latter case the Court proclaimed that the principles as to the use of force incorporated in the Charter and in General Assembly Resolution 3314 (the

¹⁸³ *Island of Las Palmas Arbitration*, *supra*, p. 839

¹⁸⁴ See, for instance, *Minquiers and Ecrehos*, I.C.J Reports (1953) analyzing the competing claims of France and England to certain Channel islands; *Right of Passage over Indian Territory*, I.C.J Reports (1960), analyzing the claim of Portugal to sovereignty over certain villages surrounded by Indian territory; *Frontier Dispute*, I.C.J Reports (1986); *Land, Island and Maritime Frontier Dispute*, I.C.J Reports (1992); *Territorial Dispute*, I.C.J Reports (1994); *Kasikili/Sedudu Island*, I.C.J Reports (1999); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, I.C.J Reports (2001); *Land and Maritime Boundary between Cameroon and Nigeria*, I.C.J Reports (2002); and *Sovereignty over Pulau Litigan and Pulau Sipadan*, I.C.J Reports (2002).

¹⁸⁵ Lesaffer, *supra*, p. 55.

¹⁸⁶ Opinion on Construction of Wall, *supra*, I.C.J Reports 2004, p. 136, paras. 87-88 (July 9, 2004).

¹⁸⁷ I.C.J. Reports 1986, pps. 98-101, paras. 187-190.

Definition of Aggression attached as an annex)¹⁸⁸ reflect customary international law and that the same was true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

Also, both the principle of “prescription” and that of “effective occupation,” which essentially legitimize an otherwise illegal acquisition of territory, are applied only in exceptional cases. The Supreme Court of Canada, while recognizing the existence of the principle of “effectivity,” refused to apply it to the question of the legality of a possible secession of Quebec from Canada, declaring: “In our view, the alleged principle of effectivity has no constitutional or legal status. In essence, acceptance of the principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so . . . Such a notion is contrary to the rule of law, and must be rejected.”¹⁸⁹ Some members of the International Court of Justice have gone so far as to reject the incorporation of such doctrines into international law. Whereas, in his separate opinion in 1986 on the Judgment on Jurisdiction and Admissibility in *Nicaragua*, Judge Mosler stated that acquisitive prescription is “a general principle of law within the meaning of Article 38, paragraph 1(c) of the Statute, by which lapse of time may remedy deficiencies of formal legal acts,” Judge Torres Bernardez, in his separate opinion in 1992 in *Land, Island and Maritime Frontier*, called acquisitive prescription “a highly controversial

¹⁸⁸ General Assembly Resolution 3314 (XXIX), 29 U.N. GAOR, Supp. (No.31) at 34; U.N. Doc.A/9631 (1975) contains language to the effect that the invasion of a state by the armed forces of another state is an aggressive act for purposes of the U.N. Charter, and the Court decided that article 3, paragraph (g) of the Definition relating to irregular bands or mercenaries going from one state into another, reflects customary international law. The Resolution now forms part of the discussion paper proposed by the Chairman in the Special Working Group on the crime of aggression for the International Criminal Court. See ICC-ASP/6/SWGCA/2.

¹⁸⁹ Reference: Secession of Quebec, *supra*, paras. 107-108. The Court went on to suggest that states consider whether or not an entity claiming recognition of a *de facto* status has complied with internationally accepted legal norms in acquiring that status when deciding whether or not to grant recognition. Paras. 142-143.

concept which, for my part, I have the greatest difficulty in accepting as an established institute of international law.”¹⁹⁰

III. CONCLUSION

In conclusion, based on our review of legal precedent, the Committee believes that international law has differentiated between the right to self-determination for those people seeking liberation from severe oppression, most commonly associated with colonial domination, and those peoples within established nation states that already provide for some form of self-government. Indeed, if groups of people living within established nation-states, including those that have achieved independence from their former colonial administrators, were to claim the right to self-determination, meaning independence, based on purely ethnic, cultural, religious or historical grounds, there may be a continuing cycle of secessions leading to dismemberment or severe impairment of the territorial integrity or political unity of sovereign and independent states.¹⁹¹ On the other hand, international law clearly recognizes as a general rule that the “peoples” of former colonial territories – meaning the indigenous inhabitants of the territory – in circumstances in which there is a *geographic separateness* of the territory and a distinctive social identity of the people living within or originating from the territory that distinguishes them from the colonial administering power,¹⁹² have a right to self-determination that includes, as will be discussed further below, the right to form an independent self-governing state.

¹⁹⁰ Other authors, such as Lesaffer, *supra*, have suggested that the doctrine of effective occupation may have eclipsed the doctrine of acquisitive prescription, rendering it obsolete as a distinct principle in international law. At 56.

¹⁹¹ The Right To Self-Determination Study, *supra* at para. 275.

¹⁹² See, The United Nations and the Evolving Right to Self-Determination, *supra* at pps. 551-554, 556.

There are certain exceptions to the right of the peoples of Non-Self-Governing Territories to exercise self-determination, such as the principle of “integration.” However, as a principle of international law, integration has historically been deemed relevant only in the most limited circumstances, that is, to tiny territories ethnically and economically parasites of, or deriving from, that state, and that cannot be said in any legitimate sense to constitute separate territorial units. Although there may be limits on the right of subgroups of a Non-Self-Governing Territory to invoke the right to self-determination, the right is clearly applicable to the indigenous inhabitants of the territory as a whole, particularly when the territorial boundaries established by the colonial powers are respected.

States have a right under international law to invoke the principle of territorial integrity to prevent the dismantling of their already existing and recognized boundaries by groups seeking secession. They also have the right to expand their territories by the acquisition of territory from other sovereign states with the approval of the people of that state. However, they cannot acquire sovereign rights to a Non-Self-Governing Territory through the acquisition of that territory from the Administering Power of the territory against the will of its inhabitants.

Further, a state’s right under international law to acquire the territory of another sovereign state or a Non-Self-Governing Territory, against the will of its people, under the theory of “historic ties” is severely circumscribed. The theory cannot support the annexation of the territory of another sovereign state. When applied to the territory of a Non-Self-Governing Territory, the requirements are strict; it requires proof of continuous, important and formal ties of a political and economic nature in the few instances in which it has successfully defeated the right of the inhabitants to self-determination.

According to some scholars, under the principle of “effective occupation,” a state may eventually acquire sovereign rights over an illegally annexed territory. However, this is only after a long period of effective, peaceful, flagrant and unopposed control over the territory in which the international community has acquiesced, and would not apply to territories acquired illegally through force after the creation of the United Nations, and possibly beforehand as well.

PART III: APPLICATION OF THE RIGHT TO SELF-DETERMINATION: GENERAL PRINCIPLES

As demonstrated above, over time, the right to self-determination has become a fundamental principle of customary international law that “expresses some fundamental requirements for the life of the international community.”¹⁹³ But, what does that mean? What exactly is the right to self-determination? The right as it exists loosely provides peoples with a right to participate in their government; in short, the right to self-determination is a right to self-government. Indeed, although the “self-determination of peoples” is referred to in Articles 1 and 55 of the United Nations Charter, while “self-government” is referred to in Article 73(b) and “self-government or independence” is referred to in Article 76(b), Aurelie Cristescu (the U.N.’s Special Rapporteur of the of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) advised that “the principle of self-determination and the right of peoples to self-government or independence are essentially the same.”¹⁹⁴ Cristescu explains his reasoning for this conclusion as follows:

The United Nations cannot uphold the principle of self-determination of peoples under Articles 1 and 55 of the Charter without upholding the right of the peoples of Non-Self-Governing and Trust Territories to self-government or independence under Article 73, subparagraph b, and Article 76, subparagraph b, of the Charter;

¹⁹³ The Right to Self-Determination Study, *supra*, note 17, para. 136.

¹⁹⁴ *Id.* para. 265.

the converse is also true. It would be absurd to maintain that the Charter gives the peoples of Non-Self-Governing and Trust Territories the right to self-government or independence, but refuses them the right to self-determination.¹⁹⁵

I. RESPONSIBILITIES OF ADMINISTERING POWERS

As discussed in detail above, Chapter XI (Articles 73-74) of the United Nations Charter established the framework through which the Non-Self-Governing Territories would interact with the administering authority for that territory. Under Chapter XI, the administering authority of the territory has an obligation to promote the “well-being” of its inhabitants. The promotion of the inhabitants’ well-being means helping to advance their social, economic, educational and political development. This includes assisting the inhabitants “in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.”¹⁹⁶ The end objective is for the “peoples” of the territory to reach the “full measure of self-government.”¹⁹⁷ Until a Non-Self-Governing Territory reaches the “full measure of self-government,” it has a special status recognized under customary international law, which includes U.N. General Assembly Resolutions and advisory opinions of the International Court of Justice.

As such, the administrator’s role is supposed to be temporary and its powers are intended to be transferred eventually to the people of the territory. Indeed, Resolution 1514 states: “*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

¹⁹⁵ *Id.*

¹⁹⁶ United Nations Charter, Chapter XI, “Declaration Regarding Non-Self-Governing Territories,” Article 73.

¹⁹⁷ *Id.*

will and desire . . .”¹⁹⁸ (emphasis added). Each territory may advance towards the ability to exercise self-determination or self-government according to its own circumstance.¹⁹⁹ The administering authority is supposed to help advance, not impede, this process.

U.N. General Assembly Resolution 742 (VIII) (“Resolution 742”) provides a detailed list of factors to be taken into account in deciding whether the peoples of a territory have yet attained a full measure of self-government. Further, Resolution 1541 sets forth a number of principles that provide some guidance for this purpose.

II. OPTIONS AVAILABLE TO NON-SELF-GOVERNING TERRITORIES

Resolution 1514, which remains in effect, is widely considered to be the seminal United Nations document on the right to self-determination. Cristescu called Resolution 1514 an “epoch making document, on an equal footing with the Charter and the Universal Declaration.”²⁰⁰ The International Court of Justice noted in its Western Sahara Opinion that “General Assembly Resolution 1514 (XV) provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations.”

Adopted by the General Assembly on December 14, 1960 as the decolonization process was unfolding, Resolution 1514 focused on “external” self-determination, which is directed to the peoples’ determination of their international political status. To this end, it

¹⁹⁸ G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (1960).

¹⁹⁹ Chapter XI of the United Nations Charter.

²⁰⁰ The Right To Self-Determination Study, *supra* para. 41.

declared that external self-determination should result in complete independence, as its title suggests: “Declaration on the Granting of Independence to Colonial Countries and Peoples.”²⁰¹

Resolution 1514 viewed the U.N.’s role as “assisting the movement for independence in Trust and Non-Self-Governing Territories.” It declared that “[A]ll armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence” The goal was to end the “subjugation of peoples to alien subjugation, domination and exploitation.” To this end, as noted above, Resolution 1514 called for “immediate steps” to 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 in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”²⁰² Complete independence did not only mean complete political freedom. It also included economic and cultural independence.

This does not mean, however, that complete independence is the only political status outcome that can legitimately arise from the peoples’ free exercise of their right to self-determination, as evidenced by the alternative options of free association and integration set forth, for example, in Resolutions 742 and 1541, discussed below. The primary emphasis of these Resolutions is on ensuring that the “peoples” entitled to self-determination have the ability to exercise their choice of government, whatever that choice may be, in a free and fair manner, without interference from any third party.

²⁰¹ G.A. Res. 1514, *supra*.

²⁰² *Id.*

Resolution 742, like Resolution 1514, leans more towards the independence option in the exercise of self-determination. The Resolution, however, acknowledges that there are legitimate outcomes short of full sovereign independence that can result from the peoples' exercise of their right to self-determination, so long as their will is "freely expressed by informed and democratic processes" without any outside interference, and independence is one of the options they have. In its Annex, Resolution 742 lists a number of factors which should be taken into account in deciding whether a Non-Self-Governing Territory has or has not attained a full measure of self-government.²⁰³ It states that the manner in which a Non-Self-Governing Territory "can become fully self-governing is primarily through the attainment of independence," but acknowledges that self-government can also be achieved by other means such as "by association with another State or group of States if this is done freely and on the basis of absolute equality." Resolution 742 provides a detailed description of the factors useful in measuring whether the peoples have truly attained self-government, through whatever option they freely choose, which subsequent General Assembly Resolutions have drawn upon.²⁰⁴ The factors, taken

²⁰³ G.A. Res. 742 (VIII), 8 U.N. GAOR Supp. (No. 17) at 21, U.N. Doc. A/2630 (1953). As explained by Cristescu, upon approving this list, "the General Assembly recommended that it should be used by the General Assembly and the Administering Member States as a guide in determining whether any territory, due to changes in its constitutional status, was or was no longer within the scope of Chapter XI of the Charter, in order that a decision might be taken by the General Assembly on the continuation or cessation of the transmission of information required by Chapter XI of the Charter." *The Right To Self-Determination Study*, *supra*, para. 310.

²⁰⁴ Under Part I of the Annex to Resolution 742, entitled "Factors Indicative of the Attainment of Independence," the prerequisites necessary to effectuate independence without any outside interference, include: (1) Full international responsibility of the territory for the acts inherent in the exercise of its external sovereignty and for the corresponding acts in the administration of its internal affairs; (2) Eligibility for membership in the United Nations; (3) Power to enter into direct relations of every kind with other governments and with international institutions and to negotiate, sign and ratify international instruments; (4) Sovereign right to provide for its national defense; (5) Complete freedom of the people of the territory to choose the form of government which they desire; (6) Freedom from control or interference by the government of another state in respect of the internal government (legislature, executive, judiciary and administration of the territory); and (7) Complete autonomy in respect of economic, social and cultural affairs. Part 2 of the Annex to Resolution 742, entitled "Factors Indicative of the Attainment of Other Separate Systems of Self-Government," again refers to the right of the peoples to choose complete independence. However, Part 2 adds factors that can be used to assess the effectiveness of other forms of self-government, which retain a structural relationship with an existing independent state while ensuring the peoples' internal freedoms within that structure. Some of the factors are the same as appear in Part 1, except for the obvious items evidencing the successful movement of the Non-Self-

in their entirety, support the notion that the future political status of a Non-Self-Governing Territory will depend on what its own peoples decide without interference by the administering authority or by any other state.

Resolution 1541, adopted at the same time as Resolution 1514, focuses less on the specific outcome of self-determination, as compared with assuring a fair process that provides the opportunity for the peoples of a Non-Self-Governing Territory moving towards decolonization to freely express their will in a free and fair manner. In this regard, Principle VI of Resolution 1541 lays out the options available to a Non-Self-Governing Territory that has reached the point of achieving a full measure of self-government:

- (a) Emergence as a sovereign independent state;
- (b) Free association with an independent state; or

Governing Territory to a sovereign independent state of its own, such as providing for national defense and eligibility for membership in the United Nations. Factors listed in Part 2 of particular interest include: (1) The opinion of the population “freely expressed by informed and democratic processes, as to the status or change in status which they desire;” (2) Freedom of choice “on the basis of the right to self-determination of peoples between several possibilities, including independence;” (3) Ethnic and cultural considerations that distinguish the population of the territory from the peoples of the country with which they choose to freely associate themselves; (4) The degree of political advancement of the population “sufficient to enable them to decide upon the future destiny of the Territory with due knowledge;” (5) The extent to which the territory can freely engage in international relations with other governments and international institutions (more relevant to full sovereign independence than other forms of self-government which are more internal in nature); (6) Nature and measure of “control or interference, if any, by the government of another state with the internal government of the territory or with the ability of the population of the territory to participate in its government;” and, (7) The degree of the peoples’ “autonomy in respect of economic, social and cultural affairs.” Part 3 of the Annex to Resolution 742, is entitled “Factors Indicative of the Free Association of a Territory on Equal Basis With the Metropolitan or Other Country as an Integral Part of That Country or in any Other Form.” As its title suggests, it is focused on the option of free association with an existing independent state, rather than full sovereign independence for the territory itself. There is some overlap with the factors listed in Parts 1 and 2, but additional factors of particular interest include: (1) The freedom of the population of a Non-Self-Governing Territory which has chosen association “to modify this status through the expression of their will by democratic means;” (2) The extent to which there are equal constitutional guarantees for the associated territory; (3) Whether there are powers in certain matters constitutionally reserved to the territory or to the central government and whether there is provision for the participation of the territory on an equal basis in any changes in the constitutional system of the state with which the territory has chosen to be associated; and (4) Whether the population of the territory enjoys equal citizenship, voting rights and representation on the same, non-discriminatory basis as other inhabitants and regions of the state with which the territory has chosen to be associated. In ensuring effective participation of the population in the government of the territory, is the electoral system conducted without external interference and are there “effective measures to ensure the democratic expression of the will of the people?”

(c) Integration with an independent state.

Self-government is achievable by the peoples of a Non-Self-Governing Territory by any of these three means, amongst which the peoples are free to choose. The key point, with respect to any of these options, however, is choice. The free choice of the peoples in deciding their political future is the *sine qua non* of self-determination, at least in the context of the decolonization process. Resolution 2625²⁰⁵ reinforces this bedrock principle, stating that “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status *freely determined by a people* constitute modes of implementing the right of self-determination by that people.” (emphasis added)

For example, Principle VII of Resolution 1541 states that the option of free association (i.e., autonomy) with an independent state should be the “result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.” If the peoples of the territory choose association rather than complete independence, they retain certain rights and protections under international law inherent in their right to self-determination. These include the right to govern themselves in a democratic manner within the whole autonomous structure and to be protected against unilateral modification by the central government of the peoples’ autonomous status and democratic guarantees as opposed to permitting such modification only if and to the extent freely approved by the peoples of the territory themselves through democratic means. If the people choose the option of integration, Principle VIII of Resolution 1541 states that it should be “on the basis of complete equality

²⁰⁵ G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated.”

Principle IX stresses the importance of the process involved in making the choice of integration, which involves sacrificing the territory’s independence. It cautions that an integrating territory should only be one that has attained “an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes.” As a result, attempts by an administering or occupying power to integrate a Non-Self-Governing Territory absent the free and informed choice of the peoples of that territory should not be recognized under international law.

Based on the principles set forth above, the peoples of the disputed territory have a right to exercise self-determination in a free and fair manner, including potentially through independence. As a result, the Committee concludes that for Non-Self-Governing Territories, whose peoples had begun to emerge from colonialism without first having had the chance to freely exercise their promised right to self-determination on the basis of Resolution 1514, there is a credible legal argument under the principles of the U.N. Charter and customary international law that complete independence as a separate sovereign state should remain a viable option without any interference from a third party.²⁰⁶ Under this line of reasoning, the peoples of such Non-Self-Governing Territories do not forfeit the opportunity to choose the independence option preferred by Resolution 1514 because of intervening changed circumstances imposed unilaterally by the administering authority or occupying state.

²⁰⁶ A.A. Idowu, “*Revisiting the Right to Self-Determination in Modern International Law: Implications for African States*,” *European Journal of Social Sciences* – Volume 6, Number 4 (2008).

III. PROCESS FOR EXERCISING SELF-DETERMINATION

Unfortunately, the General Assembly Resolutions discussed in the above section provide little guidance on the precise method by which the people's freely determined choice of political status is to be made known. The International Court of Justice has noted both in the *Western Sahara Case* and other decisions that the law requires "the need to *consult* the wishes of the people of the territory as to their political future."²⁰⁷ (emphasis added). The Court, in its Advisory Opinion on Western Sahara, furthermore stated that the principle of self-determination meant "the need to pay regard to the freely expressed will of peoples."²⁰⁸ The Court noted that in General Assembly Resolution 2229 (XXI) ("Resolution 2229"),²⁰⁹ and in subsequent Resolutions dealing specifically with Western Sahara, the General Assembly had selected a referendum conducted under U.N. auspices as the mode of consultation it deemed to be the most appropriate method for ascertaining the freely expressed will of the peoples.²¹⁰ However, the Court did not take a position on whether a referendum was legally required as opposed to other possible methods of consultation.

In his separate concurring opinion, Justice Dillard concluded that from his examination of the relevant General Assembly Resolutions "self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it."²¹¹ Justice Dillard found no basis in the Resolutions or "in the legal aspects of the 'right' [self-determination] itself" that established a *per se* requirement of a referendum.²¹² However, Justice

²⁰⁷ Advisory Opinion, *supra* at para. 64.

²⁰⁸ *Id.* at para. 59.

²⁰⁹ G.A. Res. 2229 (XXI), 21 U.N. GAOR Supp. (No. 16) at 72, U.N. Doc. A/6316 (1966).

²¹⁰ Advisory Opinion, *supra* at paras. 62-63.

²¹¹ Separate opinion of Dillard, J. concurring with Advisory Opinion at p. 123.

²¹² *Id.*

Dillard agreed with the majority opinion on the importance of consultation. He said that the people's will can "only be adequately determined by consulting them one way or another."²¹³

Judge Nagendra Singh, in a declaration appended to the International Court of Justice Opinion, emphasized that "the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration, association or independence."²¹⁴ Justice Singh stated that this is "established by not only the general provisions of the United Nations Charter, but also by specific resolutions of the General Assembly on this subject."²¹⁵ Justice Singh agreed with the International Court of Justice Opinion that there may be exceptional circumstances where such consultation is not necessary (e.g., the result was known to be a foregone conclusion or that consultations had already taken place in some form) but that such exceptions did not apply in the case of Western Sahara.

A. The Precedent of Referendums in Exercising Self-Determination

Though no specific method of consulting the people must be applied, there is strong precedent for the holding of referendums or plebiscites on the issue of self-determination, at least in the colonial context.²¹⁶ Indeed, the International Court of Justice in the Advisory

²¹³ *Id.* p. 126.

²¹⁴ Declaration of Judge Nagendra Singh, p. 81.

²¹⁵ *Id.*

²¹⁶ Hanauer, *supra*, pps. 154-155; Franck, *supra*, at 699-701 ("[T]here has grown up through the vast majority of cases a clear pattern of orderly decolonization through freely conducted elections or plebiscites, often under U.N. supervision, in which the local population has had the opportunity to choose its own national destiny.") In his analysis, Franck found a pattern and practice in the U.N. as far back as 1954, in which the U.N.-supervised plebiscites or elections for U.N. Trust Territories and, after implementation of the Special Committee in 1961, for ordinary colonies. In some cases, the U.N. has stepped in to supervise referendums at the request of the parties. However, he also noted several "exceptional" instances, since the creation of the Special Committee, in which the U.N. either declined to take the position that a free self-determination vote should be taken in a colony (Gibraltar and West Irian), or where the colonial power rejected a request by the U.N. to supervise a referendum.

Opinion concerning Western Sahara affirmed that the means employed to grant self-determination must be the “result of the freely expressed wish 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.”²¹⁷

In recent years, the U.N. supervised and enforced the results of a referendum on self-determination by a former colonial Non-Self-Governing Territory (East Timor) against a neighboring state (Indonesia) which had occupied it. In that situation, the colonial administering power (Portugal) adopted a law in 1975 that provided for a transitional government in East Timor to prepare for the election of a popular assembly in 1976, and the eventual termination of Portuguese sovereignty over the territory.²¹⁸ Ultimately, notwithstanding Indonesia’s position that self-determination did not apply to East Timor because the integration of the territory had taken place in accordance with the wishes of the population, Indonesia offered special autonomy to East Timor and concluded, in 1999, an agreement with Portugal that provided for a referendum on the proposed special autonomy with the state of Indonesia. If the vote was against the autonomy option (which was the result), Indonesia would sever its links to the territory and restore it to its legal status prior to the invasion; in which Portugal, as the colonial administering power, would cooperate with Indonesia and the United Nations to transfer power to the U.N. as a prelude to independence. Even though the vote was only on whether to accept special autonomy,

²¹⁷ G.A. Res. 1541(XV), cited with approval by the International Court of Justice in the Advisory Opinion on *Western Sahara*, paras. 32-33; *see also* para. 115 n.5 (separate opinion of Dillard, J.).

²¹⁸ Vance, *supra*, p. 83.

other provisions in the agreement made it clear that the only other option was independence.²¹⁹ Thus, notwithstanding the extreme length of time between the establishment of the right to self-determination and its exercise, the precedent of East Timor demonstrates that the use of a referendum which includes the option of independence is still valid, and conforms with the pattern and practice of the U.N. in the colonial context.²²⁰

Most recently, a referendum was opted for by all interested parties to the Comprehensive Peace Agreement (“CPA”) on Sudan, signed in 2005, to resolve decades of conflict among regions in the former colonial territory. In essence, the parties agreed to a political solution – a power- and wealth-sharing agreement within the confines of the territory – but the agreement contained an “escape clause” so that at the end of a defined time period, the people of southern Sudan would have the opportunity to choose between perpetuating the power-sharing arrangement, or opt for full independence from northern Sudan; while the Abyei would decide in a separate referendum whether they wanted to be part of the north or the south. The agreement also provided that the U.N. Mission in Sudan would provide guidance and technical assistance on the conduct of the elections.²²¹ In 2012, a referendum was held in which approximately 98% of the population of southern Sudan voted in favor of independence. On July 9 of that year, the Republic of South Sudan became an independent state. The final status of the Abyei is as yet unresolved. While this is not a case that is strictly analogous to the colonial context, as is East Timor, it does demonstrate the continued recognition by the international

²¹⁹ Weller, *supra*, p. 146, citing Art. 6 of the Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, May 5, 1999; and Report of the U.N. Secretary-General, S/2002/432 (April 17, 2002)

²²⁰ This is only reinforced by virtue of the fact that the Western Sahara conflict is based, as was East Timor, in the context of “unfulfilled colonial self-determination,” *see* Weller, *supra*, p. 143.

²²¹ S/RES/1590 (March 24, 2005), at 4; Carnegie Endowment for International Peace, “The Comprehensive Peace Agreement,” January 4, 2011, <http://sudan.carnegieendowment.org/2011/01/04/the-comprehensive-peace-agreement> (accessed on January 29, 2012).

community that a free and fair referendum is the most apposite means to determine the will of “peoples” to their political status.

B. Achieving Self-Determination Through Non-Classical Means

Notwithstanding the established practice under international law of employing a referendum to determine the will of people entitled to exercise the right to self-determination, there is some emerging support for alternative means of exercising self-determination rights so long as the method provides a means for the people to demonstrate their free will. As discussed further below, the most common alternative method is a negotiated political settlement. However, this precedent has emerged exclusively from sovereignty disputes arising outside the colonial context.

In a recent study of precisely this issue, one commentator analyzed 78 sovereignty conflicts since the end of World War II, and found that a large proportion of them had achieved or were in the process of achieving a settlement agreement.²²² However, it was noted that these disputes arose in situations not contemplated by the law of self-determination of colonial peoples as set forth in Resolution 1514.²²³

²²² Weller, *supra*, pps. 114-115.

²²³ There exist three principal types of cases: (1) *Cases arising outside the colonial context* (for example, Chechnya, Corsica, the Basque Country, Kosovo, etc.), where the concept of self-determination in the sense of secession does not apply at all, given the lack of a colonial nexus, (2) *Challenges to the territorial definition of former colonial entities* (for example, Bougainville, Sri Lanka, Philippines, Burma, India in relation to tribal peoples), where a former colony exercised the right to self-determination, but ethnic movements emerging within the newly independent state sought separation, and (3) *Challenges to the implementation of colonial self-determination* (for example, Eritrea, Somaliland, Kashmir, perhaps Southern Sudan and the Comoros and Mayotte), where it is argued that the doctrine of *uti possidetis juris* was wrongly applied at the point of decolonization, or that an entity was wrongfully incorporated into the newly independent state at that moment. Weller, *supra*, pps. 113-114.

It has been noted that, in such non-colonial situations, the state which is faced with a claim for secession or self-government has been able to successfully assert that the claim to “self-determination” to apply “only in the classical and narrowly-defined circumstances of salt-water colonialism”; for example, Chechnya’s claim against Russia did not qualify for self-determination rights.²²⁴

The means of a referendum in the colonial context, as opposed to a settlement in the non-colonial context, has the force of logic as well as legal precedent. As has been noted, because the right to self-determination can be exercised only within the boundaries established by the colonial power, colonial entities asserting self-determination rights have a legal personality with territorial boundaries even prior to the exercise of the act of self-determination.²²⁵ Thus, aside from the non-insignificant issue of determining which voters meet the definition of the “people” entitled to exercise the right to self-determination, a referendum is well-suited to this context – which is no doubt the reason that U.N. precedent has favored this option.

IV. CONCLUSION

Based on the foregoing precedents, the Committee believes that the process by which the “peoples” of Non-Self-Governing Territories should be permitted to exercise the right to self-determination, or self-government in choosing from the possible political status outcomes available to them (e.g., the creation of a new independent sovereign state, free association with

²²⁴ *Id.*, p. 113.

²²⁵ *Id.*, p. 113 n.8 (“Genuinely colonial self-determination entities enjoy legal personality even before administering the act of self-determination, they have a right to territorial unity, to be free from the use of force and repressive measures, they may ‘struggle’ through the means of a national liberation movement, and arguably receive international support in their struggle. They can also unilaterally bring into application the law of international armed conflict, instead of the much more limited law of internal armed conflict which covers domestic conflicts”).

an existing independent state, or full integration with an existing independent state), must be one that fairly reflects their freely expressed will. Some form of consultation is indicated, but not necessarily a referendum. The Committee takes no position on whether a negotiated settlement might serve to allow the peoples in a colonial territory to exercise their right to self-determination. However, we do note that such an approach would be a departure from settled practice and precedent in the colonial context, and more in line with limited precedent from situations in which the right of colonial self-determination does not apply, and even a negotiated settlement must fairly reflect the freely expressed will of the peoples of the territory concerned.

PART IV: APPLICATION OF PRINCIPLES OF INTERNATIONAL LAW TO THE DISPUTE OVER WESTERN SAHARA

I. THE RIGHT TO SELF-DETERMINATION OF THE PEOPLE OF WESTERN SAHARA UNDER PRINCIPLES OF INTERNATIONAL LAW

Applying the above principles of international law to the dispute over Western Sahara, the Committee has come to the conclusion that the people of Western Sahara – the Sahrawis – undoubtedly benefit from a right to self-determination that cannot be abridged by any legitimate competing legal claim of Morocco.

A. Western Sahara Retains Its Status as a Non-Self-Governing Territory

Western Sahara remains today a Non-Self-Governing Territory in the process of decolonization. In 1963, Spanish Sahara (now called Western Sahara), with essentially the same borders that it has today, was placed on the United Nation's list of Non-Self-Governing

Territories, and Spain was declared the “administering power” of the territory. Since that time, despite the proclamation of the “Madrid Accords,” purporting to create a temporary tripartite administration of the territory among Spain, Mauritania, and Morocco, and despite the occupation of portions of the territory by Morocco beginning in 1975, Western Sahara has remained on the list of Non-Self-Governing Territories.²²⁶ Moreover, Western Sahara has consistently been recognized as having the status of a Non-Self-Governing Territory by organs of the United Nations, members of the Security Council, and the members of the General Assembly in the various Resolutions on the subject of Western Sahara that have been passed during this period. Morocco’s claims to sovereignty over the territory, by contrast, have not been recognized by the United Nations or any state. Accordingly, the rights of the people of Western Sahara to self-determination must be viewed in the context of the rights of the peoples of a Non-Self-Governing Territory.

As noted previously, this Committee has concluded that the principle that the peoples of Non-Self-Governing Territories, as that term has been defined in various United Nations Resolutions and by state practice, who are in the process of decolonization, have a right to self-determination has acquired the status of a right under international law.

Moreover, as applied specifically to the situation in Western Sahara and the rights of the Sahrawis, the “people” of Western Sahara, this right has been recognized in numerous

²²⁶ In an opinion issued January 29, 2002, in response to a request for an Advisory Opinion concerning the legality of Morocco’s contracts with Western firms for oil exploration activities, Hans Corell, at the time the U.N. Undersecretary General for Legal Affairs, first analyzed the legal position of Morocco in Western Sahara. He determined that the Madrid Accords “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” and that the transfer of administrative authority to Morocco and Mauritania in 1975 “did not affect the international status of Western Sahara as a Non-Self-Governing Territory.” He noted furthermore that “Morocco . . . is not listed as the administering Power of the territory in the United Nations list of Non-Self-Governing Territories . . .” Letter dated January 29, 2002, from then Undersecretary General of the United Nations for Legal Affairs Hans Corell to the President of the Security Council, S/2002/161 (February 12, 2002) (“Corell Opinion”) at 2.

Resolutions of the United Nations Security Council²²⁷ and the United Nations General Assembly²²⁸ from 1965 to the present day. It has been affirmed by international institutions such as the African Union.²²⁹ It has been recognized by the state that currently occupies a majority of the territory, Morocco.²³⁰ It has been recognized by the United States.²³¹ And it has formed the

²²⁷ In its first Resolution on the issue of Western Sahara, in 1975, the Security Council reaffirmed the terms of G.A. Res. 1514(XV) of December 14, 1960, which expressed the principle of self-determination for the people of Non-Self-Governing Territories. S/RES/377(1975). In all of its subsequent Resolutions, including its most recent Resolution in 2011, the Security Council reaffirmed its commitment to the right to self-determination of the people of the Territory. S/RES/1979 (2011) (seeking to achieve “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 principles and purposes of the Charter of the United Nations . . .” See, also, S/RES/379, 380 (1975); S/RES/621 (1988); S/RES/658 (1990); S/RES/690, 725 (1991); S/RES/809 (1993); S/RES/907 (1994); S/RES/973, 995, 1002, 1017, 1033 (1995); S/RES/1042, 1056, 1084 (1996); S/RES/1108, 1131, 1133 (1997); S/RES/1148, 1163, 1185, 1198, 1204, 1215 (1998); S/RES/1224, 1228, 1232, 1235, 1238, 1263, 1282 (1999); S/RES/1292, 1301, 1309, 1324 (2000); S/RES/1342, 1349, 1359, 1380 (2001); S/RES/1394, 1406, 1429 (2002); S/RES/1463, 1499, 1485, 1495, 1513 (2003); S/RES/1523, 1541, 1570 (2004); S/RES/1598, 1634 (2005); S/RES/1675, 1720 (2006); S/RES/1754, 1783 (2007); S/RES/1813 (2008); S/RES/1871 (2009); S/RES/1920 (2010).

²²⁸ See, for instance, G.A. Res. 2072 (1965); 2229 (1966); 2354 (1967); 2428 (1968); 2591 (1969); 2711 (1970); 2983 (1972); 3162 (1973); 3292 (1974); 3458 (1975); 45 (1976); 22 (1977); 31 A & B (1978); 37 (1979); 19 (1980); 46 (1981); 28 (1982, 40 (1983); 40 (1984); 50 (1985); 16 (1986); 78 (1987); 33 (1988); 88 (1989); 21 (1990); 67 (1991); 25 (1992); 49 (1993); 44 (1994); 36 (1995); 143 (1996); 75 (1997); 64 (1998); 87 (1999); 141 (2000); 69 (2001); 135 (2002); 109 (2003); 131 (2004); 144 (2005), 415 (2006); 116 (2008), 101 (2010).

²²⁹ AHG.Res.104(XIX) (June 12, 1983). Indeed, the proposal of the OAU (now the AU) for a referendum in which the Sahrawis could choose between independence and incorporation into Morocco formed the basis of the Settlement Plan which was eventually adopted by the United Nations.

²³⁰ Morocco acknowledged the right of the people of Western Sahara to self-determination in its ratification of a Resolution of the General Assembly in 1966. Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 21 GAOR, Annexes, Addendum to Agenda Item No. 23, 603, U.N. Doc. A/6300/Rev.1 (1966). Morocco voted in favor of all but one of the Resolutions of the General Assembly affirming the right of the people of Western Sahara to self-determination and calling for a referendum passed between 1967 and 1973. Later, it acknowledged this right and agreed to have the issue of sovereignty decided by a referendum, when it agreed as part of a cease-fire agreement to implement a plan, dubbed the “Settlement Plan” which had been approved unanimously by Security Council members, including the United States, and outlined in Security Council Resolutions 650 (1990) and 690 (1991).

²³¹ The commitment of the United States to the principle of self-determination as applied to the people of Western Sahara appears in every Security Council Resolution passed on the subject since 1974, including Security Council Resolutions 650 (1990) and 690 (1991) outlining the “Settlement Plan” and establishing the cease-fire between the parties. This commitment was reiterated in its acceptance of a number of Security Council Resolutions following the adoption of the “Settlement Plan,” including Resolutions 1131 and 1122 (1997) and 1495 (2003) in which it endorsed several alternative proposals put forth by James Baker III, and the more recent Security Council Resolutions, such as Resolution 1754 (2007), seeking a “negotiated solution.”

justification for the United Nations peacekeeping mission in Western Sahara, MINURSO, since 1991.²³²

B. There are No Legitimate Claims of Morocco that Would Abridge the Peoples' Right to Self-Determination

(1) Integration

Morocco cannot assert sovereign rights over the territory of Western Sahara through the theory of “integration.” As noted previously, at least one author has argued that the right to self-determination for people inhabiting Non-Self-Governing Territories, at least in certain circumstances, may be circumscribed by the principle of integration.²³³ However, integration has historically been deemed relevant only to tiny territories ethnically and economically parasites of, or deriving from the state that wishes to integrate it, and the principle is not applicable to larger, more viable territories such as Western Sahara.

Indeed, the International Court of Justice in its Advisory Opinion on Western Sahara noted that:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a ‘people’ entitled

²³² G.A. Res. 1514(XV) and 1541(XV), granting “Non-Self-Governing Territories” certain rights, including the right to self-determination, formed the rationale for Security Council Resolutions 650 (1990) and 690 (1991), under which the Security Council, including the United States, approved the establishment of the U.N. peacekeeping mission in Western Sahara called MINURSO. Thereafter, the commitment of the United States to the principle of self-determination as applied to the Sahrawis was reiterated in its acceptance of a number of additional Security Council Resolutions, including Resolutions 1131 and 1122 (1997) and 1495 (2003) in which it endorsed several proposals put forth by James Baker III.

²³³ See, A. Rigo-Sureda, *supra.*, at 214-20.

to self-determination or on the conviction that consultation was totally unnecessary, in view of special circumstances.²³⁴

No such “special circumstances” were found to exist with respect to Western Sahara. The Court specifically refused to consider as precedent for the course that should be followed with respect to Western Sahara the fact that the small enclave of Ifni had been retroceded to Morocco without a referendum to ascertain the wishes of its people.²³⁵ In comparing the different ways in which the General Assembly Resolutions from 1966 to 1969 dealt with the two regions, the Court noted that in Resolution 2229 (XXI) the General Assembly requested Spain “to take immediately the necessary steps to accelerate the decolonization of Ifni and to determine with the Government of Morocco, bearing in mind the aspirations of the indigenous population, procedures for the transfer of powers in accordance with the provisions of General Assembly Resolution 1514 (XV)” whereas it requested Spain “to determine at the earliest possible date . . . the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of [Western Sahara] to exercise freely its right to self-determination . . .” The Court noted that the different policies the General Assembly had applied to the two territories reflected “the difference in nature of the legal status” of the territories, and were noted in each successive Resolution concerning them until Ifni was

²³⁴ Advisory Opinion, para. 59.

²³⁵ As noted previously, Ifni, a small enclave that was surrounded by Morocco on all sides, was deemed to be one of the “special cases” referred to by the Court in which the “colonial enclave” theory may be invoked. The “colonial enclave” theory declares that legal ties between an enclave and a geographically contiguous entity can exist if, at the onset of colonial occupation, the two territories shared a common political system and a cultural identity. *See* Hanauer, p. 150, fn. 55. The General Assembly had concluded that because of its small and “parasitic” nature, and the circumstances under which it had been ceded initially by Morocco to Spain, Ifni could be retroceded to Morocco without the need for an exercise of self-determination of the indigenous people through a referendum. This principle was also applied to the British colony of Gibraltar and the Portuguese colony of Goa. Some scholars have suggested that this practice violates the principle of self-determination as it has developed and should be discontinued. *See* Hanauer, *id.*: “no territory should be deprived of its right to choose independence – whatever the circumstances . . . [A]t the time the people choose their new status . . . their choice must be unrestricted, and they may choose independence if they prefer, however small and poor their territory may be.” Citing the United Nations Institute for Training and Research, STATUS AND PROBLEMS OF VERY SMALL STATES AND TERRITORIES, UNITAR Series No. 3, at 15, 19, U.N. Doc. JC/365/U6 (1969).

retroceded to Morocco in 1969. The Court also noted that Morocco had “assented to the holding of a referendum” for Western Sahara.²³⁶ Based upon these considerations, the Court found no justification for applying the precedent of Ifni to the decolonization of Western Sahara.

(2) Claims Based Upon the Right to Territorial Integrity

As noted previously, the right of a state to invoke the principle of territorial integrity normally arises as an argument to counter the right to secession of subgroups within the state’s present and recognized territorial boundaries. Western Sahara has never, since the creation of the modern Moroccan state in 1956, been within its official and internationally recognized borders. In particular, Western Sahara was not within the officially recognized borders of Morocco in 1975 when Morocco sent troops to occupy the territory. Accordingly, the rights of the Sahrawis to self-determination cannot be equated with the rights of a subgroup of a recognized state seeking secession against the will of a state asserting its rights of territorial integrity.

(3) Claims Based Upon Historic Ties

It has already been discussed that, as a philosophical principle, the existence of historic ties, if they exist, to justify a claim of sovereignty over a Non-Self-Governing Territory against the will of its people suffers from a number of drawbacks, and must satisfy stringent proof requirements. As a result it has rarely been successfully invoked.²³⁷

²³⁶ Advisory Opinion, para. 65.

²³⁷ One of these few cases was *The Legal Status of Eastern Greenland*. In that case, which was heavily relied upon by Morocco in its arguments before the Court in the *Western Sahara Case*, the Court was asked to determine whether Denmark or Norway had the right to claim a swath of land in Greenland that extended to the North Pole.

However, since the mid-1950s, Morocco's claims to the territory of Western Sahara rest primarily on the argument of historic ties between the people of the territory and the Sultans of Morocco prior to its colonization by Spain. More precisely, Morocco has claimed that the "historic ties" between the Sultan of Morocco and the inhabitants of Western Sahara in the period of history preceding the territory's colonization by Spain were sufficient to establish Moroccan "sovereignty" over the territory, and as such to permit it to avail itself of the principle of "territorial integrity" in order to require the return of the territory to Morocco as part of the decolonization process.²³⁸

Accordingly, the Committee has analyzed extensively Morocco's claims to historic ties in the context of the Advisory Opinion of the International Court of Justice in the *Western Sahara Case*.

As noted previously, in 1974 at the request of Morocco and Mauritania,²³⁹ the International Court of Justice was asked to issue an Advisory Opinion on the question of whether or not their ties to the territory of Western Sahara, if they existed at all, were of such a nature as to justify its annexation by those states and deprive the people of the territory of their right to self-determination.

Denmark claimed that because of its historic ties with certain settlements in Greenland, it had the right to claim the territory that constituted the hinterland. The Court agreed. However, at issue in that case was a territory considered *terra nullius* or "no-man's land" where there were no conflicting claims of indigenous peoples, and the question was which of two competing colonial powers should be able to claim it. This was a far cry from the situation presented by Western Sahara, where the court specifically found that the territory was *not* "*terra nullius*," but rather, inhabited by people who had certain rights under international law. The existence of historic ties to a territory by a colonial power has seldom been considered sufficient by the Court to negate the rights of the people of the territory under international law.

²³⁸ See discussion page 8 *supra*.

²³⁹ At the behest of the Kingdom of Morocco and the Islamic Republic of Mauritania, United Nations General Assembly Resolution 3292 (XXIX) was adopted on December 13, 1974.

The Court was asked the following two questions:

“I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain²⁴⁰ a territory belonging to no one (*terra nullius*)?”

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?” [paras. 1, 75]

On October 16, 1975, the International Court of Justice issued its opinion, rejecting the Moroccan and Mauritanian claims. As to the first question presented, the 16-member Court decided unanimously that Western Sahara was not *terra nullius* at the time of colonization since it

... was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them ... Spain did not proceed on the basis it was establishing its sovereignty over *terra nullius* ... Spain proclaimed that the King was taking Rio de Oro under his protection on the basis of agreements which had been entered into with chiefs of the local tribes ... in the Sakiet El Hamra area, Spain did not rely on any claim to the acquisition of sovereignty over *terra nullius*... The Court’s answer to Question I is, therefore, in the negative ... [paras. 81, 82, 83]

The Court then addressed the second question and examined the pre-colonial “legal ties”²⁴¹ between Morocco and Western Sahara, noting that the question of such ties had to be examined in the context of a territory in which the indigenous population exhibited a tribal

²⁴⁰ In addressing these questions, the Court defined the term “time of colonization by Spain” as the period beginning in 1884, when Spain proclaimed a protectorate over Rio de Oro. Advisory Opinion, para. 77.

²⁴¹ The Court dealt with the definition of “legal ties,” saying that it “must be understood as referring to such ‘legal ties’ as may affect the policy to be followed in the decolonization of Western Sahara. In this connection the Court cannot accept the view that the legal ties the General Assembly had in mind in framing Question II were limited to ties established directly with the territory and without reference to the people who may be found in it. Such an interpretation would unduly restrict the scope of the question, since legal ties are normally established in relation to people.” Advisory Opinion, para. 85.

and nomadic social and political organization, and followed nomadic routes which necessarily caused them to pass through areas of adjacent states.²⁴²

In support of the existence of such “legal ties” Morocco presented: (1) examples of the alleged internal display of Moroccan authority over the territory, and (2) international treaties between Morocco and foreign states, said to constitute recognition of Morocco’s sovereignty over the area.

With respect to its alleged internal display of authority over the territory, Morocco first claimed an “immemorial possession” of the territory based not on an isolated act of occupation, but on the public display of sovereignty, uninterrupted and uncontested, for centuries.²⁴³ In support of this claim, Morocco referred to a series of events throughout history, that it claimed were sufficient to establish sovereignty under the test established by the Permanent Court of International Justice case of *Legal Status of Eastern Greenland*.²⁴⁴

The Court, however, disagreed, calling these events “far-flung, spasmodic and often transitory,”²⁴⁵ and concluded that “the paucity of evidence of actual display of authority unambiguously relating to Western Sahara renders it difficult to consider the Moroccan claim as on all fours with that of Denmark in the *Eastern Greenland* case.”²⁴⁶ Rather, the Court declared that “what must be of decisive importance . . . is not indirect inferences drawn from events in

²⁴² Advisory Opinion, para. 88.

²⁴³ Advisory Opinion, para. 90.

²⁴⁴ P.C.I.J., Series A/B, No. 53.

²⁴⁵ *Id.*, para. 91.

²⁴⁶ Advisory Opinion, para. 92.

past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time.”²⁴⁷

Morocco offered as specific evidence of its internal display of authority over the tribes of Western Sahara in the period immediately prior to the Spanish colonization certain royal decrees appointing *caids* to head allegedly Saharan tribes;²⁴⁸ the alleged declarations of allegiance by Sahrawi leaders, most particularly Sheikh Ma ul-’Aineen, to various sultans;²⁴⁹ and

²⁴⁷ *Id.* para. 93. Morocco also requested that in evaluating evidence of an internal display of authority the Court take account of the “special structure of the Sherifian State.” The Court agreed that the “Sherifian State” had special characteristics: “Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory.” However it concluded that “Such an allegiance . . . if it is to afford indications of the ruler’s sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority. It follows that the special character of the Moroccan State . . . do[es] not dispense the Court from appreciating whether at the relevant time Moroccan sovereignty was effectively exercised or displayed in Western Sahara” Advisory Opinion, para. 95.

²⁴⁸ Morocco particularly relied upon the allegiance of certain Teckna tribes which allegedly traversed Western Sahara as well as southern Morocco. Through these Teckna caids, Morocco claimed, the Sultan’s authority and influence were exercised on the nomadic tribes pasturing in Western Sahara. Advisory Opinion, para. 99. However, the Court cited evidence that the Moroccan Sultan in the 1800s lacked authority over all but a few tribes within present-day Morocco, noting that the Moroccan “state” in the 1800s consisted partly of what was called the Bled Makhzen (areas actually subject to the Sultan), and partly of what was called the Bled Siba (areas in which *de facto* the tribes were not submissive to the Sultan). Morocco argued that this fact merely described two types of relationships between the Moroccan local authorities and the central power, not a territorial separation and should not be considered relevant in determining the Sultan’s authority over the tribes of Western Sahara. However, the Court noted that there was evidence that the Bled Siba “was not administered by the Makhzen; it did not contribute contingents to the Sherifian army; no taxes were collected there by the Makhzen; the government of the people was in the hands of caids appointed by the tribes, and their powers were derived more from the acquiescence of the tribes than from any delegation of authority by the Sultan” and that “even if these local powers did not totally reject any connection with the Sherifian State, in reality they became *de facto* independent powers . . . historical evidence shows the territory between the Souss and the Dra’a to have been in a state of permanent insubordination and part of the Bled Siba; and that this implies that there was no effective and continuous display of State functions even in those areas to the north of Western Sahara.” Advisory Opinion, para. 96.

²⁴⁹ Morocco relied to a great extent on the relationship which existed between a notable leader of one of Western Sahara’s largest tribes, Ma ul-’Aineen, and the Moroccan Sultan, claiming that once the tribal leader established himself in Smara, Western Sahara, in the late 1890s, much of this territory came under the direct authority of this sheikh, and that he became the personal representative of the Sultan. Advisory Opinion, para. 99.

Moroccan expeditions under Sultan Hassan I in 1882 and 1886 into the Noun region of southern Morocco.²⁵⁰

Spain countered by arguing (1) that the appointment of *caids* was purely formal, only confirming established chiefs, and that such appointments did not relate to indigenous tribes of Western Sahara but only to tribes indigenous to southern Morocco; (2) that Ma ul-'Aineen was never the "personal representative" of the Sultan, but merely concluded an alliance on equal terms with the latter for the purpose of resisting French expansion from the south; (3) that the Sultan's expeditions had gone no further south than Tiznit and Goulimine in present day Morocco; (4) that the migratory, nomadic tribes of Western Sahara had not submitted to Moroccan authority; and especially, (5) that Western Saharan tribes had not paid taxes to the Moroccan authorities.²⁵¹

The International Court of Justice rejected each of Morocco's arguments concerning these alleged "internal" displays of sovereignty over Western Sahara.

The Court found that the royal decrees appointing *caids* only related to tribes inhabiting areas within present day Morocco and did not constitute evidence of the Sultan's authority over the tribes of Western Sahara.²⁵² Nor did it find evidence of the levying of Moroccan taxes in the territory convincing. It did not find the material presented as to the

²⁵⁰ Sultan Hassan I allegedly visited the southern area of the Souss to maintain and strengthen his authority and to reinforce the local inhabitants' resistance to foreign penetration. Advisory Opinion, para. 99.

²⁵¹ Advisory Opinion paras. 100, 101.

²⁵² The Court noted that it did not "overlook the position of the Sultan of Morocco as a religious leader." However, it expressed the view that "the information and arguments invoked by Morocco cannot, for the most part, be considered as disposing of the difficulties in the way of its claim to have exercised effectively internal sovereignty over Western Sahara. The material before the Court appears to support the view that almost all the dahirs and other acts concerning caids relate to areas situated within present-day Morocco itself and do not in themselves provide evidence of effective display of Moroccan authority in Western Sahara." Advisory Opinion, para. 103.

activities of Ma ul-'Aineen sufficient to convince it that the activities of that sheikh should be considered as having constituted a display of the Sultan's authority in Western Sahara. As to the expeditions of 1882 and 1886, the Court found "... they did not reach even as far as the Dra'a, [in present day Morocco] still less Western Sahara ..."²⁵³

In short, the vague oaths of allegiance to the Sultan and/or certain Moroccan tribes of some leaders of some Sahrawi tribes during some periods of time for some purposes and the lack of control exhibited by the Sultan over the government and the everyday lives of the people of the territory did not establish the "continued display of authority" or "effective occupation" that had established title to a territory in other cases.²⁵⁴

The Court concluded, "Thus, even taking into account the specific structure of the Sherifian State, the material so far examined does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in Western Sahara."

Rather, the most it provided were "indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory."²⁵⁵

Finally, Morocco pointed to various treaties between it and foreign states as evidence of international acts that established the international community's recognition of Moroccan sovereignty over the territory. These included eighteenth and nineteenth century

²⁵³ Advisory Opinion, para. 104.

²⁵⁴ See *Legal Status of Greenland (Denmark v. Norway)*, *supra.*, and Hanauer, at 162 fn. 96.

²⁵⁵ Advisory Opinion, para. 107.

treaties with major European maritime powers,²⁵⁶ the Anglo-Moroccan agreement of 1895 concerning a trading concession in “Terfaya,” and an exchange of letters in 1911 between France and Germany allegedly recognizing the sovereignty of Morocco over certain portions of Western Sahara.²⁵⁷

The Court found this evidence similarly unconvincing. The Court did not consider the so-called “shipwreck” treaties between Morocco and foreign states evidence of the international community’s recognition of Moroccan sovereignty over the area; nor did it find that the 1895 Anglo-Moroccan agreement evidenced the implied international recognition of the Sultan’s territorial sovereignty over Western Sahara by Great Britain.²⁵⁸ As to the 1911 exchange of letters between France and Germany, the Court found only that they “. . . recognize or reserve for one or both parties a ‘sphere of influence’ as understood in the practice of the time.”²⁵⁹

In summary, it found that “[e]xamination of the various elements adduced by Morocco in the present proceedings does not . . . appear to the Court to establish the international recognition by other States of Moroccan territorial sovereignty in Western Sahara”²⁶⁰

Concluding its consideration of the acts submitted by Morocco as evidence of legal ties between Morocco and Western Sahara, the Court stated,

²⁵⁶ These included a treaty with Spain in 1767, and so-called “shipwreck” treaties in 1836, 1856 and 1861 with the United States, Great Britain and Spain, respectively, concerning the rescue and safety of shipwrecked mariners.

²⁵⁷ Advisory Opinion, para. 108.

²⁵⁸ *Id.*, paras. 108-123.

²⁵⁹ *Id.* para. 126.

²⁶⁰ Advisory Opinion, para. 128.

The inferences to be drawn from the information before the Court concerning internal acts of Moroccan sovereignty and from that concerning international acts are, therefore, in accord in not providing indications of the existence, at the relevant period, of any legal tie of *territorial* sovereignty between Western Sahara and the Moroccan State (emphasis added).

Rather, the Court found that they provided only “indications of a legal tie of allegiance between the Sultan and some, though only some, of the tribes of the territory, and in providing indications of some display of the Sultan’s authority or influence with respect to those tribes.”²⁶¹

The Court’s response to the claims of Mauritania was essentially the same.²⁶²

To summarize, neither Morocco nor Mauritania were able to demonstrate the *type* of historic ties with the people of Western Sahara *as a whole*, and on a *continuous basis*, for a *sufficient period of time* which would constitute ties of *territorial sovereignty*.

Consequently, by a vote of 14 to 2, the Court concluded that the information and evidence before it

... did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the

²⁶¹ *Id.*, para. 129. Judge Gros, in his separate opinion, expressed his belief that such ties should carry no legal weight whatsoever; “those ties are not legal ties, but ethnic, religious or cultural ties, ties of contact of a civilization with what lies on its periphery and outside it.” Advisory Opinion at p. 75 (separate opinion of Gros, J).

²⁶² Next, examining evidence of pre-colonial ties between the Mauritanian entity (the modern state of Mauritania having been created in 1960) and Western Sahara, in light of the evidence presented, it was the Court’s opinion that,

“... at the time of the Spanish colonization, there existed many ties of a racial, religious, cultural and economic nature between the various tribes and emirates ... in the Sahara region which today is comprised within the territory of Western Sahara and the Islamic Republic of Mauritania. It also discloses, however, the independence of the emirates and many of the tribes in relation to one another ... and the absence among them of any common institutions or organizations, even of a quite minimal character.” Advisory Opinion, para. 149.

“... the Court must conclude that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of ‘simple inclusion’ in the same legal entity.” Advisory Opinion, para. 150.

Court has 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 self-determination through the free and genuine expression of the will of the peoples of the Territory.²⁶³

Accordingly, even assuming *arguendo* that a claim of historic ties to a Non-Self-Governing Territory could be used as a justification for annexing the territory against the will of its people under principles of international law in certain circumstances, the type of ties that could support such a claim were not established by Morocco in proceedings that were initiated at its request before the International Court of Justice in 1974, and the Court's ruling on these claims were well known to Morocco in 1975 when the King organized the Green March and entered into the Madrid Accords.

(4) Claims Based on the Madrid Accords

In November, 1975, within weeks following the issuance of the Advisory Opinion of the International Court of Justice, Spain, the *de jure* as well as *de facto* "Administering Power" of the territory of Western Sahara entered into an agreement with Morocco and Mauritania, commonly known as the "Madrid Accords." Although the details of these Accords have never been made public, what was published was a communiqué in which the parties announced an agreement "in conformity with Article 33 of the U.N. Charter"²⁶⁴ under which Spain would withdraw from the territory by the end of February, 1976, and until that time would administer the territory jointly with Morocco and Mauritania, in consultation with the *djemma* or

²⁶³ Advisory Opinion, para. 162.

²⁶⁴ Article 33 of Chapter VI of the U.N. Charter states in part: "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice."

council of Sahrawi elders appointed by the Spanish. No mention was made of what would transpire after Spain's withdrawal.

Whatever the legal effect of the Madrid Accords might be, they cannot be the basis of a claim that Spain ceded territorial sovereignty over Western Sahara to Morocco and Mauritania, as Spain had no sovereign rights to convey; it enjoyed only the status under international law of an "administering power." The U.N. General Assembly's Friendly Relations Declaration ("Resolution 2625") asserts that, under the U.N. Charter, the Non-Self-Governing Territory has a "status separate and distinct from the territory of the State administering it." The separate and distinct status continues to exist until the people of the Non-Self-Governing Territory "have exercised their right of self-determination in accordance with the Charter."²⁶⁵ As such, the administrator's role is supposed to be temporary; it does not gain sovereignty over the territory.²⁶⁶

Further, legally the Madrid Accords could not have transferred the official status of an "administering power" to Morocco and Mauritania; under recognized United Nations

²⁶⁵ G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

²⁶⁶ It is true that Spain officially withdrew from what now constitutes the southernmost part of Morocco in 1956, after Morocco achieved independence from France, and this is sometimes cited as a precedent for the right of Spain to have "ceded" Western Sahara to Morocco through the Madrid Accords as part of the decolonization process. However, as already noted, by the time of the Madrid Accords Western Sahara had been listed as a Non-Self-Governing Territory and Spain's authority had been limited to those of an "administering power," which did not include the authority to "cede" the territory to another state. Moreover, the territory Spain withdrew from, at the time called "Spanish Southern Morocco," was always considered a Spanish "protectorate" within Moroccan territory whereas the territory of Western Sahara was considered a Spanish "colony" outside Moroccan territory. Article 6 of the Franco-Spanish convention of October 3, 1904 confirmed this. It discussed the territory which was to be called Western Sahara and stated that "Spain has henceforth full liberty of action in regard to the territory comprised between 26 degrees and 27 degrees 40' north latitude and to the eleventh meridian west of Paris, *which are outside Moroccan territory.*" [emphasis added] In the Treaty of Fez, of March 30, 1912, Sultan Moulay Hafid accepted the "protection" of France and Spain over the "protectorate" zones in Morocco and the region now known as Western Sahara was confirmed to be "outside Moroccan territory." *See*, Hodges, pps. 47-48;73-74 Accordingly, Spain did not "cede" the territory of Spanish Southern Morocco to Morocco in 1956, it simply withdrew from a territory that was always considered part of Morocco. This fact does not constitute precedent for a right for Spain, in the Madrid Accords, to "cede" to Morocco the territory of Western Sahara, which, according to the Treaty of Fez, was never considered by Spain, France – or Sultan Moulay Hafid – to be part of Morocco.

practice the official status of “administering power” can only be conferred by the United Nations itself, and carries with it certain responsibilities.²⁶⁷ Under the procedural norms developed by the United Nations, the only recourse for an “administering power” who wishes to abdicate its responsibilities is to transfer those responsibilities to the United Nations or permit the people of the territory to exercise their right to self-determination. The United Nations never conferred the status of “administering power” upon Morocco and Morocco has never fulfilled the responsibilities of an “administering power” over Western Sahara. Indeed, Morocco has never claimed to be the “administering power” of Western Sahara, a status that would be inconsistent with its claim of sovereign rights over the territory.²⁶⁸

(5) Claims Based Upon Possession and Control

An argument can be raised that when Morocco sent troops into Western Sahara in 1975, it committed an illegal act of aggression. As noted above, there is no theory of

²⁶⁷ Hans Corell, former United Nations Legal Advisor, noted in his Advisory Opinion on the legality of certain oil exploration contracts concerning the Territory that Morocco had entered into, that according to Article 73 of the Charter, among other duties Administering Powers must transmit to the United Nations certain technical and statistical information on the Territories they administer. Spain did so beginning in 1962 until it withdrew from the Territory in 1976; but following its occupation of the Territory Morocco has not. *See*, Corell Opinion, paras. 5 and 7.

²⁶⁸ This Committee has heard evidence that despite the position it has adopted at the United Nations, in which it has acquiesced in the position of the international community that Western Sahara has retained the status of a Non-Self-Governing Territory entitled to self-determination, the Moroccan government has for some period of time declared to its citizens that Western Sahara is a “province” of Morocco, and considers any expression denying the sovereignty of Morocco over Western Sahara or acknowledging the right of the peoples of Western Sahara to establish an independent state a criminal offense, whether expressed by citizens of Morocco or inhabitants of Western Sahara. As the Moroccan Association of Human Rights (“AMDH”) in an addendum to a report it issued in 2001 wrote: “As for the problem of Western Sahara raised by the report, international bodies are better able to judge its progress since the Moroccan people do not have the right to express an opinion contrary to the official position; worse still we note continual repression of any opinion contrary to that of the official position . . .” (Report of the AMDH on Human Rights in Morocco (Addendum) 2001). With respect to the situation in the Moroccan-controlled portion of Western Sahara in a Report of a Mission sent by the Office of the High Commissioner for Human Rights to Western Sahara and the refugee camps in Tindouf in May and June of 2006 (OHCHR Geneva, September 8, 2006), the Mission stated: “It has been confirmed in several meetings, both with governmental as well as non-governmental counterparts, that the sovereignty of Morocco over Western Sahara may not be questioned . . .” Report, at para. 28. This position would make it extremely difficult for Morocco to request to be officially named the Administering Power of Western Sahara, and to date it has not made such a request.

international law under which Morocco could be considered to have been entitled to exercise sovereign rights over Western Sahara in 1975; nor is there any theory of international law under which Morocco could be deemed to have acquired the official status of “administering power” over the territory at that time. It is true that in reaction to the publication of the Madrid Accords communiqué, the United Nations issued a Resolution in which it “took note of the Madrid Accords,”²⁶⁹ and it could be argued that by doing so the United Nations gave its tacit approval to the agreement of the parties. However, this Resolution was followed by another Resolution affirming the right of the people of Western Sahara to self-determination and deploring Morocco’s occupation of the territory by force.²⁷⁰ Moreover, whatever the intended implications of the first Resolution might have been, it is questionable whether it was intended to condone the seizure of the territory by force and measures that would ignite an armed conflict that would last more than 15 years.²⁷¹ Such armed conflict is diametrically opposed to the principles of Article

²⁶⁹ G.A. Res. 3458B (1975). However, while taking note of the Madrid Accords, the Resolution also reaffirmed the right of the people of Western Sahara to self-determination and requested the parties to the Madrid Accords “to ensure respect for the freely expressed aspirations of the Saharan population.”

²⁷⁰ On November 21, 1979 a Resolution was adopted affirming not only “the inalienable right of the people of Western Sahara to self-determination and independence” but also “the legitimacy of their struggle to secure the enjoyment of that right.” The Resolution deplored “the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania” and urged Morocco to terminate the occupation of the territory. The Polisario for the first time were officially recognized as the representatives of the Sahrawi people. G.A. Res. 34/37, 34 U.N. GAOR, Supp. (No. 46) 203, U.N. Doc. A/34/46 (1979). From 1976 to 1978, the General Assembly passed three additional Resolutions in which it took note of and deferred to measures that were being taken by the OAU (now the AU) to resolve the conflict. *See*, G.A. Res. 31/45 (1976), 32/22 (1977), 33/31 (1978). These measures culminated in a proposal to hold a referendum for self-determination along the lines of that which was eventually accepted in the Settlement Plan.

²⁷¹ On December 10, 1975, the United States abstained in the U.N. General Assembly on an Algerian-backed Resolution (3458A) which reaffirmed the U.N.’s traditional calls for a referendum, and instead voted in favor of a rival Resolution (3458B) backed by Morocco. The record indicates that this may have been under the mistaken belief that the Madrid Accords would result in a peaceful settlement of the dispute. As a State Department official later explained, “[this Resolution] took note of the Madrid Agreement, which we believed at the time offered the best basis for an eventual peaceful settlement.” Statement of Nicholas A. Veliotis, Deputy Assistant Secretary, Bureau of Near Eastern and South Asian Affairs, Department of State, October 12, 1977, in *The Question of Self-Determination in Western Sahara*, Hearings before the Subcommittees on International Organizations and on Africa of the Committee on International Relations, House of Representatives, 95th Congress, October 12, 1977 (U.S. Government Printing Office, Washington, D.C. 1977) p. 39.

33 of the U.N. Charter, upon which the Madrid Accords were allegedly based. Morocco sent the first of its troops into Western Sahara, and engaged in armed conflict with Sahrawi forces, more than two weeks before the publication of the Madrid Accords. At that time Morocco knew of the conclusions of the U.N. Committee sent to ascertain the wishes of the inhabitants of the territory that they wished to be independent of both Morocco and Mauritania. Accordingly, by the date of the publication of the Madrid Accords, Morocco knew or should have known that its occupation of the territory would be met with armed resistance by the indigenous population.

Accordingly, sending its army to occupy the territory in 1975 was arguably an illegal act.²⁷² As noted previously, the U.N.'s Friendly Relations Declaration provides:

The territory of a State shall not be the object of military occupation from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition by another state resulting from the threat or use of force shall be recognized as legal.

Nevertheless, assuming, *arguendo*, that Morocco's occupation of the territory by force in 1975 was an illegal act, under the principles of "effectivity" and "prescription," Morocco might over a period of time be able to claim sovereign rights over Western Sahara, despite the lack of any other legal basis for its claims. However, *inter alia*,²⁷³ in order for the principles of

²⁷² Professor Roger S. Clark has suggested that the Moroccan invasions "were equally a breach of the Charter provisions concerning the use of force, notably the prohibition on the use of force in Article 2, paragraph 4 and the provisions of Chapter VII concerning threats to the peace, breaches of the peace and acts of aggression." He notes that "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or party thereof" are among the "acts" that qualify as acts of aggression under Article 3(a) of General Assembly Resolution 3314(XXIX) of 1975. He suggests that these acts should be equally applicable to Non-Self-Governing Territories such as Western Sahara and that "It is hard to escape the implications of this definition for Morocco's actions." See, "Western Sahara and the United Nations Norms on Self-Determination and Aggression," INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA (IPJET, 2007) pps. 54-55.

²⁷³ There are a number of other arguments that might also defeat Morocco's claim to the territory on the basis of "effective control" or "prescription," such as the fact that throughout most of the period of Morocco's occupation of the territory there was an armed conflict raging between Morocco and large numbers of Sahrawis who

effectivity or prescription to be applicable the international community must be shown to have acquiesced in its claims to sovereignty. More than the mere passage of time of occupation is needed, even if coupled with the *de facto* acceptance of the situation by certain members of the international community. This is amply demonstrated by the case of East Timor. After the Indonesian invasion of the territory, one contemporary commentator noted, many U.N. member states “accepted the integration of East Timor into Indonesia as irreversible and, in some cases, have extended *de facto* recognition to the annexation.”²⁷⁴ Nevertheless, the General Assembly continued to voice support for the right of the people of East Timor to self-determination with the option of independence,²⁷⁵ and East Timor eventually became an independent state in 1999.

Despite its more than 30 years of occupation of Western Sahara, neither the United Nations, nor the African Union, nor any individual state has recognized Morocco’s claims to the territory as legitimate.²⁷⁶ Even the members of the Security Council who have advocated the “direct talks” between Morocco and the Polisario that have taken place since 2007 as opposed to the implementation of the “Settlement Plan” that would require a referendum, have maintained their support for the right to self-determination of the people of Western Sahara.²⁷⁷

contested Morocco’s title, which has continued today in the diplomatic forum, and indications that a number of Sahrawis presently living in Western Sahara have also contested Morocco’s sovereignty over the territory. This does not indicate a “peaceful” “acquiescence” in Moroccan rule. However, since the absence of international acceptance of Morocco’s sovereignty is apparent from the record, the Committee will refrain from discussing these other possible arguments.

²⁷⁴ *Id.*, citing Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 34 GAOR, 2 Supp. (No. 23), U.N. Doc. A/34/23/Add.1 (1979), at 121-122.

²⁷⁵ *Id.* p. 83.

²⁷⁶ In addition, both the EU and the U.S. have taken steps to exclude products from Western Sahara from those that are included in trade agreements with Morocco. *See* the discussion of this issue in the prior report of the Committee on Western Sahara.

²⁷⁷ Even in its initial Resolution suggesting that the parties enter into “direct talks” to come to a “political solution” of the issue, if possible, the members of the Security Council reaffirmed their commitment to the principle of self-determination for the people of Western Sahara. *See* S/RES/1754, April 2007.

Moreover, by agreeing in a ceasefire agreement in 1991 to have the issue of sovereignty over the territory determined by a referendum conducted under the auspices of the U.N. and the African Union, it may be argued that Morocco has conceded, at least to the international community, that it does not currently possess sovereign rights over the territory.

II. THE INTERNATIONAL LEGAL STANDARDS UNDER WHICH THE PEOPLES OF WESTERN SAHARA SHOULD EXERCISE THEIR RIGHT TO SELF-DETERMINATION

A. The Peoples Entitled to Exercise the Right to Self-Determination Are the Indigenous People of the Territory, the Sahrawis

Since the inception of this dispute and throughout all the procedures for self-determination proposed by the international community until 2001, there was agreement that only the indigenous people of the territory – the Sahrawis – had the right to determine the territory’s future. The proposal for a referendum put to Spain in 1966 by the United Nations stipulated that voters would be limited to the indigenous population and would not include Spanish settlers.²⁷⁸ The Settlement Plan, orchestrated by the United Nations and the OAU and agreed by Morocco and the Polisario in 1991, stipulated that only the individuals included on the Spanish census of Sahrawis conducted in 1974 would be allowed to vote in a referendum.²⁷⁹

²⁷⁸ In 1966, the General Assembly called for Spain to organize a referendum under the auspices of the United Nations, under which the Sahrawis would be able to vote on the territory’s political future. Resolution 2229 (XXI), 21 GAOR Supp. (No. 16) 72, U.N. Doc. 6316 (1966). The Resolution stipulated that Spain should “take all the necessary steps to ensure that only the indigenous people of the Territory participate in the referendum”

²⁷⁹ On June 18, 1990, the Secretary-General issued a Report outlining the details of the Settlement Plan. S/21360/1990 (18 June 1990). The Report confirmed the agreement in principle of the parties that the future of the territory would be determined by a referendum in which the indigenous population, defined as “all Sahrawis included on the Spanish census of 1974 eighteen years of age or older” would be allowed to vote. *Id.* at 5. The terms of the Settlement Plan were further delineated in the next Report of the Secretary-General, issued on April

Although the eligibility criteria were expanded thereafter, such criteria still attempted to limit voter eligibility to the Sahrawi population.²⁸⁰ These eligibility criteria were agreed by Morocco as well as the Polisario, and formed the basis of the provisional voters' list published by MINURSO in 1999.

Only after Morocco, who had submitted applications on behalf of over 100,000 individuals deemed ineligible by MINURSO according to those criteria, threatened to withdraw from the referendum process, was a plan submitted by the United Nations that would change the eligibility criteria to include individuals who were not part of the indigenous population.

As noted previously, the right to self-determination under international law pertains to the indigenous inhabitants of a Non-Self-Governing Territory – in this case the Sahrawis who inhabited the territory – and cannot be invoked by non-indigenous settlers. Accordingly, while the Sahrawis who inhabited the territory prior to Morocco's occupation may voluntarily agree to permit outsiders to partake in determining the future of Western Sahara, they cannot be required to do so, and any plan that would have that effect would contravene principles of international law.

19, 1991, S/22464/1991 (April 19, 1991), again confirming the parties' agreement in principle to a referendum in which all Sahrawis listed on the Spanish census who were 18 years or older would be allowed to vote, and the choices would be between independence and integration with Morocco.

²⁸⁰ In his report, S/23299/1991 (December 19, 1991), at 9-10, the Secretary-General proposed including in the voters' list not only individuals on the Spanish census who were 18 years or older (Category 1), but also persons who could prove that they were living in the territory as members of a Saharan tribe at the time of the 1974 census but were not counted (Category II), persons who were members of the immediate family of individuals in Categories I or II (Category III), persons born of a Saharan father born in the territory (Category IV), and persons who were members of a Saharan tribe and who resided in the Territory for six consecutive years or intermittently for 12 years prior to the Spanish census (Category V).

B. The Political Options That Must Be Available to the Peoples of Western Sahara

In conformity with the above general principles applicable to the right to self-determination, the Committee believes that the peoples of Western Sahara have a right under international law to exercise this right by choosing from the full array of possible political outcomes available to them pursuant to Resolution 1514:

- (1) the creation of a new independent sovereign state,
- (2) full integration with Morocco, or
- (3) free association with Morocco on some other basis, including as an autonomous region.

Any proposal which would limit the options available to the peoples of Western Sahara would be inconsistent with the principle of self-determination under international law.

C. The Necessity of Ascertaining the Freely Expressed Will of the People

The choice among the options available to the peoples of Western Sahara must fairly reflect their freely expressed will. Some form of consultation is indicated, but not necessarily a referendum. However, past United Nations practice has established the referendum process as the favored means by which the will of the peoples of Non-Self-Governing Territories can be ascertained. Moreover, the referendum process has been consistently advocated as the means to resolve the Western Sahara dispute in Resolutions by the General Assembly and the Security Council from 1966 to 2007, as well as in recommendations by the African Union and the International Court of Justice. Also, it is the means chosen by the parties themselves to resolve their dispute in the Settlement Plan, initiated as part of a cease-fire agreement in 1991,

and other than the fact that Morocco has unilaterally decided to withdraw from a referendum process (at least one in which there is an option of independence), the United Nations has offered no reason why such a referendum cannot take place.²⁸¹

Although other means have been approved by the United Nations as ways to resolve sovereignty disputes, they have primarily been utilized to resolve conflicts between member states and subgroups within the state – who, as the Committee has noted previously – are subject to self-determination rights that differ from those applicable to the peoples of Non-Self-Governing Territories in the process of decolonization. These “other means” have sometimes included “negotiations” with the aim of limiting the choice available to the subgroup to one that is acceptable to the state and the international community. In the Western Sahara dispute, Morocco’s current objection to the holding of a referendum on self-determination has been based on precedent outside the colonial context in which disputes over sovereignty had been resolved “by granting autonomous status within the existing state structure”; and its claim that “negotiations remained the privileged means for the parties to adapt the settlement to their

²⁸¹ The Committee has been able to ascertain no legitimate reason why a referendum on the basis of the Settlement Plan of the parties which formed part of the current cease-fire agreement and has justified the mandate of MINURSO cannot be implemented. Morocco and certain United Nations officials have claimed that disputes over the eligibility criteria for participating in such a referendum present an insurmountable obstacle to such a referendum. However, the criteria for voter eligibility were clearly agreed by the parties, and the United Nations, in the Settlement Plan. Under these criteria persons eligible to vote would be those included on a census of the population conducted by the Spanish in 1974. These criteria were later broadened, with the agreement of the parties, to include five categories of persons deemed eligible to vote, and interview sessions were conducted and a provisional voters’ list prepared by MINURSO on the basis of these criteria. Although there were initially disagreements over the treatment of members of tribal units that were only represented on the Spanish census by a small number of individuals and which were not considered by the Polisario to be tribal units indigenous to the territory, these disagreements were resolved by the time the provisional voters’ list was published. There remained only the stage of appeals, and after a procedure for appeals was stipulated by MINURSO, the parties were able to file appeal applications. It was only at this stage of the proceedings that Morocco unilaterally pulled out of the referendum process, insisting upon a “negotiated settlement.” We note that the current autonomy proposals of Morocco call for a referendum to be held – but only to confirm a “political solution.” Apparently, Morocco does not foresee any “insurmountable obstacles” to a referendum as long as the option of independence is not on the table.

aims and to regional characteristics.”²⁸² In the context of the classical colonial self-determination right, it is perhaps not surprising that the state challenging the prospect of territorial independence would seek to apply precedent from the non-colonial context to define what constitutes a valid act of self-determination. However, the Committee believes that precedent from the non-colonial context is not applicable to the case of Western Sahara under existing norms of international law.

CONCLUSION

The most recent Resolution called for the extension of MINURSO’s mandate for an additional twelve months (i.e., until April 30, 2013).²⁸³ Meanwhile, a large proportion of the Sahrawi community continues to languish in refugee camps in Algeria and those who remain in Western Sahara continue to face an uncertain political future.

In this Report, the Committee has analyzed the various legal theories supporting the right to self-determination of the people of Western Sahara and the countervailing right of the state of Morocco to territorial integrity, and has come to the conclusion that the people of

²⁸² Weller, *supra*, p. 143, citing Morocco’s written objection to the Peace Plan (S/2003/565, Annex III). As further noted by this commentator:

[D]espite its earlier commitment to a referendum offering the option of independence, Morocco objected to the plan ... [and] continued its argument by reminding the U.N. envoy that many disputes throughout the world, since the Åland Island case in 1920, had been resolved by granting autonomous status within the existing state structure. Basing itself on this precedent outside the colonial context, Morocco claimed that negotiations remained the privileged means for the parties to adapt the settlement to their aims and to regional characteristics. These negotiations would favour the attainment of such self-determination as ‘would fall squarely within the democratic, decentralized nature of the Moroccan state as a whole’.” Morocco’s earlier acceptance of the holding of a referendum was now claimed to relate to the endorsement of such a settlement. Accordingly, Morocco reverted to offering a decentralization or autonomy solution, instead of offering the genuine act of colonial self-determination which was meant to be on offer after the expiry of the interim period of self-governance. Hence, the proposal remained unimplemented.

Weller, pps. 143-144 (internal footnotes citing to S/2003/565 and its Annexes omitted).

²⁸³ S/RES/2044 (April 22, 2012).

Western Sahara clearly have a right under international law principles to self-determination that is undiminished by any legitimate territorial or other legal claim of Morocco. We have examined the acceptable means by which this right to self-determination can be expressed under principles of international law and have come to the conclusion that the means through which the people of Western Sahara are permitted to exercise this right to self-determination must ensure that the free will of the population is respected and cannot involve the restriction of options to the one that may be conducive to the aims of Morocco or convenient for the international community. The Committee believes that the members of the United Nations Security Council, the United Nations General Assembly, and the international community at large have an affirmative duty to enforce these principles of international law and to facilitate the resolution of the dispute over Western Sahara in a manner consistent with these principles.

RECOMMENDATIONS FOR A WAY FORWARD

The Committee is mindful of the fact that the issue of self-determination for Western Sahara has eluded resolution for a very long time. In light of that, the Committee does not purport to present the “best” solution, but rather to highlight the principles of international law that apply and measure the proposals against their compliance with them.

First, the Committee has concluded that the right to self-determination under international law requires that the Sahrawis have the opportunity to freely determine their political status and that this determination must include the option of independence. Accordingly, the exercise of self-determination, in whatever form it may take must include the possibility that the final status of Western Sahara will be independence. The right to self-determination, with the independence option bound up in that right, is the only affirmative right in play; the countervailing right of territorial integrity, which serves as a check on self-determination rights,

does not apply in this case because the International Court of Justice has already determined that Morocco does not have territorial sovereignty over Western Sahara.

Thus, any plan which eliminates the independence option for the exercise of self-determination is illegitimate under well-established international law. This does not mean that the Sahrawis could not waive this right and submit to a plan which does not include this option (however, this seems unlikely given the consistent position taken by the Polisario over the past 30 years), but we would caution the international community to refrain from imposing this framework on the peoples of Western Sahara without their consent. As the Secretary-General commented after Morocco rejected the Peace Plan because it included an independence option: “It is difficult to envision a political solution that ... provides for self-determination but that nevertheless precludes the possibility of independence as one of several ballot questions.”²⁸⁴

We note that, while there is some recent international precedent for resolving self-determination disputes without an independence option, such situations have arisen outside of the colonial context. It is undisputed that Western Sahara fits squarely into the classical colonial context and the specific requirements of Resolution 1514, which provides for an independence option. Also, in light of the fact that the heart of the requirement is the “freely expressed will of the people,” it would be against recognized norms of international law to eliminate a legally protected status outcome when it is undisputed that it has strong support among persons who are unquestionably “people” to whom the right applies – even if that option were not to ultimately prevail. In that context, although a “political solution” (i.e., possibly without any referendum) to the conflict would be consistent with principles of international law if the people of Western Sahara were willing to accept one, no political solution can be forced upon them consistent with

²⁸⁴ S/2003/565 at 10-11.

international law principles and in negotiating such a “political solution” the option of independence cannot be ruled out.

In short, it is clear that, without having all of the legally-protected options on the table, the people of Western Sahara would not be able to exercise their right to self-determination under international law. Accordingly, the Committee concludes that limiting the choice of the people of Western Sahara to the Moroccan “Autonomy Plan” does not comply with international law.

In light of this principle, without taking a position on the merits or political feasibility of any plan, the Committee notes that the following procedures would, in principle, be among the options consistent with the Sahrawis right to self-determination under international law:

(1) Enforcement of the original U.N.-OAU Settlement Plan:

Under this alternative, the referendum would be conducted by MINURSO in accordance with the provisions of the Settlement Plan agreed to by the parties to the conflict, and the list of eligible voters established by MINURSO, under the supervision of the Security Council and the AU, and consistent with internationally recognized legal norms.

(2) Enforcement of a version of the Peace Plan, or an alternative plan which provides for an act of self-determination with an option for independence, and which ensures that the electorate will be those entitled to the right to self-determination under international law;

Under this alternative, a referendum would ultimately be held which includes – among other options – a ballot option for independence. The contours and the specifics could vary, so long as the provisions are aimed at ensuring that the decision is made by the “people” of Western Sahara.

- (3) Order negotiations on a “political solution” with preconditions, which include (1) the requirement that all options for self-determination be included, including independence, and (2) a timetable for such negotiations, after which, if no agreement is reached, a referendum will be held with all options available.

There is an inconsistency between the principle of self-determination under international law, which has been repeatedly confirmed through General Assembly Resolutions on the matter to include an independence option, and the actions of the Security Council, in merely asking the parties to proceed with discussions on a “political solution” with no preconditions. Given the parties’ entrenched and irreconcilable positions on sovereignty over the territory, this approach allows each side to maintain their positions but glosses over the fact that the Polisario’s position is not inconsistent with legal precedent, but Morocco’s is. While not wishing to suggest the details of such an option, we note that a feature of the Comprehensive Peace Agreement for Sudan was the Machakos Protocol, in which after a period of six years of negotiations on a political settlement of the conflict, the people of South Sudan were granted the right to a referendum in which independence was an option. A similar approach to the Western Sahara conflict would be consistent with international law principles.

The Committee notes that each of the three options above may require a mandatory order by the Security Council under Chapter 7 of the U.N. Charter.²⁸⁵ Whether to invoke the powers of Chapter 7 to resolve this dispute is a political issue and the Committee is mindful of the political problems such a decision may entail. We note simply that this would be a means – perhaps the only means – of enforcing the self-determination principles under international law.²⁸⁶

Without such action, the dispute will continue and the status quo will be maintained. Unfortunately, this appears to have had the effect of making the dispute more intractable and benefitting the position of the party in control of most of the territory – Morocco. As one commentator noted, in describing so-called “frozen conflicts” in sovereignty disputes, “the inability to constrain the parties to negotiate seriously after agreement to suspend their positions ... bears the risk of enhancing the position of the party which benefits from the status quo ... and may extend to an attempted consolidation of *de facto* [arrangements].”²⁸⁷

²⁸⁵ As Baker noted: “If you’re going to say that you have to resolve the conflict by consensus agreement between the parties then the parties have got to want to resolve it. And there really should be some outside action forcing events to get to that objective. If, on the other hand, you can persuade let’s say, the Security Council as we did in the lead up to the Gulf War to use its Chapter 7 powers to impose upon one party or the other or ask one party or the other to do something they would not otherwise voluntarily agree to do, that’s a little different. And it’s easier to resolve a conflict when you have that power and that ability behind you.” Interview of James A. Baker III by Mishal Husain, *Wideangle*, August 19, 2004, http://www.pbs.org/wnet/wideangle/printable/transcript_sahara_print.html

²⁸⁶ The Committee notes that in his report S/2002/178 (February 19, 2002) the Secretary-General, acknowledging that progress in resolving the dispute was “pessimistic,” asked the Council to consider the options of : (1) implementing the Settlement Plan without the consent of the parties; and (2) revising the draft Framework Agreement, taking into account the parties’ concerns, and submitting the revision to the Security Council to impose it on the parties on a non-negotiable basis; and that neither of these options was adopted by the Security Council which refused to impose any proposed action on the parties. However, we feel that only by an action that would require both parties to uphold the right to self-determination of the peoples of Western Sahara, will this dispute be finally settled.

²⁸⁷ Weller, *supra*, p. 137.

We encourage the international community to take steps to see that this dispute is resolved in the near future. The longer it takes to resolve the sovereignty issue, the more complicated will be the task of implementing any solution reached.

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