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## CHAPTER Four

# SELF- DETERMINATION, STATEHOOD, AND THE REFUGEE QUESTION UNDER INTERNATIONAL LAW IN NAMIBIA, PALESTINE, WESTERN SAHARA, AND TIBET

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### **Introduction to the Legal Framework on Namibia, Palestine, Western Sahara and Tibet**

This chapter addresses the significance of the legal framework established by the United Nations (UN) for resolution of the core issues underlying the conflicts in South West Africa/Namibia, Palestine, Western Sahara (W. Sahara), and Tibet. The chapter will examine what elements were present in the UN' framework for self-determination in South West Africa/Namibia that contributed to Namibia's ultimate independence and the solution of its refugee problem that are present or absent in the cases of Palestine, W. Sahara, and Tibet.<sup>1</sup> The chapter will conclude with examining which of these elements appears necessary to resolving the ongoing refugee problem in each of these cases, suggesting the utility of various strategies to build on the Namibia precedent.

Namibia and Palestine are closely analogous cases from the perspective of the legal principles applicable to them in the UN. The two territories have parallel histories in terms of how their campaigns towards self-determination and independence began, and in the way their status was addressed at the League of Nations and the UN. The decolonization effort

for W. Sahara took a somewhat different course through the UN, and the UN has not viewed Tibet as an occupied or colonized territory. However, comparing the histories of these territories through the lens of the UN, and comparing that to broader international law principles, is helpful to understand the different ways in which law provides a framework for resolving the core self-determination problems at the heart of these conflicts. What are the key elements in the UN approach towards Namibia that allowed it to secure independence in fulfillment of self-determination? Are those elements present or absent in the UN's approach to the cases of Palestine, W. Sahara and Tibet? Which of those elements appears necessary to resolving the refugee issues in these cases? Can what Namibia achieved be achieved by any of these other territories or peoples in the near future?

## **The UN's Framework for Decolonization and Self-Determination**

Self-determination as a legal concept, and then as a right of “peoples” to be implemented by the community of states and the UN, evolved between the two world wars.<sup>2</sup> At the end of WWI, the great powers incorporated various kinds of supervisory relationships with former colonial or Ottoman territories into the League of Nations Covenant and the Treaty of Lausanne (ending the Ottoman Empire).<sup>3</sup> This plan created three classes of territories, claimed to be at different stages of development, and placed them under the Mandate, or supervision, of one or other of the great powers.<sup>4</sup> The Mandates system was a compromise between the notion of self-determination and the interests of the colonial powers.<sup>5</sup> The League of Nations Covenant placed Palestine among the Class A mandates, or those closest to readiness for independence, along with Iraq, Lebanon, Syria, and Transjordan.<sup>6</sup> Britain was given Mandatory power over Palestine.<sup>7</sup> South West Africa/Namibia was among the Class C mandate countries and considered farthest from independence under the League of Nations Covenant, Article 22—in fact, independence was not contemplated at all by the League for the Class C territories.<sup>8</sup> Namibia was placed under South Africa's Mandate.<sup>9</sup> On April 18, 1946, the League dissolved, leaving all the Mandate countries continuing under the terms of Covenant Article 22 as trusteeships under the new United Nations Organization, with the exception of Syria, Lebanon, and Transjordan, which had by then become independent.<sup>10</sup>

With the dissolution of the League of Nations and the establishment of the United Nations, self-determination as a concrete aim of the international community of states became a cornerstone of the UN Charter. Article 1 of the Charter included among the Purposes of the United Nations, “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”<sup>11</sup> The General Assembly’s (UNGA) two Resolutions, 1514 (XV) and 1541 (XV), passed one day apart in 1960, marked a watershed in the long march towards ending colonialism and recognizing self-determination as a legal right of certain “peoples.” UNGA Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, stated, “all peoples have the right to self-determination which entails freely determining political status.” It declared that:

5. 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, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. 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.<sup>12</sup>

Resolution 1514 set out a list of Principles for member states to follow in order to determine when states had an obligation to transmit information to the UN concerning the status of territories to be decolonized under Chapter XI of the Charter. Principle VI of the Resolution lists three ways in which decolonization could take place and self-determination of the territory in question could be realized: full independence; free association with an independent state; or integration with an independent state. The Resolution describes what is required for any of these options to meet the criteria for fulfillment of self-governance. Free association would have to be based on “free and voluntary choice by the peoples of the territory...through informed and democratic processes.” Integration should be “on the basis of complete equality between the peoples of the Self-Governing Territory and those of the independent country...” as well as on “equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without distinction or discrimination.”<sup>13</sup> The definition of self-determination in Resolution 1514 was incorporated in 1966 as Article 1 in the two UN human rights covenants, the International

Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, the Charter, the Declaration, the Covenants, nor any other international law instrument define the “peoples” who hold the right. The meaning of “self-determination” and “peoples” are highly disputed and appear to fluctuate widely with UN practice.<sup>14</sup>

What “peoples” are nationals of a territory and entitled to rights in and to that territory, and when a territory becomes a state, are also highly contested, as the cases of Namibia, Palestine, W. Sahara and Tibet painfully illustrate.<sup>15</sup> The determination of who the ‘nationals’ are of a territory that has undergone a change in status depends on the reasons for the territorial change. If the territorial status has changed as a result of occupation, international law is quite clear that such occupation cannot deprive the habitual residents of that territory of their nationality rights in it, nor can the occupier’s settlers acquire nationality in that territory –the transplantation of settlers into occupied territory is manifestly illegal.<sup>16</sup> On the other hand, if the change in territorial status is due to state succession in the absence of occupation, the rules governing nationality rights for habitual residents and nationals of the prior territory are more complex. Simply put, the thrust of the rules on successor states is that habitual residents of the territory are presumptively granted the nationality of the successor state; they cannot be ‘arbitrarily’ deprived of the new nationality of the successor state; they must have the voluntary choice of national status if they are entitled to more than one nationality; and the successor state cannot deprive habitual residents of nationality under any circumstances if to do so would render them stateless.<sup>17</sup>

Of course, the trigger question in the situations examined here is whether the territories are occupied as a matter of international law. In the Namibia case, the consensus view by 1945, when the UN Charter came into force, was that classic ‘colonization’ was occupation, and illegal under the Charter, whether through the Mandate system or otherwise. The colonization determination has not been so clear for the other territories under consideration, making the decision of who their ‘nationals’ are, a far more contested matter. Bound up with the right of “peoples” to self-determination in the context of decolonization are the complicating factors from the perspective of the UN of territorial aggression, prolonged occupation, and settler implantation. These factors were present in Namibia, but did not prevent ultimate independence. They remain major barriers to the realization of self-determination in the three other cases under consideration, and despite *jus cogens* and peremptory norms prohibiting them, the UN has been incapable of enforcing the prohibitions in favor of

realizing self-determination for the peoples in question.

When a territory becomes a ‘state’ is yet another difficult question demanding a formula to help resolve which peoples have rights to that particular territory. There are two views of exactly when a territory or people are a “state” as a matter of international law, and the global community of states has not acted consistently on the issue.<sup>18</sup> The most commonly accepted standard for the elements of statehood is the Montevideo Convention on the Rights and Duties of States (1933).<sup>19</sup> This Convention defines the criteria of a state as a permanent population with a defined territory, government, and the capacity to enter into relations with other states.<sup>20</sup> Since Montevideo, it is also claimed that an additional element is required for statehood: independence.<sup>21</sup> One position is that statehood is a function of the declaration and recognition by other states; the other is that statehood is a function of recognition plus other factors, which may or may not include independence.<sup>22</sup> Historically, there are many examples of states that have been recognized without having territorial independence, including our primary illustration, Namibia.<sup>23</sup>

A struggle over territory and the rights of peoples to it, inevitably involves armed conflict, and the right to resort to force of arms is intrinsically connected with the self-determination question. The use of armed force *against* a people recognized as having the right to self-determination is absolutely prohibited under the UN Charter, as a peremptory or *jus cogens* norm of international law. The prohibition against preventing dependent peoples from realizing self-determination “reached peremptory status in the course of the massive decolonization process.”<sup>24</sup> The UN Charter is explicit on the prohibition of the use of force in Article 2(4), and authorizes the Security Council (UNSC) to intervene militarily or otherwise to prevent “breaches of the peace and acts of aggression” under Chapter VII. In 1975, the UNGA defined what constituted “acts of aggression” in UNGA Res 3314, including:

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 part thereof.<sup>25</sup>

The Rome Statute of the International Criminal Court (ICC), adopted in July 1998, although listing the “crime of aggression,” did not initially incorporate a definition. In June 2010, the definition of the “crime of aggression” was incorporated into Article 8 of the Statute, reading, in relevant part:

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) 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 part thereof. . . <sup>26</sup>

Military occupation, whether short or long term, constitutes a crime of aggression under contemporary international law under the Rome Statute, and can be prosecuted in the ICC. The feasibility of prosecution in the cases under consideration is another matter, but the illegality of the acts involved in the occupations in these cases precedes the codification of ‘aggression’ in the Rome Statute. The laws and legal proscriptions on occupation long pre-date the UN Charter, going back to the 1907 Hague Convention Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land.<sup>27</sup> Neither the Hague Regulations nor the Fourth Geneva Convention prohibit occupation *per se* but even they place limitations on acts an occupier can take in the territory occupied. Among those limitations are the proscription against changing the laws in place in the territory, imposing its own laws, and exploiting the resources or property of the occupied area for its own economic benefit.<sup>28</sup> Two corollary prohibitions under the law of occupation are now war crimes under the Rome Statute of the International Criminal Court: <sup>29</sup> the prohibition against the transfer of an occupier’s population into occupied territory and the deportation of the indigenous people outside of the occupied area.<sup>30</sup> Moreover, the Geneva Conventions of 1949 expanded the definition of “occupation” and “protected persons” to periods of occupation that are not militarily opposed.<sup>31</sup>

The thrust of these rules is clear: an occupier does not acquire sovereignty over the territory it occupies, regardless of the length of occupation. Whether occupation is legal or illegal in general (depending

on the binding nature of the governing treaties), in the cases of Namibia, W. Sahara, and Palestine, the actions of the occupiers have been viewed as illegal or in contravention of the right to self-determination of the peoples involved as a matter of customary law, underscored by specific pronouncements as such from the International Court of Justice (ICJ).<sup>32</sup> Although there is a strong basis to conclude that Tibet is illegally occupied under general international law, in the consensus of academics, civil society and within certain governments, such consensus is for the most part lacking from the UN political organs and in the public positions of most UN member states.<sup>33</sup>

Finally, as part of its decolonization framework, the UN has very explicitly authorized the use of force for liberation movements seeking to implement the right of self-determination. The right of resistance against colonialism or denial of self-determination has been spelled out in a series of UN resolutions since at least 1970. UNGA Resolution 2621 (XXV) of October 12, 1970, articulates the right to act against and resist subjugation, domination, and exploitation. In two important paragraphs, the Resolution states that the UNGA: “declares the further continuation of colonialism in all its forms and manifestations a crime” constituting a violation of the UN Charter, and “reaffirms the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial powers.”<sup>34</sup> The Resolution incorporated very specific language that member states had an obligation to support the struggle of African territories against apartheid, through sanctions and other means against South Africa. The principle of the right to resistance through armed struggle is confirmed by Art. 1(4) of Protocol 1 of the Fourth Geneva Convention (1977), which defines the fight for self-determination as an international armed conflict and a “war of liberation.”<sup>35</sup> Art. 1 recognizes the right of resistance in wars of national liberation, including the use of military force.<sup>36</sup> The UN has explicitly endorsed this right for Namibia, W. Sahara, and Palestine.<sup>37</sup>

What made Namibia’s bid for independence successful in the face of enormous odds, while W. Sahara, Tibet, and Palestine have been unable to achieve self-determination or independence with similar (though not identical) forces against them? Has the UN’s intervention differed in any meaningful way in these cases? Is territorial independence a *sine qua non* to resolving these protracted refugee problems, or are there other options consistent with the UN’s approach toward these issues? Must Palestine, W. Sahara, and Tibet also succeed in obtaining independence like Namibia in order to resolve their refugee crises, or does the UN’s framework in these cases suggest other strategies towards resolution? How does the Namibian case help identify strategies for Palestine, Tibet, and W. Sahara

to resolve their protracted refugee situations?

These questions require unpacking the key factors that contributed to achieving independence and the return of refugees in Namibia, beginning with the UN's view of self-determination and its perspectives on each of the refugee crises.

## **The UN's Approach to Self-Determination and Refugees: Namibia, Palestine, W. Sahara and Tibet**

### **Namibia**

South Africa sought to fully incorporate Namibia as South African territory during the Mandate period. However, the UN refused South Africa's bid of territorial incorporation and the UNGA voted to put Namibia under trusteeship under Ch. XII of the UN Charter.<sup>38</sup> South Africa objected, beginning a lengthy battle in the UN Almost immediately, the UNGA filed the first of three requests for Advisory Opinions from the ICJ on various questions relating to the status of Namibia.<sup>39</sup> The UNSC later filed another request for an Advisory Opinion with the ICJ,<sup>40</sup> and Liberia and Ethiopia filed a contentious case challenging South Africa's apartheid policies and failure to comply with UN requirements towards South West Africa.<sup>41</sup>

In the first of the UNGA's requested advisory opinions, the International Status of South West Africa, the ICJ found that South Africa retained its obligations as Mandatory, that the UNGA was legally bound to perform supervisory functions formerly performed by the League, that South Africa had to submit to UNGA supervision and file annual reports, but that it did not have to put Namibia under UN Trusteeship.<sup>42</sup> However, the ICJ also found that South Africa could not unilaterally modify the status of Namibia because that required UN consent. South Africa rejected the Opinion. The UNGA submitted two subsequent advisory opinions relating to South West Africa/Namibia: Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, and Admissibility of Hearings of Petitioners by the Committee on South West Africa.<sup>43</sup>

In a series of resolutions following the first Advisory Opinion in 1950, the UNGA established multiple UN Committees to address the South West Africa issue: The Committee on South West Africa (1953); the Good Offices Committee (1957); and two Special, or *Ad Hoc*, Committees on South West Africa (1970).<sup>44</sup> The UNGA as early as 1957 requested the Committee on South West Africa to determine what legal action was available to the UN to ensure that South Africa complied with its



obligations. In response, the Committee submitted a special report discussing what legal actions were open to the UN to compel South Africa to comply.<sup>45</sup> It was on the recommendation of this report that Ethiopia and Liberia, former members of the League of Nations and now UN members, decided to file a contentious case in the ICJ—the case that was ultimately filed as the South West Africa Cases (*Ethiopia and Liberia vs. South Africa*). The Committees were tasked with furthering the goal of independence for Namibia; for example, the *Ad Hoc Committee for South West Africa* was required to recommend “means of administering South West Africa to enable the people of the territory to exercise self-determination and achieve independence.”<sup>46</sup> Throughout this period, South Africa refused to put Namibia under trusteeship or to fulfill any mandate obligations.

In October 1966, the UN terminated South Africa’s Mandate and placed Namibia under direct UN responsibility. In 1967, the UNGA established the Namibian Council to administer the territory until independence.<sup>47</sup> The UNSC then sought an Advisory Opinion asking what states’ obligations were given South Africa’s continuing intransigence.<sup>48</sup> In its Advisory Opinion to the UNSC, the ICJ affirmed the legal framework set up by the UNGA, and held that the ultimate objective of the Mandates was self-determination and independence of the administered states.<sup>49</sup> The ICJ further found that South Africa’s Mandate was properly terminated, its continued presence in Namibia was illegal, and it was required to withdraw from the territory. The Court also found that member states were obliged not to recognize or support South African presence in Namibia, including the obligation not to enter into treaties and economic and other dealings with South Africa.

The UNSC accepted the Opinion, declared South African occupation an internationally wrongful act, threatened Ch. VII action, and requested a review of treaties involving South African relations in Namibia.<sup>50</sup> The UNGA dissolved the Special Committee and transferred the question of South West Africa to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Special Committee of Twenty-Four). Following the first report of this Committee, the UNGA passed Resolution 1899, which required all states to refrain from supplying arms, equipment, petroleum and other goods to South Africa, and to “refrain from any action which might hamper implementation of the present resolution and prior UNGA resolutions on South West Africa.”<sup>51</sup> These led to the initiation of the sanctions regime against South Africa.

Meanwhile, refugees had been fleeing Namibia to neighboring states

since 1960, and in increasingly large numbers through the 1970s and 1980s, primarily to Zambia and Tanzania. With the establishment of the South West Africa People's Organization (SWAPO) and its military arm, the People's Liberation Army of Namibia (PLAN) in 1960, the reception and maintenance of the refugees was organized and coordinated directly by these entities representing the Namibian government-in exile.<sup>52</sup> In 1976 the UNSC passed Resolution 385, a legal framework for the transfer of power, free elections, and territorial integrity of Namibia. The Secretary General drafted a settlement that was later adopted by the UNSC as Resolution 435. In Resolution 435, the UNSC adopted the Secretary General's view that the return of the refugees should not be contingent on independence, but that refugee return was a prerequisite to a fair pre-independence electoral process.<sup>53</sup>

According to the Proposal for a Settlement of the Namibian Situation, addressed to the President of the UNSC, the UN "will ensure that Namibians remaining outside of Namibia are given a free and voluntary choice whether to return. Provision will be made to attest to the voluntary nature of decisions made by Namibians who elect not to return to Namibia."<sup>54</sup> The United Nations High Commissioner for Refugees (UNHCR) was tasked to oversee a repatriation process that was to take place within six weeks of UN authorization, to ensure that all repatriations were voluntary, and to assist in resettlement of those not choosing to return.<sup>55</sup>

SWAPO committed to the UN framework on behalf of the Namibian people's liberation movement. Actual implementation of the Resolution was delayed for a decade, however, due to the ongoing conflict between SWAPO and its Cuban and Angolan supporters on the one hand and South Africa on the other, and the refusal of South Africa to give full amnesty to the returning refugees. Still, the repatriation of over 40,000 refugees took place prior to the elections of November 1989, ensuring an easy victory of SWAPO to form the first independent Namibian government.<sup>56</sup> The small number of refugees compared to the number of Sahrawi, Palestinian, and Tibetan refugees must be understood in the context of the small population of Namibia at the time of barely 1.6 million people. UNHCR maintained a short presence after independence, with almost no involvement in reintegration of returnees, which was entirely taken over by the SWAPO government.

Ultimately, South Africa entered into an agreement with Cuba and Angola about withdrawal of all troops, and recognized the right of self-determination, independence, and equality for South West Africa. Most states refused to recognize South Africa's claims to Namibia after

Resolution 435, even though independence did not come about until 1990, after the 1988 tripartite agreement with Cuba and South Africa.<sup>57</sup> In other words, most of the world community of states dealt with the Namibian Council as the lawful administrative authority over Namibia at least a full decade before actual independence. During this time, within the UN's framework, Namibia was able to consolidate resources on its territory, set the sanctions regime against South Africa in place, and continue its armed resistance until final withdrawal of foreign forces and the agreement for independence from South Africa.<sup>58</sup> In the Namibia case, then, independence was not a prerequisite to achieving the main goals of self-determination—the end of apartheid, non-recognition of South African claims to its territory, its right to armed resistance to achieve the withdrawal of South Africa, and return of refugees in advance of elections or territorial independence.

Although South Africa did not recognize Namibian independence and did not withdraw from its territory until 1988-1990, the world community, following the actions taken at the UN and at the ICJ, created a defined legal framework for Namibia's status, declared its independence, imposed sanctions on South Africa, and created the mechanisms to implement independence over a period of 20 years before independence was actually achieved. And this was so, even though the UNSC never actually voted to take Chapter VII enforcement action to force South African withdrawal from South West Africa. Much of these developments occurred through a robust legal strategy involving submissions to the ICJ from the start, and the aggressive work, led by the Afro-Asian bloc and the Non-Aligned states along with the Committee of Twenty-Four in the UNGA to assert, advocate for, and litigate to preserve Namibian rights and resources within and outside the UN itself.

The UN's approach towards the Namibian, Palestinian, Sahrawi, and Tibetan claims to self-determination has meant something different in each of these cases. In W. Sahara, the UN's position evolved from a framework for self-determination and independence to a commitment today to a negotiated referendum that could include an independent state or some other form of autonomy within the Moroccan state. On W. Sahara, the ICJ has articulated an obligation for the international community *erga omnes* not to recognize Morocco as the colonial power, but the UN appears to have backed away from that commitment in favor of a negotiated framework with Morocco over terms of a referendum.

In the case of Palestine, the UN has interpreted self-determination as meaning full independence, but has changed its position on the question of *from* which country Palestinians are entitled to self-determination. Prior to

1947, Palestine as a Class A mandate territory was to exercise this right in all of historic Palestine as a former colony of the Ottoman Empire; the self-determination framework adopted by the UN in the late 1960's positions this right vis-à-vis Israel as the occupying power in only the West Bank and Gaza. Thus, the UN has insisted on an 'independent state' in noncontiguous territory with borders roughly on the 1967 Armistice Lines of the West Bank and Gaza for Palestine, in an area which is no more than 22% of mandate Palestine.<sup>59</sup>

In both the Palestinian and W. Sahara cases, although their claims towards territorial independence have ripened within the UN and the view of the international community, the UNSC has been unwilling or unable to engage Chapter VII action to secure the legal rights it claims to have guaranteed. The UN's approach towards Tibet has focused on curbing Chinese human rights violations against the Tibetan people and perhaps, at maximum, an endorsement of some type of Tibetan political representation within China.

## **Palestine**

Palestinians were recognized as a distinct nationality under international law by 1924, by virtue of their inclusion as such in the Treaty of Lausanne of August 6 of that year. In 1925, Britain, holding the Mandate over Palestine, passed legislation conforming to the international status that recognized Palestine citizenship, and issued thousands of Palestinian passports pursuant to its citizenship legislation.<sup>60</sup> British (and other) courts recognized Palestinian nationality in decisions throughout the Mandate period, and Israeli courts did so as late as 1950.<sup>61</sup> In fact, in enacting its 'Citizenship (Nationality) Law,' Israel expressly repealed Palestinian citizenship—an act that UN bodies have challenged as illegal under international law because of its discriminatory basis, which is discussed below.

The territory of Palestine was administered as a Class A mandate through the League of Nations, and was the only one of the Class A territories *not* to achieve independence by the time the League terminated in 1946.<sup>62</sup> In 1946, the Arab states objected to continuing Palestine's UN trusteeship status. Similar to South Africa's Mandate over Namibia, the UN accepted Britain's commitment to its Mandate obligations rather than put Palestine under direct UN trusteeship. It is important to note the inconsistencies in Great Britain's role as mandatory power: Great Britain had, on the one hand, committed to bringing Palestine to independence, while simultaneously committing to a national home for the Jewish people

in Palestine through the Balfour Declaration.<sup>63</sup> The UNGA's *Ad Hoc Committee* to study proposals on the future government of Palestine rejected the Arab and other states' initial proposals to seek an ICJ Advisory Opinion and instead recommended Partition.<sup>64</sup>

The UNGA then passed Resolution 181 in November 1947, recommending partition of Palestine into two states.<sup>65</sup> By the end of 1947, there were 1,230,000 Palestinians, comprising 2/3 of the population of Palestine, and 610,000 Jews, comprising 1/3 of the population. The Jewish community owned no more than 7% of the land of Palestine. The Partition Resolution, however, allocated 55% of Mandate Palestine to the 'Jewish State' and 44% of Palestine to the 'Arab State.'<sup>66</sup> Resolution 181 was a compromise between satisfying the demands of the Zionist movement and the commitment to the independence of the Palestinian 'peoples' in the League Covenant under its Article 22, and later by the United Nations.

The Resolution referred to the Arab and Jewish communities living in Palestine as the 'two Palestinian Peoples' and required that each of the new states enact a constitution specifically guaranteeing equal rights for all citizens of the territory, the protection of religious and political rights of minorities, and the free choice of citizenship in either of the new states. The territories were to remain under UN supervision until they enacted constitutions meeting these requirements.<sup>67</sup> It is important to note that, in contrast to the recognition of Palestinian nationality, the UN did not, through Resolution 181 or any subsequent Resolution, recognize 'Jewish nationality.' The national groups to be granted citizenship in the new states under 181 were Palestinian nationals recognized as such under the 1925 Mandate legislation and their descendants, as well as all those, Jews and Arabs, who were habitual residents of Palestine at the time of the Partition Resolution. The Resolution did not recognize the claims of the Zionist movement to 'Jewish nationality' on an extraterritorial basis (that is, to Jews around the world who were not territorially connected to Palestine). As the King-Crane Report had stated: "For a national home for the Jewish people is not equivalent to making Palestine into a Jewish State; nor can the erection of such a Jewish State be accomplished without the gravest trespass upon the civil and religious rights of existing non-Jewish communities in Palestine."<sup>68</sup>

When the inevitable armed conflict ensued in response to Resolution 181, the Zionist militias gained control of 77% of historic Palestine beyond the borders of territory designated under Resolution 181 and Israel declared its state in the enlarged territory on May 1948. Israel failed to comply with the prerequisites of the Resolution in proclaiming its state.<sup>69</sup> Unlike Namibia, however, the UN did not affirm the territorial integrity of

Palestine, or move to enforce the terms of Resolution 181. Surprisingly, after Resolution 181 passed, the UNSC first asked members to study partition of Israel/Palestine, but then backed away from it, requesting the UNGA to reconsider alternatives, including a possible trusteeship for Palestine.<sup>70</sup> However, also unlike Namibia, which was eventually placed under UN trusteeship, UN trusteeship over Palestine never materialized. The UN instead admitted Israel as a member in 1949, pending compliance with UNGA Resolution 194. This key Resolution, passed on December 11, 1948, incorporated the individual rights of refugee return, restitution and compensation.<sup>71</sup> As with Resolution 181, Israel failed to comply with the critical provisions of Resolution 194 concerning the obligation to accept return of the refugees after its admission to the UN.

Soon after 181 passed, the UNGA and the UNSC began to act in very different and inconsistent ways towards Palestine. The UNGA developed a significant body of Resolutions affirming both individual rights—refugee return, property restitution, and compensation—and collective rights of self-determination, statehood, and independence. After 1967, these Resolutions framed the collective rights only with respect to the part of Palestine not recognized as sovereign Israeli territory, that is, the territories occupied by Israel since 1967. The UNGA, however, has insisted on the framework of both individual and collective rights for peace negotiations.<sup>72</sup> In contrast, the UNSC’s framework has almost exclusively focused on Resolutions 242 and 338 as the basis of a negotiated solution.<sup>73</sup> These two resolutions create the “land for peace” formula that suggest that the only legal framework necessary to resolve the conflict is Israeli withdrawal from the 1967-Israeli Occupied Palestinian Territory (OPT), including the option of some exchange of territory, for a permanent peace.<sup>74</sup>

Without outside pressure to push back against the consistent US veto supporting Israel’s positions at the UNSC, the UNSC has remained consistent in reaffirming only Resolutions 242 and 338 as the basis for a negotiated peace, and has refused to accept the framework for individual refugee rights.<sup>75</sup> In other words, the UNSC’s framework focuses solely on satisfaction of the collective right to self-determination within some part of the 1967 territories, without incorporating resolution of the individual rights of Palestinian refugees. In turn, the negotiation framework from Oslo onwards has referenced only Resolutions 242 and 338 and none of the UNGA individual rights resolutions.<sup>76</sup> The negotiations framework to date has proceeded on the premise that ‘Palestine’ is or will be a state in the OPT. Even the most recent framework established in April 2002 by the ‘Quartet’—comprising the Russian Federation, the United States, the

European Union, and the UN—assumes that a Palestinian state could be established prior to the conclusion of final status negotiations with Israel.<sup>77</sup> The Quartet’s framework is that, based on negotiated agreements, the Palestinian Authority (PA) can assert its claim to statehood with provisional borders and attributes of sovereignty even before full Israeli withdrawal. That was also the basis of the Oslo Accords.<sup>78</sup>

In 2013, 5.3 million Palestinian refugees were registered with the United Nations Relief and Works Agency (UNRWA), the specialized agency established to provide humanitarian assistance for Palestinian refugees under UNGA Resolution 302(IV) of December 8, 1949.<sup>79</sup> As Karen AbuZayd notes, the UNGA passed Resolution 194 (III) on December 11, 1948, hard on the heels of the massive exodus of between 700,000-800,000 refugees from Palestine.<sup>80</sup> Resolution 194 established the first agency with a protection mandate for the Palestinian refugees, the United Nations Conciliation Commission for Palestine (UNCCP). However, because of the UN’s view that Palestinians were a separate and special refugee situation, Palestinian refugees have been defined differently by various UN agencies and in treaties affecting their rights.

The “refugees” whose “rights, property and interests” the UNCCP was designed to protect were defined on a group or category basis: all persons displaced from their homes in Palestine due to the 1947-1949 conflict.<sup>81</sup> This definition encompasses over 8 million Palestinians today. The UNCCP was unable to fulfill its mandate of ensuring the return, property restitution and compensation for losses of the refugees as required by Resolution 194’s para. 11 on the one hand, and mediate a final resolution to the conflict between the warring parties, as required by Resolution 194’s para. 6, on the other.

Nevertheless, the existence of the UNCCP with an explicit international protection mandate towards the refugees, and the establishment of UNRWA to provide international humanitarian assistance towards the refugees, led the UN delegates drafting the statute of the UNHCR, the 1951 Refugee Convention/1967 Protocol and the 1954 Convention on Stateless Persons to preclude the application of those instruments to Palestinian refugees. The dual UN agency framework of UNCCP and UNRWA for achieving the prescribed solution explains the Palestinian “exclusion clauses” of Article 1D in the Refugee Convention, paragraph 7 (c) in the UNHCR Statute, and Article 1(2) of the Convention on Stateless Persons. The UN intended the para. 11 formula to apply to all Palestinians encompassed in the group definition of Resolution 194, not just the subset of Palestinian refugees registered with UNRWA—that is, all Palestinians displaced from Palestine as a result of the 1947-49 conflict, the over 8 million persons

mentioned above who fit this definition today.<sup>82</sup>

The ambiguities created by the differing mandates of UN agencies and differing definitions of “Palestinian refugee” have led to widely divergent interpretations of who *are* Palestinian refugees, to what benefits they are entitled, and who is covered by the various legal obligations the UN has mandated for them through Resolutions and UN institutions.<sup>83</sup> The exclusion clauses in the various instruments defining and affecting Palestinians as refugees have led to a “protection gap” for this population since the *de facto* demise of the UNCCP.

UNRWA provides assistance to the subset of Palestinian refugees registered with the Agency in the host countries in which most of them reside, yet UNRWA has no mandate to seek or implement durable solutions for them. UNHCR has no mandate over Palestinians in the UNRWA host states, but has interpreted the exclusion clause in its Statute, para. 7(c) as meaning that it does have a mandate towards Palestinian refugees outside the UNRWA areas. UNHCR has not, however, intervened to protect the rights and interests of Palestinians as spelled out in Resolution 194, particularly their right of return, and has not intervened to protect their rights as stateless persons. Despite the ambiguities, the UNGA has never wavered from the para. 11 formula in Resolution 194. In fact, this Resolution is of a unique character, as it has been affirmed through an overwhelming majority vote every year by the UNGA since its passage, representing the consensus of the community of states that the refugees must be allowed to return “to their homes,” obtain restitution of their properties and compensation for losses, regardless of what territorial solution is ultimately negotiated.<sup>84</sup>

The political organs of the UN have been outpaced by the work of the human rights bodies, however, which have developed a significant body of soft law in the form of Concluding Observations and Human Rights Council resolutions.<sup>85</sup> Beginning in the late 1990s, the human rights treaty bodies began a sustained focus on the violation of individual rights of Palestinians, including refugees and displaced persons. All of the treaty bodies have rejected Israel’s position that its obligations under the human rights treaties do not extend to the OPT, declaring that to be a violation of each of the treaties. The Committee on Economic, Social and Cultural Rights (CESCR) has found systemic treaty violations with regard to Israel’s treatment of Palestinians through the institutionalized discrimination against Palestinians emanating from the “excessive emphasis on the State as a ‘Jewish State’”, and through such laws as the Israeli Nationality Law and the Absentee Property laws.<sup>86</sup> The CESCR has affirmed that Israeli settlements, removal of Palestinians and expropriation



of their properties, demolition of Palestinian homes, and denial of Palestinian family reunification and residency rights violate Israel's obligations under the treaty. For example, in its June 2003 Concluding Observations, the CESCR noted:

18. The Committee is particularly concerned about the status of 'Jewish nationality,' which is a ground for exclusive preferential treatment for persons of Jewish nationality under the Israeli Law of Return, granting them automatic citizenship and financial government benefits, thus resulting in practice in discriminatory treatment against non-Jews, in particular Palestinian refugees. The Committee is also concerned about the practice of restrictive family reunification with regard to Palestinians, which has been adopted for reasons of national security.<sup>87</sup>

The institutionalized discrimination against Palestinians on the basis of legislation preferencing Jews over non-Jews is at the heart of the denial of Palestinian refugee return and property restitution, and has been consistently declared a violation of the human rights treaties not only by the CESCR, but by the Committees Against Torture (CaT), Rights of the Child (CRC), Against Racial Discrimination (CERD), and Discrimination against Women (CEDaW).<sup>88</sup> The CERD has found Israel's institutionalized preferencing of its Jewish citizens in land, citizenship/nationality and other laws, both within Israel and in the OPT, to be illegal discrimination under the Convention. In particularly strong language in its 2012 Concluding Observations, the CERD found that the separate legal regime applicable to Palestinians in East Jerusalem and the OPT to be "racial segregation and apartheid" in violation of Article 3 of the Convention.<sup>89</sup>

The Human Rights Council's 33 resolutions on Israel since 2006 have condemned violations of human rights and humanitarian law concerning Palestinians, particularly with regard to the denial of their rights to self-determination. In March 2007, for example, the Council resolved that:

The construction of the wall by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, along with measures previously taken, severely impedes the right of the Palestinian people to self-determination. . . . [The Council] [s]tresses the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem. . . [and] [u]rges all Member States and relevant bodies of the United Nations system to support and assist the Palestinian people in the early realization of their right to self-determination. . . .<sup>90</sup>

These resolutions and concluding observations have been important sources of lawmaking for Palestinians, both refugees and non-refugees, in addition to the ICJ Advisory Opinion on the Wall, discussed below. On November 22, 1974, the UNGA adopted Resolution 3237, which granted the Palestine Liberation Organization (PLO) observer status within the UN,<sup>91</sup> allowing it to participate in all the sessions and the work of the UN, effectively as a “quasi-state.”<sup>92</sup> In 1975, the UNGA passed Resolution 3376, establishing the *Committee on the Exercise of the Inalienable Rights of the Palestinian People*, entrusted to work towards Palestinian independence and sovereignty, and to implement the individual rights spelled out in prior UNGA resolutions. The Committee was also tasked to work with civil society organizations to accomplish its goals. Subsequently, on 2 December 1977, the *Division for Palestinian Rights* was set up by UNGA Resolution 32/40B, to support and assist the Committee in its work, and to be a liaison with civil society organizations working on Palestinian issues. Over the years, a network of over a thousand such organizations has cooperated in various ways with the Committee to help pursue these goals. Moreover, the Palestinian cause has a solid bloc of support within the UN, support that has been underutilized by the Palestinian leadership in achieving its goals.

Today, Palestine, like Namibia, has statehood recognition by the overwhelming majority of states, as well as “non-member state” status in the UNGA. Statehood recognition, however, has been granted based on the condition that Israeli sovereignty over the part of Palestine conquered in 1948 is respected, that is, Palestinian statehood and independence is to be exercised only in the 1967 OPT. The practical consequences of such recognition cannot be realized because Israel has refused to recognize Palestinian statehood and continues to occupy its territory. Finally, the UN’s approach is conflicted: the world community has recognized Palestinian statehood through its overwhelming vote at the UNGA, but because of the US veto the UNSC has not recognized Palestine as a UN member state.<sup>93</sup> Thus, from the UN political organ’s perspective, Palestinian statehood and independence, as well as a solution of the refugee problem, must be the outcome of a peace agreement with Israel, rather than insisting on a settlement in accordance with international law.

## **Western Sahara**

W. Sahara, unlike Palestine and Namibia, was not a League of Nations Mandate, but a Spanish colony from 1885-1975. In the decolonization efforts following the adoption of the UN Charter, W. Sahara was declared

first a non-self-governing territory, and then entitled to self-determination by the UN<sup>94</sup> Resolution 1514 became the foundation for the UNGA's position that W. Sahara was entitled to self-determination, and it passed several resolutions calling on Spain to bring about Sahrawi independence through a UN supervised referendum.<sup>95</sup> Spain took steps to grant more autonomy to W. Sahara, and established a local government for the territory in the face of competing claims by Morocco and Mauritania, which sought some form of union between W. Sahara and their countries.<sup>96</sup>

The Sahrawi took matters into their own hands, establishing the *Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro*, the POLISARIO Front, in 1973, and negotiating an agreement with Spain to protect their interests and to demand a UN brokered referendum.<sup>97</sup> In 1974, the UNGA, prompted by Morocco and Mauritania, requested both an Advisory Opinion on the status of the territory, and that Spain postpone the referendum. In quick succession, a UN mission called for by the Committee of Twenty-Four found that the Sahrawi by an overwhelming majority sought independence, and, on request by the UNGA, the ICJ issued its W. Sahara Advisory Opinion.<sup>98</sup> The Opinion stated that the territory had not been *terra nullius*; the Sahrawi people were the indigenous inhabitants of the territory, they were entitled to self-determination in their territory, and neither Morocco nor Mauritania had any superseding claims to the territory.<sup>99</sup> The ICJ W. Sahara Advisory Opinion drew two important conclusions. First, the Court found that the legal basis for self-determination for the territory was in its relationship to Spain, the former colonial power, not Morocco, the occupying power. Second, the Opinion interpreted UNGA Resolution 1514, the Declaration on Colonial Countries, as "confirming that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned."<sup>100</sup> The 'peoples concerned' were the Sahrawi people.

Spain gave up its claims under the Madrid Accords of 1975, and declared an interim administration that included Morocco and Mauritania.<sup>101</sup> Under the Agreement, Spain relinquished administration, but not sovereignty (which it did not possess) over W. Sahara to Morocco and Mauritania. According to the Agreement, Spain was to "set up an interim government in the territory with the participation of Morocco and Mauritania and the collaboration of the Yema'a. The responsibilities and powers as administrative authority will be transferred to this government."<sup>102</sup>

In defiance of the Advisory Opinion, Morocco organized its "Green March" in October of 1975, in which hundreds of thousands of its citizens invaded W. Sahara to claim it as Moroccan territory. Other than re-

affirming the Sahrawis' right to self-determination, the UN did not intervene, and fighting broke out between Moroccan and Mauritanian forces on the one hand and the POLISARIO Front on the other, compelling thousands of Sahrawi to flee to Algeria. On 27 February 1976, the POLISARIO declared the independence of the Sahrawi Arab Democratic Republic (SADR), and Morocco and Mauritania reacted by partitioning the territory.<sup>103</sup> The Moroccan-Mauritanian treaty of partition gave Morocco about two-thirds of the territory of W. Sahara, and when Mauritania relinquished its claims in 1979, Morocco moved in to occupy what was left. Today, Morocco occupies eighty percent of W. Sahara; with the Sahrawi population divided between the Moroccan-occupied area and the Tindouf camps in Algeria, separated by the Moroccan-constructed berm.<sup>104</sup>

From 1976-1983, the UN relinquished responsibility over the W. Saharan question to the Organization of African Unity (OAU) as a regional issue. In July 1978, the OAU Assembly established an Ad Hoc Committee of Heads of State and Government to seek a solution of the W. Sahara problem on the basis of self-determination.<sup>105</sup> The Ad Hoc Committee presented a set of conclusions that called for the free exercise of the right to self-determination through a referendum to be administered by the UN and the OAU. The OAU Assembly endorsed the Committee's conclusions at the 16<sup>th</sup> Ordinary Session a year later.<sup>106</sup> The referendum proposal was accepted, in principle at least, by the King of Morocco, and the OAU Assembly proceeded to establish an Implementation Committee to carry out the referendum process.<sup>107</sup> The OAU established the framework for participation in a referendum on self-determination through the work of the Implementation Committee.<sup>108</sup> The framework included a proposal to establish an impartial interim administration with the mandate to set up and conduct the referendum; an arrangement for secret ballots to include options for independence or integration with Morocco; and a cease-fire to be monitored by a peace-keeping force. These proposals were all endorsed by the OAU Assembly.<sup>109</sup> Morocco refused any further cooperation in carrying out the proposals for a referendum, and the OAU decided to recognize the SADR as a member of that body in November, 1984.

Subsequent to recognition of the SADR by 26 of the OAU states, the SADR was admitted to the OAU Council of Ministers. Morocco resigned from the OAU in protest. The SADR went on to be a founding member of the African Union (AU), while Morocco remains the only African country that refuses to become an AU member. From 1986 onwards, in the face of stalemate at the OAU/AU, the issue returned to the UN.<sup>110</sup> UN Secretary-

General Perez de Cuellar initiated a cease-fire and referendum proposal to the POLISARIO Front and Morocco in 1988. The Secretary-General, however, moved away from the OAU proposal of a referendum leading directly to independence. Rather than a framework to be instituted and enforced by the UN, the Secretary General's Settlement Plan called for a referendum to be accomplished through direct negotiations between the parties.<sup>111</sup> Under the Plan, the UN would supervise a ceasefire between Morocco and the POLISARIO Front, followed by a referendum giving the Sahrawi the option of independence or integration with Morocco.<sup>112</sup> The Plan required establishment of an Identification Commission to "implement the agreed position of the parties that all Western Saharans counted in the 1974 census undertaken by the Spanish authorities and aged 18 years or over will have the right to vote, whether currently present in the Territory or outside as refugees or for other reasons."<sup>113</sup>

In April 1991, the UNSC established the United Nations Mission for the Referendum in W. Sahara (MINURSO), a monitoring force for the ceasefire.<sup>114</sup> MINURSO was charged with a multi-pronged mission beyond the ceasefire monitoring that included the release and exchange of prisoners, implementing repatriations, identifying and registering qualified voters, and organizing a free and fair referendum. To date, the UN's efforts through MINURSO and the Secretary-General have resulted in a voting list of 84,251 names, with many appeals pending, but the Identification Commission set up through MINURSO suspended its work in 2003 with no further progress on the referendum. The POLISARIO Front, along with Algeria and Mauritania as observer countries, accepted the criteria for voter eligibility, but Morocco rejected them. Meanwhile, the Plan (including subsequent versions, the "Baker Plans" of 1997-2004), has stalemated on the eligibility question.

The ICJ W. Sahara Advisory Opinion and UNGA Resolution 1514 established the terms of the self-determination question for the territory and people of W. Sahara.<sup>115</sup> When Spain relinquished her claims, neither Morocco nor Mauritania obtained legal recognition for a claim of sovereignty over W. Sahara—not by the ICJ, nor through the 1975 Madrid Accords. The UNGA confirmed this in Resolution 3458 (XXX).<sup>116</sup> The ICJ has since proclaimed self-determination as a right *erga omnes*.<sup>117</sup> At least in the decolonization context of W. Sahara, the meaning of Resolution 1514 is that self-determination confers on the colonized people a right to free choice about the means to achieve independent statehood, a choice that is to be implemented by the international community as a non-negotiable matter. However, the UN's perspective on W. Sahara has shifted from the obligation to ensure statehood to committing to a

referendum on self-determination that *may include* the freedom to choose independence. Falling short of the commitment the UN made towards Namibia, the UN has not been unconditionally committed to independence as the ultimate legally required goal for W. Sahara.<sup>118</sup>

Although the initial UN construct of decolonization of W. Sahara from Spain might have helped advance the independence process for the Sahrawi at a time when the decolonization framework was a major focus of the UN bodies, the U. N. has all but forgotten Spain's *de jure* continuing colonial administration role or obligation today. The UN appears to have been unable to bridge its ambiguity between recognizing its obligation towards W. Sahara as a former colony entitled to decolonization under UNGA Resolution 1514 and 1541—a position enshrined in the ICJ Advisory Opinion and thus binding on the UN as a matter of law—and Morocco's territorial claims, however specious, that refer to the Sahrawi as a minority population of Morocco. The UNSC. has not explicitly declared Morocco an illegal occupier of W. Sahara, although the UNGA. has declared W. Sahara to be occupied in a series of Resolutions since the 1970's.<sup>119</sup> The UN Secretaries-General have also exhibited this ambiguity, with Perez de Cuellar from 1985-1991 advocating for the integration of W. Sahara into Morocco, rather than confirming the ICJ's position in the W. Sahara Advisory Opinion.<sup>120</sup> Meanwhile, many states and particularly large private corporations have *de facto* dealt with Morocco as if it had lawful title over the territory, including entering into economic agreements for the exploitation of W. Sahara mineral, oil and fisheries resources.<sup>121</sup>

As for attributes of statehood, Jeffrey Smith makes the case that most of the Montevideo criteria have been met: defined territory, defined population, and capacity to enter into relations with other states. He underscores the democratic nature of the SADR institutions and their accountability to the entire Sahrawi population in the divided and occupied territories.<sup>122</sup> The SADR's internal structures of democratic accountability are an impressive achievement for a besieged and occupied people, but they have not brought the Sahrawi closer to actual recognition by the community of states. Less than half of the UN member states have recognized the SADR, and the UN has not accepted it as a member of the organization.<sup>123</sup> Yet, neither the UN nor the world community has formally or legally recognized Moroccan title to any part of W. Sahara. At the same time, there appears to be no contest about whom are the "peoples" belonging to the territory of W. Sahara; there is no contest over nationality rights between the Sahrawi and the Moroccans from the perspective of the UN or international consensus.

In W. Sahara, too, the UN perspective is conflicted: the UNGA has

made a clear commitment that W. Sahara comprises a defined people and territory with the right to choose the form of self-determination; yet the Secretaries-General and the UNSC have been unwilling (or unable) to take Chapter VII measures to enforce this legal framework. This is particularly problematic following a quarter century of failed efforts to arrange a self-determination referendum.

At the same time, the UN human rights mechanisms, particularly the treaty bodies, have not been silent on W. Sahara. The CESCR has issued Concluding Observations in 2000, 2006, and 2011, focusing on the denial of self-determination.<sup>124</sup> Likewise, the Human Rights Committee, CaT, CRC and CEDaW have issued Concluding Observations decrying violations of human rights as well as Morocco's persistent denial of the Sahrawi's right to self-determination.<sup>125</sup> In 1999, the HRC specifically commented on the referendum process:

The Committee remains concerned about the very slow pace of the preparations toward a referendum in Western Sahara on the question of self-determination, and at the lack of information on the implementation of human rights in that region.<sup>126</sup>

In 2012, the Human Rights Council held its Universal Periodic Review of Morocco, and ten state delegates for the first time raised Morocco's violations of human rights and the denial of self-determination in W. Sahara.<sup>127</sup> This Review was a breakthrough in terms of challenging Morocco directly within the human rights machinery by UN member states. Unfortunately, the companion effort to introduce a human rights monitoring mechanism into the MINURSO mandate failed at the UNGA the same year.<sup>128</sup> However, the terms of reference for MINURSO—found in the 1990 and 1991 arrangements for the Mission—require securing the public order and establishing the necessary conditions among the civilian population for a referendum to take place. This aspect of the mandate necessarily encompasses a human rights observation and reporting, if not a protection, function.<sup>129</sup> Nevertheless, further progress on realizing Sahrawi self-determination has stalemated in tandem with the stalemate of the referendum itself.

Today, between 150,000 and 200,000 refugees from W. Sahara live in one of four of the remote desert camps of Tindouf, in Algeria.<sup>130</sup> Most live in tents, but many now have more permanent sand-brick homes. UNHCR provides many of the basic necessities for survival for the refugee communities, with other community needs met by the SADR and by Algeria itself. The widespread support for Sahrawi civil and political rights has helped establish a network of official and non-official relationships in

neighboring countries that provide education and relatively easy access to work and study in Algeria, Spain and other states. The unique *Vacaciones en Paz*, established by the Asociacion Amigos de Pueblo Saharai, a Spanish NGO, provides summer programmes with host families in Spain for 7,000 to 10,000 Sahrawi children each year.<sup>131</sup> These summer sojourns establish contacts through informal relationships that help build civil society knowledge and support for the Sahrawi cause. Meanwhile, UNHCR sponsors family visits across the divided territory, and intervenes to ensure family unity for separated Sahrawi families or spouses between the Tindouf camps and occupied W. Sahara, as well as Algeria, Morocco, and Mauritania proper.<sup>132</sup> These transnational networks and relationships are critical for relieving the isolation of the refugees, but are also opportunities for Sahrawi youth to access education, travel, and employment opportunities, ensuring their integration in a globalized society. The refugees, in this sense, are not ‘forgotten’ or left behind, while their rights to return and implementation of self-determination are on hold. As a practical or legal matter, the return of Sahrawi refugees is not a major factor in ending the conflict or finding an ultimate resolution of the occupation of W. Sahara.

## **Tibet**

In distinct contrast to the cases of Namibia and W. Sahara, the UN has not viewed Tibet as a colonial project entitled to the international commitment towards decolonization embodied in UNGA Resolution 1514.<sup>133</sup> Arguably, of the four territories under examination, Tibet may have the strongest historical claim as an independent state with territorial integrity prior to the United Nations Charter. From 1911 until 1950, Tibet functioned as an independent state, with a centralized government, cabinet, currency, civil service and defined territory and population. In 1913, the 13<sup>th</sup> Dalai Lama formally proclaimed the restoration of Tibetan independence, and during this period, Tibet engaged in diplomatic relations and executed treaties with other states.<sup>134</sup> In October 1950, China invaded Tibet and coerced a surrender agreement, causing the exodus of the leadership under the Dalai Lama and thousands of refugees.<sup>135</sup> According to van Walt van Praag, “Few scholars seriously challenge the notion that Tibet possessed actual independence at least between 1911 and 1950.”<sup>136</sup>

The UN has had minimal intervention in Tibet, providing an extremely weak legal framework on which to base Tibetan self-determination claims. The UNGA has passed only three resolutions on Tibet: 1353 (1959),



calling for respect for human rights of the Tibetan people; 1723 (1961), demanding an end to violations of Tibetan human rights and freedoms including the right to self-determination; and 2079 (1965), decrying the continued violation of the fundamental freedoms of the Tibetan people. The UN has never recognized Tibet as an independent state, and the majority of states did not recognize it as such prior to China's invasion in 1950. Neither the UNGA nor the UNSC condemned China for its invasion as a violation of the UN Charter, and the UN appears to have accepted Chinese rule over the "Tibetan Autonomous Region, *de facto* if not *de jure*."<sup>137</sup> Nor has there been reaction from the main UN organs over the effective dismantling of the framework of the 17-Point Agreement by China—already defunct and widely discredited as the result of coercive action over non-representative members of the Tibetan community left behind after the exodus. The agreed-upon Tibetan "self-rule" has been replaced with the national minority policy and direct Chinese Communist Party rule.<sup>138</sup> At the same time, there has been no real contest over Tibetans as a distinct nationality. The Chinese Government itself refers to Tibetans as one of its 'national minority' groups receiving special status under China's Law on Regional National Autonomy.<sup>139</sup>

The UN's perspective on Tibetan self-determination has been confined to a single statement in one of the three UNGA resolutions that were passed between 1959 and 1965. In UNGA Resolution 1723, the UNGA called for a "cessation of practices which deprive the Tibetan people of their fundamental human rights and freedom including their rights to self-determination . . . ."<sup>140</sup> The UNGA Resolutions have called for respect for the "fundamental freedoms" of the Tibetan people, but even in the immediate aftermath of China's invasion of Tibet, the UN failed to condemn Chinese aggression or call for an end to China's occupation of Tibet.<sup>141</sup> That framework has not changed to date, and neither the UN nor the community of states has labeled China an occupying power in Tibet. Not surprisingly given China's seat as a permanent member of the UNSC, that body has never passed a resolution on Tibet.

The weak UN position contrasts sharply with Article 2 of the UN Charter, enshrining the right to self-determination; the expert and academic consensus embodied, for example, in the International Commission of Jurists report on its Fact-Finding Mission to Tibet; and the many governmental statements at an informal level reiterating Tibet's entitlement to self-determination.<sup>142</sup> It is safe to say that Tibet's status as an independent state until 1950, as a matter of the UN Charter and general international law, did not change as a result of China's occupation or the 17-Point Agreement. China's aggressive occupation of Tibet in 1950, a

violation of the UN Charter, remains so today, and as a legal matter cannot alter the status of Tibetan territory it occupies. Likewise, the 17-Point Agreement, even if it were legal at the time of signing, has been breached by China both *de facto* and *de jure*, and has been repudiated by the Tibetan leadership, as well.<sup>143</sup> Regardless of the legitimacy of Tibet's historic and legal claim to self-determination under international law, the UN political bodies presently offer no framework to realize such a claim.

The UN treaty bodies have not addressed China's actions towards Tibet in terms of occupation or denial of self-determination, but have done so in terms of the rights of Tibetans as a minority group, and through the lens of ethnic, religious or racial discrimination. The CERD, CaT, CEDaW and CESCR have all issued Concluding Observations on China's treatment of Tibetans that are human rights-focused.<sup>144</sup> CESCR issued Concluding Observations on China for the first time in 2005. Its framing of the violations is typical of the treaty body reports:

38. The Committee notes with concern the reports regarding the discrimination of ethnic minorities in the State party, in particular in the field of employment, adequate standard of living, health, education and culture. In this regard, the Committee regrets the insufficient information provided by the State party regarding the enjoyment of economic, social and cultural rights enshrined in the Covenant by populations in the ethnic minority areas. The Committee notes with concern the reports from sources other than the State party relating to the right to the free exercise of religion as a right to take part in cultural life, and the use and teaching of minority languages, history and culture and the Xinjiang Uighur Autonomous Region (XUAR) and the Tibet Autonomous Region (TAR).<sup>145</sup>

China's second report is due for review in 2014, and non-governmental organizations have raised, in parallel reports on China, the occupation of Tibet and the violation of the right of self-determination as the root causes of the legal issues at stake.<sup>146</sup> Unfortunately, the CESCR did not include occupation or denial of self-determination in the "List of Issues" to which it has asked China to respond in its upcoming review.<sup>147</sup>

The Tibetan refugee problem is both an issue of internal displacement and exile, as Chinese policies have resulted in massive forcible internal relocation of Tibetans as well as institutionalized Tibetan exile settlements in India and Nepal. The Tibetan Relief Committee estimates that about 145,150 Tibetans live in India, Nepal and Bhutan, while smaller numbers live in Canada, Switzerland and the United States.<sup>148</sup> The majority of Tibetan exiles are in India, and the Government in Exile under the Dalai Lama has been operating in MacLeod Ganj in Dharamsala, India, since

1960 as ‘honored guests’ of the Indian state.

India is not a party to the 1951 Refugee Convention and has not incorporated domestic refugee legislation. India thus does not recognize Tibetans as having legal status as refugees. India’s policies towards Tibetan exiles have been *ad hoc* and have changed over time in response to political relations between India and China. Indian Foreigners legislation governs the treatment of Tibetans in the same way as other non-Indians residing or visiting India.<sup>149</sup> The Registration Certificates which Tibetans must obtain in India, are valid for up to six months, must continually be renewed, and do not entitle Tibetans to residence or citizenship. Unless they can obtain third state citizenship, Tibetans in India, as in other neighboring states, are *de facto* stateless.<sup>150</sup>

Initially, the Dalai Lama, as the formal leader of Tibetans in exile, in his Five-Point Peace Plan, laid out the “Middle Way,” expressly renouncing violence as a means to securing self-determination and other rights. The Tibetan leadership’s commitment to the ‘Middle Way’ has eroded as a matter of a shift in power to groups such as the Tibetan Youth Congress, which have expressly refuted non-violence. The shocking increase in self-immolations among the Tibetan communities, particularly monks, can also be understood only as a resort to violence in desperate calls for attention to systemic violations of human rights.<sup>151</sup> At the same time, the Tibetan leadership in exile has suspended its commitment to the ‘Middle Way’ in the face of China’s lack of response to Tibetan demands for genuine autonomy to preserve their cultural, social, economic, and political life within the Tibetan region, and a completely defunct peace process.<sup>152</sup>

The UN’s view of Tibetans within the Tibetan Autonomous Region (TAR) as defined by China, and Tibetan refugees, is through a purely human rights framework. The first UNGA Resolution passed concerning Tibet in 1959, defined the problem to be resolved as the “violation of Fundamental Human Rights of the Tibetan People, suppression of their distinctive culture and religious life.”<sup>153</sup> UNGA Resolution 1723 (1961), quoted above and Resolution 2079 (1965), echoed the emphasis on human rights violations, although Resolution 1723 also added that the denial of rights included “their right to self-determination.”<sup>154</sup> From the UN’s view, then, the return of Tibetan refugees is tied to China’s human rights policies vis-à-vis Tibetans as a minority within China, while from the Tibetan perspective, it is a function of securing real political autonomy for the entire Tibetan region *from* China in recognition of Tibetan self-determination.

## **Implications of *Erga Omnes* Obligations for Solving the Self-Determination and Protracted Refugee Problems**

Violations of *jus cogens* norms give rise to third state responsibility, particularly those of non-recognition and non-assistance in illegal acts.<sup>155</sup> The International Law Commission's Draft Articles on State Responsibility list the acts that constitute serious breaches of fundamental legal obligations that would give rise to third state responsibility.<sup>156</sup> The prohibitions against wars of aggression, denial of self-determination, population transfers and settler implantation have been recognized as *jus cogens*, or at least peremptory, norms that trigger obligations by third states.<sup>157</sup> Such third state obligations—or obligations *erga omnes*—have been articulated by the ICJ in its Advisory Opinions vis-à-vis Namibia, W. Sahara, and Palestine.<sup>158</sup> The UNGA has also expanded on the *erga omnes* obligations of states in many resolutions specifically with regard to W. Sahara and Palestine.<sup>159</sup>

In its Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, the Court outlined the sanctions obligations as:

[M]ember states are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental cooperation. . . Member States . . . are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there . . . [the Resolutions] impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory . . .<sup>160</sup>

By 1971, the legal framework for Namibia was agreed upon by the UNSC, UNGA and the ICJ, with the key components of independence, self-determination, equal rights, non-discrimination, end of apartheid, and the obligation of all states through a sanctions regime to bring those about. UNSC Resolution 283 reiterated the obligations of third states: to declare South African presence in Namibia illegal; to refrain from diplomatic and other relations with South Africa and withdraw diplomatic representation; to cease any investments or corporate relations with South Africa in

Namibia; and to review and terminate any treaties with South Africa as applicable to Namibia. All states were required to report to the UN on the measures taken to comply with the Resolution.

The UNSC did not enforce the sanctions demanded by the UNGA or call for intervention, because of French, United States, and United Kingdom vetoes. Yet because of the ICJ's endorsement of sanctions against South Africa, and the Court's insistence that all Member States were obligated to bring about Namibian independence, the sanctions regime was "legalized" to support individual states' actions in imposing sanctions on South Africa.<sup>161</sup>

In the W. Sahara Advisory Opinion, the ICJ was not specific about what obligations third states had with regard to the self-determination of W. Sahara. In a single paragraph, the Court cited language from UNGA Resolution 2625, the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations:

Every state has a duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the UN in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order: . . . (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.<sup>162</sup>

Following the Advisory Opinion, the UNGA tasked the Secretary-General to implement Sahrawi self-determination, and continued to support the Secretary-General and OAU efforts under the Settlement Plan.<sup>163</sup> However, no UN Resolution directly addressed third states' *erga omnes* obligations as a follow up to the ICJ reference. The UNSC took up the matter after the 1975 invasion, condemned the Green March, called for Moroccan withdrawal, and reaffirmed UNGA Resolutions 1514 and 3292 with regard to W. Sahara.<sup>164</sup> However, the UNSC failed to specifically condemn the attempt to acquire Sahrawi territory by force as violations of the Charter. Nor did it call on other states to refuse to recognize the illegal seizure of territory.

Thus, although the UNSC and UNGA initially agreed that W. Sahara was a former Spanish colony with defined territory and a people entitled to self-determination, they have not agreed on what to do about the relationship of Morocco to W. Sahara beyond recognizing that Morocco has no tenable territorial claim there.<sup>165</sup> This ambiguity has permitted Morocco and its allies to block any UNSC action against Morocco's use of

force and transfer of population in W. Sahara, and to prevent the call for sanctions or obligations of third states against Morocco. The ICJ's W. Sahara opinion implies that there were obligations *erga omnes* on the community of states not to support any claim of right to W. Sahara by Morocco, but that has not been taken up by a sufficient number of state supporters of W. Sahara to counteract the powerful interests of Morocco and its allies at the UNSC

The ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT is both the most explicit instruction of *erga omnes* obligations concerning violations of *jus cogens* norms, as well as the most important pronouncement on the law concerning Israel-Palestine. Although it was confined to issues relating to the construction of Israel's wall inside the OPT, it addressed many of the critical contested questions relating to self-determination and the human rights of the Palestinian people. In a near-unanimous decision, the ICJ found that Israel's wall construction, as well as the "associated regime" of permits and access zones, were a violation of international law and that Israel should immediately cease construction, dismantle the portion already built, and terminate the permit regime.<sup>166</sup> The ICJ further found that Israel was required to provide restitution and reparations for all damages it had caused to Palestinian landowners in confiscating land and constructing the wall.

The ICJ then discussed both third state obligations and the responsibilities of the UN to bring about an end to the Israeli violations involved in the wall construction. As to the first, the ICJ found: "All states are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction."<sup>167</sup> It reminded States parties to the Fourth Geneva Convention of their obligations under that treaty "to ensure compliance by Israel with international humanitarian law." As to the UN's obligations, the ICJ stated: "The United Nations, and especially the UNGA and the UNSC, should consider what further action is required to bring an end to the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion."<sup>168</sup>

The ICJ found that the *erga omnes* obligations flowed from the prohibition against acquisition of territory by force by Israel. The Court was explicit that Israel's violation of the self-determination of the Palestinian people, the land expropriation and other human rights abuses against Palestinians involved in the property takings, and the wall construction within Palestinian territory constitute grave breaches of the

Fourth Geneva Convention.<sup>169</sup> It found that the wall construction was designed to further Israeli settlements and settler implantation, and was prohibited by Art. 49(6) of the Fourth Geneva Convention.

These violations of *jus cogens* norms triggered the duty of non-recognition and non-assistance by third states as well as the UN in Israel's actions. The Advisory Opinion, in near-unanimity on every point, called on all the organs of the UN to take action to implement the Opinion.<sup>170</sup> The UNGA adopted the Advisory Opinion on 20 July 2004, and demanded that Israel comply with the obligations spelled out by the ICJ.<sup>171</sup> The UNGA also called on UN member states to comply with the *erga omnes* obligations set out by the Court, and for States Parties to the Fourth Geneva Convention to ensure Israel's compliance, as well. The UNGA tasked the Secretary-General with creating a Register of Damages for restitution and compensation to Palestinians victimized by the wall construction.<sup>172</sup>

The Wall Advisory Opinion was not the first pronouncement from the UN organs on *erga omnes* obligations vis-à-vis Israel's violations of Palestinian self-determination and Israeli occupation in Arab territories. Beginning in the 1980's, the UNSC issued a series of Resolutions finding obligations on third states relating to Israel's territorial aggression, occupation, and violation of Palestinian self-determination in East Jerusalem and the OPT, as well as in the Syrian Golan Heights. Very similar to resolutions on Namibia, the UNGA has called on all states to initiate boycotts and sanctions on Israel. In particularly strong language, UNGA Resolution Es-9/1 condemned Israeli 'aggression' into the Golan Heights, and called upon all UN Member States to suspend weapons supplies or military assistance; economic, financial and technological assistance and co-operation; and to sever diplomatic, trade and cultural relations to or from Israel.<sup>173</sup> These Resolutions were clearly the work of the PLO and its allies in the UN during the 1970's and '80's—an alliance which has all but disappeared with the collapse of the PLO as the representative body of the Palestinian people today.

Moreover, the UNGA's success in submitting the question of the wall construction to the ICJ was itself a watershed in the long-running impasse at the UNSC at producing any resolution critical of Israel. The question whether the UNGA had the authority to refer the question to the ICJ related to Art. 12(1) of the Charter and the scope of Resolution 377 (V), the 'Uniting for Peace' Resolution. Art. 12(1) of the Charter states that "While the UNSC is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the UNGA shall not make any recommendation with regard to that dispute or situation unless the UNSC so requests."

Resolution 377(V) had been passed in 1950 precisely to break the repeated political deadlock at the UNSC so that the UNGA could act on urgent issues, especially when conflict was imminent or ongoing. Resolution 377(V) provides that if the UNSC fails to act because one or more Permanent Member fails to agree in situations of a ‘threat to peace, breach of the peace, or act of aggression...’ the UNGA shall consider the matter in emergency special session.<sup>174</sup> UN Charter Art. 96 specifically grants the UNGA and the UNSC the right to request an advisory opinion from the ICJ ‘on any legal question.’<sup>175</sup> Thus, the issue was not whether the UNGA had the authority to take a question for an advisory opinion to the ICJ, but whether it could do so if or when the UNSC was ‘seized of the matter.’

The ICJ itself ruled on this question in the Wall Opinion, finding that as long as the UNSC was not debating the precise issue that was the subject of the Advisory Opinion request at the same time as the UNGA was considering it, then Resolution 377(V) authorized the UNGA to raise the question to the ICJ.<sup>176</sup> This ruling has significant reach for each of the cases here, as Palestine, W. Sahara and Tibet face opposition by powerful vote-holders in the UNSC who block more aggressive action, certainly Ch. VII action, to advance their rights through that body. The ICJ Wall Opinion ruling on the legality of the Uniting for Peace Resolution to bypass a stalemate at the UNSC is a major breakthrough for building the foundations for *erga omnes* obligations through ICJ Advisory Opinions brought directly by the UNGA. The Wall Opinion was a milestone with regard to UN findings on *erga omnes* obligations vis-à-vis Israeli violations of *jus cogens* norms and war crimes against Palestine and the Palestinians. Since the Opinion, there has been a steady expansion of UN bodies, special procedures and fact-finding missions promoting third state and corporate responsibility for complicity with Israeli violations of peremptory norms.<sup>177</sup> The General Assembly and the Human Rights Council have adopted these reports and conclusions, forming a solid legal foundation for the institution of a sanctions regime.

## **Lessons Learned from Namibia**

Law is a necessary, but of course insufficient element for resolving prolonged refugee crises with roots in denial of self-determination and ongoing occupation. Too frequently, law is disregarded as either irrelevant or minimally relevant to the resolution of long-running conflicts, in which armed struggle and raw political power are seen as the key determinants of outcome. This view, however, fails to take into account that customary



international law is based on the actual practice of states. States and individual government actors respond to the pressure of civil society, and civil society is persuaded to act by a perception of injustice, persuasively articulated as a violation of legal norms. The case of Namibia is precedential for the contemporary conflict and refugee situations discussed here for its illustration of the critical role law can play in accomplishing self-determination and durable solutions for refugees. The resolution of the Namibia question took a path from legal normative framework set out by the UN, to civil society action—operating in tandem with an armed struggle under relatively unified leadership—to the utilization of international legal machinery to bring about self-determination and ultimate independence. Although each case is unique, the Namibia ‘lesson’ is an important one for the people of W. Sahara, Tibet and Palestine to accomplish their objectives.

In the Namibia case, the UNGA and UNSC ended up with an agreement on the underlying legal framework *against* UNSC member consensus. The UNSC came to agree with the UNGA reluctantly and late because of the actions of several of the permanent members blocking a vote. It ended up being forced to that position because the ICJ’s four advisory opinions (one in answer to the UNSC itself) consistently articulated what the law required.<sup>178</sup> And because of the efforts of numerous Committees within the UN, particularly the aggressive Committee of Twenty-Four, the Namibian Council, the leadership of SWAPO, and the commitment of a grassroots anti-apartheid movement, states responded to the ICJ rulings to impose sanctions without UNSC Chapter VII action.

The creation of the Committee for South West Africa and the Council for Namibia that interceded in the governance of Namibia were distinguishing features of Namibia compared to Palestine and W. Sahara that may have helped move Namibia to independence. They were instrumental in using the weight of UN consensus to support the creation and implementation of the sanctions regime, making inroads in protecting Namibia’s resources, and acting as the UN’s authority within the territory in enforcing the framework for independence. The extent of their influence in the ultimate outcome is debatable, however, compared to the impact of the armed struggle waged by the ANC and PAC as well as the Namibian political and militant organizations, PLAN, SWAPO, SWANU and the South West Africa National United Front (SWANUF).<sup>179</sup> These entities were further supported by the global solidarity movement against apartheid.<sup>180</sup> It was the continuation of the armed struggle, the international community’s imposition of a sanctions regime against South Africa, a (relatively) united leadership in the struggle, and sustained civil

society pressure against apartheid that brought about Namibia's independence. What the Namibian case shows is that for 20 years before actual independence, Namibians and their supporters had a strong legal strategy, combined with the political and the armed struggle that resolved many of the key issues allowing the non-rejectionist states to make statehood meaningful by the time actual independence came about. It certainly advanced the Namibian case that apartheid was morally exhausted and universally rejected from at least 1988.

As noted earlier, Namibia's right to independence of the entire territory of South West Africa was acted upon as a matter of legal right almost immediately after the Mandate period ended, despite its Class C status.<sup>181</sup> Namibian refugees were guaranteed their rights to safe haven in neighboring countries, in settlements run directly by their government-in-exile, SWAPO, until they could return safely and voluntarily. SWAPO kept the rights of the refugees, and the connection of the refugees to the political polity, central to the resolution of their struggle. The UN's considerations in refugee return were guaranteeing voluntary choice and safety, and then carrying out orderly repatriation processes. Right to return, the choice of resettlement, and protection against *non-refoulement* were not in question for the refugee framework vis-à-vis Namibia. Furthermore, the place of return for the refugees was to their original homes in all of territorial Namibia. The refugees were able to return to Namibia even before a final agreement ended the conflict because the UN adopted an approach to self-determination that included protection of the territorial integrity of the country and statehood with full independence and sovereignty—underscored by an agreed-on framework from the ICJ, the UNGA and the UNSC

Unlike in Namibia, the UNGA and UNSC approaches have been in conflict with regard to both Palestine and W. Sahara, with the UNSC disregarding the legal framework articulated by the UNGA and reinforced by the ICJ in the Advisory Opinions in both cases.<sup>182</sup> While Palestine's efforts appear to have been defeated by the veto of permanent members of the UNSC, and W. Sahara's efforts marginally advanced in efforts to implement a referendum, the legal strategies were not defeated by permanent member vetoes at the UNSC in the Namibian case. In comparison to Namibia, however, the UNGA and the UNSC have neither jointly developed the actual foundation for recognition, nor the legal framework for Palestinian or Sahrawi independence. Moreover, in both the W. Sahara and the Palestinian cases, there has been very limited effort to follow up on the Advisory Opinions, particularly with regard to the *erga omnes* obligations that in the Namibia case were critical to the sanctions

regime but have not been pursued with the community of states for sanctions against Israel or Morocco. Nor have there been efforts to obtain additional rulings from the ICJ to articulate what obligations states have to achieve realization of Palestinian or Sahrawi self-determination following the recognition of statehood by both the ICJ and the UNGA

For Palestinians, the UNSC has failed to explicitly affirm their inalienable rights—self-determination and statehood, right of refugee return, and Israeli withdrawal from the 1967 territories—that have been the focus of the UNGA’s framework for resolution of the conflict.<sup>183</sup> The UNSC has also blocked UN sponsored conferences by vetoes or by refusing to consider UNGA recommendations.<sup>184</sup> The UNSC’s approach has been framed by the “land for peace” political formula as a basis for negotiations, with almost no reference to legal rights. Moreover, in marked contrast to Namibia, the 2004 Advisory Opinion on the Wall represents the sole submission to the ICJ on behalf of Palestinian rights in over sixty years of conflict.<sup>185</sup> Similarly, although the UNSC has authorized MINURSO as a peacekeeping and monitoring body on the ground in W. Sahara, it has also failed to act on the body of UNGA resolutions concerning Sahrawi independence, and has seemingly backed away from an initial commitment to independence to commitment to a *process* for a referendum to be agreed on by the conflicting parties. As for Tibet, since the UNSC has never spoken and there has been no Advisory Opinion request put to the ICJ on the question, there is no UN framework to speak of on the self-determination question, and no established framework for articulating *erga omnes* obligations against China.

In the cases of both Palestine and Tibet, the UN has not protected the territorial integrity of either mandate Palestine or the entire Tibetan region, promoting self-determination, statehood, independence, and sovereignty in a small part of Palestine; and imprecise ‘self-determination’ along with civil, economic, social and cultural rights to Tibetans as an ethnic minority in a truncated part of Tibet. For the Palestinians, this framework leaves the area of Palestine/Israel where the majority of the refugees should exercise their rights outside the recognized Palestinian self-determination unit, and for Tibetans, it presents the same problem for the internally displaced and the Tibetan refugee exile community—a recognized right to remain or to resettle in only the truncated ‘Tibetan Autonomous Region’ that excludes the provinces of Tsinghai and Sikang, an integral part of the historical Tibetan homeland.<sup>186</sup> This effectively prevents the option of Namibia, where the solution for the refugees was implemented in the context of independence and territorial integrity.

Although the UNGA and the UNSC are divided over when and how

statehood should be recognized in the case of Palestine, and although the UNGA—unlike the UNSC—has a longstanding record of affirming individual refugee rights in addition to Palestinian statehood, independence, and sovereignty, both the UNGA and UNSC agree that independence, sovereignty, and a solution for the refugees are to be achieved in peace negotiations with an Israeli regime that rejects all three. Israeli consensus even refuses to recognize the majority of Palestinians as refugees, and rejects out of hand their right to return to their original homes and lands and restitution of their properties within Israel, or even the vast swaths of Palestinian properties confiscated since 1967 in the West Bank. *De facto*, this is similar to the position the UN has taken for both W. Sahara and Tibet: emphasizing the denial of individual human rights, but leaving resolution of the self-determination and refugee issues to negotiations between the POLISARIO and Morocco in the former, and Tibetan leadership in exile and China in the latter. Both states, Morocco and China, reject any meaningful negotiation on the question. Forced relocation, settler implantation and land confiscation also mark Morocco's and China's actions towards the Sahrawi and Tibetan populations. Forced relocation is particularly acute for Tibetans, with 50-80% of Tibetan herders (of a population of approximately 2.25 million) to be removed from their lands as a result of China's 'Western Development Strategy.'

Just as critical for Namibia's successful independence bid as a unified UN strategy and recognition of territorial integrity were the factors of unified leadership and close collaboration with civil and UN actors. In contrast to SWAPO, the Namibian Council and civil actors have been working together to preserve rights and pursue joint strategies, the Palestinian leadership has been deeply divided, has acted less in concert with its civil society than against it, and has less and less legitimacy in the eyes of its people. The strategies it has pursued have been fractured and inconsistent, both within and outside the UN framework. In the mid-1960s, in response to the decolonization efforts within the UN of the African states, the PLO made a very deliberate change in its UN strategy. By 1969, the resolutions proposed and passed at the UN on Palestinian issues had changed their language from that of individual rights to calling for rights of the Palestinian people—collective rights.<sup>187</sup> This may have seemed like an appropriate strategy at the time, but by failing to merge individual rights with the collective, the PLO has been forced at the negotiating table to exchange one set of rights for another.

Moreover, the Palestinian leadership has agreed to severance of the majority of the Palestinian population—the refugees—from the political representation on the statehood question. Only Palestinians within the

West Bank and Gaza are acknowledged to be represented by the PA, meaning that only approximately 30% of the Palestinian people were permitted to vote in the last elections in which Fatah prevailed in the West Bank and Hamas won in Gaza. In none of the other cases here has the leadership permitted severance of their population for purposes of representation of their interests and durable solutions. The Palestinian strategy has focused on ending occupation and on international humanitarian law protections rather than a combined strategy demanding fulfillment of both individual rights and the collective rights of self-determination and independence.

Prior to and following the request for the Advisory Opinion on the Wall issued in 2004, there has been little or no effort by the Palestinian delegation at the UN to build on it as part of a distinct legal strategy.<sup>188</sup> This is surprising, in light of the PLO's solid support within the UNGA, especially with the Group of Non-Aligned States. In contrast to the four Advisory Opinions and the contentious case litigated over decades for Namibia, the single Advisory Opinion in the Palestinians' favor on many of the most contentious issues of the conflict has lost its strategic value due to the failure of any follow-up in using it as an effective legal tool.<sup>189</sup>

Additionally, the PLO and PA have failed to work within the European Union, utilize regional and other mechanisms, or facilitate the filing of lawsuits in domestic courts.<sup>190</sup> The Palestinian leadership appears to have failed to incorporate legal strategies in its negotiations frameworks, as well. For example, it has failed to insist that Resolution 194, in addition to Resolutions 242 and 338, must be incorporated in all negotiations. It has also failed to insist on inclusion of the West Bank, Gaza Strip, and East Jerusalem as a single territorial entity in all negotiation proposals.

In all three cases, there has been a systematic omission of law in favor of a political solution from the UN. In the Palestinian case, this is obvious from the UNSC's failure to reaffirm the UNGA's individual rights resolutions and the 'Quartet's' framework that a Palestinian state can be reached prior to Israeli withdrawal. In the Sahrawi case, the UN's move from implementing independence directly as a decolonization obligation to negotiating the terms of a referendum with the occupying state, Morocco, illustrates the same paradigm. The Palestinian, Sahrawi and Tibetan leadership have also taken an almost entirely political, rather than a law-based approach to the UN. The PA, for example, has failed to, or refused, collaboration with the civil society groups working with the Palestine Committee and the Division to expand and build on the roles of these UN institutions. On the contrary, the PA has frequently been at odds with these organizations and with civil society activists engaged with the UN,

preventing the kind of deep collaboration necessary to put a multi-pronged, solid legal strategy in place. At the negotiations level, too, there has been a critical lack of a robust legal approach. No legal department advised the PLO-PA until after the Oslo Accords, when the Adam Smith Institute established the first legal affairs department for the PLO. Since then, it appears that the PA has not incorporated much of the legal affairs unit's work at the international level. One can safely conclude that the leadership in all these cases has failed to see the importance that legal strategies have alongside political, negotiation, media, civil society collaborations, and the armed struggle, in achieving their goals.<sup>191</sup>

### **Strategies for Civil Actors**

A large proportion of the people of W. Sahara, Tibet, and Palestine remain both internally displaced and refugees, with no indication that their displacement will end in the near future. Yet resolving the refugee problem is not an equally critical factor in finding an overall resolution to each of these prolonged conflicts. A few comparisons help to illustrate how the Namibian example can show ways forward for the other three cases to accomplish their most critical objectives that will lead to resolution of the refugee questions, as well.

The greatest imperative for the Palestinians for the foreseeable future is a united leadership; the Hamas/Fatah division has been devastating for their cause. In the absence of uniting Hamas and Fatah, the global Palestinian community will need to reconstitute the PLO and make it fully representative of the widely-scattered Palestinians, particularly the refugees. The Palestinians have, in the last few years, succeeded in changing the popular perception of their cause in their favor and, as discussed above, have overwhelming support within the UN—as illustrated by the massive majority vote for state recognition in the UNGA in December 2012. Advocacy for Palestinian rights has been robust in the UN machinery since at least the mid-1980's. The sustained effort within the UN human rights mechanisms that has brought about the far-reaching reports and Concluding Observations described above has all been the result of the work of civil society non-governmental organizations. Many of the Concluding Observations and reports from the treaty bodies and the Special Rapporteurs were cited as support for the findings of the ICJ in the Advisory Opinion on the Wall.<sup>192</sup>

In contrast to the PLO/PA, civil society, particularly international solidarity groups, have been very pro-active, not only in developing the soft law within the UN, but also in pressuring states and corporations to

cease cooperating with Israel's occupation activities. The Boycott, Divestment and Sanctions (BDS) campaign instituted in 2005 and coordinated by the Palestinian BDS National Committee has started gaining significant traction, with the announcement by the European Union prohibiting loans to Israeli ministries, public bodies and businesses operating in the OPT.<sup>193</sup> In order to move to implementation of the *erga omnes* obligations as articulated by the ICJ—not to recognize or cooperate with Israel's wall construction and related regime of separation—as well as to build on norms prohibiting apartheid, settler implantation, ethnic cleansing and aggression, much more will be required beyond what civil society alone can do. The PA knows how to use the Uniting for Peace resolution successfully in bringing a request for an Advisory Opinion to the ICJ, and they can do it again to follow-up on the Wall Opinion. The achievement of 'non-member state' recognition opens enormous opportunities for prosecutions through the ICC, individual complaint and other processes through the specialized UN agencies, and, most important, diplomatic advocacy for a sanctions regime against Israel.

The Palestinians do not need to obtain an independent state to resolve the refugee problem. The effort to secure legal equality for Palestinian citizens of Israel began many years ago, and is more likely to succeed in repealing the discriminatory laws that prevent Palestinian refugee return and property restitution than the effort for a viable Palestinian state. The Israeli settlement project has made the "two-state solution" impossible, despite the UNSC and international political commitment to it. Refugee return, in any case, can precede any territorial outcome in Israel/Palestine, as illustrated by Namibia and by many subsequent Comprehensive Plans of Action incorporating mass refugee repatriation around the world for decades. Refugee return and property restitution can take place in a single state, confederation of states, or any other territorial configuration. For the Palestinians, diplomatic isolation of Israel, particularly if the "S" of BDS develops, will be critical to breaking the impasse on recognizing the refugees' rights to return to their original homes and lands. In any event, massive changes in demographic realities will have significant consequences for Israel's efforts to maintain exclusive Jewish-privileged statehood; Palestinians are today the majority population between the Jordan River and the Mediterranean Sea, making a state of Israel/Palestine in the not-too-distant future almost inevitable.

As for the Sahrawi, as Jeffrey Smith points out, they do not see theirs as primarily a refugee problem. The majority of the refugees are living as a "community in exile" with a government based in Tindouf that represents the occupied areas declared as part of the SADR, as well as the refugee

population.<sup>194</sup> Since the Sahrawi do not define themselves primarily as refugees, they do not rest their claims on the right of ‘refugee return.’ In fact, the right to return to that part of W. Sahara from which individuals have been displaced is uncontested as a matter of international consensus. There is also no issue that the displaced cannot be accommodated as a matter of demography, as there is sufficient territory for them to reside in their original homes and lands. Like the Namibian refugees, the Sahrawi are not widely dispersed or far from their homes of origin. For the Sahrawi, then, the question of the refugee—or “exile”—return is bound up in resolution of the self-determination and prolonged occupation questions. The Sahrawi, like the Namibians, have refused, at least formally, to give up the armed struggle, which has forced the international community to maintain the UN presence through MINURSO as a peacekeeping effort. On the other hand, the Saharawi have been scrupulous in observing the 1991 ceasefire terms, and they may have *de facto* relinquished the armed struggle. Meanwhile, UNHCR has intermittently carried out family visits and family reunification efforts for the divided communities, reestablishing after the 1991 ceasefire the connections for a refugee repatriation plan that could precede independence along the lines of the Namibian pre-independence refugee return.

The Sahrawi leadership has focused on building their internal governance, an effort that has garnered legitimacy internally and externally. However, it has not developed a legal strategy of any note—whether working to establish a UN Committee on W. Sahara or collaborating closely with the non-governmental organizations trying to enforce boycotts against or divestment from corporations exploiting W. Saharan resources. The Sahrawi leadership should move to build on the Advisory Opinion through advocacy around the *erga omnes* obligations articulated by the ICJ, or use its support in the UNGA to make requests for additional Advisory Opinions on the legality of exploiting Sahrawi resources, the construction of the berm, or the movement of settlers into Sahrawi territory. All could be framed as violations of *erga omnes* obligations, based on the *jus cogens* or peremptory norms discussed at the outset.

As opposed to the Palestinian leadership, the Sahrawi have shown widespread support for their leadership, and confidence in the representative nature of their internal election process. From the point of view of the majority of the Sahrawi, the SADR leadership is democratic and participatory, and plays an effective internal governance role. From the perspective of international relations and international strategies to advance Sahrawi rights, however, that confidence is less obvious. Within the UN, the SADR could use the Group of Non-Aligned states to help



establish a body equivalent to the Namibian Council or the Committee on South West Africa to advance Sahrawi claims in the UN machinery. There is undoubtedly enough support in the UNGA for Sahrawi rights to establish such an entity. The Sahrawi do not have a persistent opponent in the permanent veto-wielding members of the UNSC as Tibet and Palestine do, but so far there has been little visible effort to obtain UNSC resolutions and action to enforce the referendum process.

However, in the absence of meaningful UNSC intervention, the Sahrawi could develop a more robust legal effort through the UNGA and follow up Advisory Opinion requests to the ICJ to obtain legal authority for non-recognition and sanctions against Morocco by UN member states. So far, it does not appear that the SADR leadership has instituted a ‘Boycott, Divestment and Sanctions’ campaign patterned on the Namibian sanctions effort or the current Palestinian civil society strategy. The fundamentals for non-recognition and sanctions are the elements articulated by the ICJ in the W. Sahara Advisory Opinion: the *erga omnes* obligation to bring about an end to colonialism and the denial of self-determination, including economic, social, and cultural development. Bound up in the right to self-determination is territorial integrity of the self-determination “unit,” and rights over the natural resources attached to the territory.<sup>195</sup> Namibia benefited from a very explicit UNGA Resolution on the issue of rights to natural resources. In Resolution 33/182, the UNGA stated:

[T]he natural resources of Namibia are the birthright of the Namibian people and that the exploitation of those resources by foreign economic interests under the protection of the repressive racist colonial administration . . . is illegal and contribute to the maintenance of the illegal occupation régime.<sup>196</sup>

The SADR could generate momentum in the UNGA to follow up on the elements from the first Advisory Opinion for a subsequent Opinion spelling out the precise obligations on third states that result from their participation in exploiting the resources of W. Sahara. Agreements between Morocco and other states that exploit resources belonging to the territory of W. Sahara fall under the *erga omnes* obligation of non-recognition—a position repeatedly raised by the SADR with foreign states and corporations exploiting W. Sahara oil and gas, fisheries and phosphates.<sup>197</sup> This effort has begun, but primarily through grassroots advocacy and Sahrawi solidarity work conducted primarily in Europe, led by Western Sahara Resource Watch.<sup>198</sup> Despite Jeffrey Smith’s position that the refugee question is not tied to the issue of Saharan resource

exploitation, the Namibian example reflects that a key element to bringing an end to illegal occupation is draining the occupier of the economic benefits of occupation. The costs to Morocco of continuing the occupation of W. Sahara appear to far exceed the benefits it is receiving in mineral and other resource extraction.<sup>199</sup> If a sanctions regime against Morocco seems difficult to contemplate, depriving Morocco of economic benefits may be easier to achieve through raising the stakes for partnership agreements over resource exploitation with third states or corporations.<sup>200</sup> Economic pressure and diplomatic isolation helped bring an end to South African occupation of Namibia; the same can bring Morocco to agreement on the terms and eligible voters to the referendum demanded by the SADR. In the absence of UNSC action, the Sahrawi leadership can still generate greater legal legitimacy for non-recognition and non-cooperation with Moroccan actions through pressure in the other organs of the UN.<sup>201</sup>

The effort in the UN to buttress Tibetan rights is nascent. The Tibetan leadership has yet to seriously engage within the UN machinery. This is particularly distressing considering that of all the cases at issue, the Tibetans' plight is the best-known among global civil society, and has garnered the greatest sympathy and public activism worldwide. There has not been an effort to develop legal competence within the Tibetan government-in-exile, and to engage with NGO's that are using legal strategies to advocate for Tibetans within the UN machinery. At the same time, the great strength of the Tibetan people is unified, venerated and credible leadership. These two factors alone suggest that identifying and acting on legal strategies within and outside the UN should not be a complicated process (as compared to the fractured Palestinian leadership, for example).

There is a long road ahead to developing a significant body of soft law to crystallize a framework through the UN that can support further diplomatic and political effort in light of the leadership's disavowal of an armed struggle, and in the absence of UNSC intervention. The return of refugees to Tibet is, like the Palestinians, not dependent on achieving independence. It is, however, dependent on insistence of human rights protections for Tibetans within the broader Tibetan region, not just the reduced territory of the TAR. It will require insistence on equality and non-discriminatory treatment of Tibetans in all spheres: employment, housing, benefits, and particularly, protection of religious, linguistic, and cultural rights. Obtaining UN intervention to protect and monitor the economic, social and cultural rights of Tibetans will be essential to refugee return prior to real efforts to regain autonomy and political rights as a first step to meaningful self-determination. Despite potential obstacles in the

UNGA, Tibetan solidarity groups can utilize the Namibian example to develop a robust UN strategy in the human rights mechanisms and generate momentum in the UNGA for Advisory Opinion requests to the ICJ to support findings of obligations *erga omnes* against China for its human rights violations and denial of self-determination of the Tibetan people.

As discussed above, the Uniting for Peace resolution provides a method for the Sahrawi and the Tibetan leadership to obtain Advisory Opinions that clarify the underlying legal issues on which they need international consensus and commitment, and a framework for establishing *erga omnes* obligations to put pressure on their occupying states. China is far less vulnerable to boycott and divestment efforts than Morocco or Israel, and sanctions are not feasible with China's veto at the S.C. However, China is very sensitive to state and UN criticism, and consistently reacts negatively to criticism on Tibet. Thus, a sustained effort within all the UN human rights machinery to highlight Chinese abuses of Tibetan rights, and a unified call for meaningful political autonomy for the Tibetan people, is necessary and may generate concessions from the Chinese central government in halting the dispossession and development policies that are causing Tibetan human rights abuses, and perhaps incremental political concessions. The most recent policy changes illustrate China's sensitivity to sustained criticism on its 'minority populations' policies. From developing a body of 'soft law' on Tibetan rights in the UN mechanisms—as the Palestinians have done for the last few decades—the Tibetan leadership could also obtain support in the UNGA for an Advisory Opinion to follow up on the meaning and *erga omnes* obligations in implementing Resolution 1723. With legal principles articulated by the ICJ, or even the UN treaty bodies, that all states have obligations not to recognize China's actions in Tibet, or engage in economic cooperation in the Tibetan region, there may be slow progress towards greater autonomy for Tibet. This is not simple, but the Namibians have shown how it may be feasible.

The comparison of these three cases with Namibia illustrates the importance of a clear body of soft and hard law to support the recognition of self-determination by the UN in order to accomplish the demands of the Sahrawi, Palestinian, and Tibetan people. For each of the refugee cases involved, refugee rights can be achieved in the absence of full independence, but only if the key elements discussed above are present. In each case, success in achieving the end of these protracted refugee crises depends on the existence of a unified leadership with a sustained UN strategy. That leadership must, in turn, be capable of transforming the UN

legal framework into diplomatic action with the community of states—legalized through *erga omnes* imprimatur—to establish a non-recognition, non-cooperation or sanctions regime against the occupying state. Without these critical elements, the Sahrawi, Tibetan, and Palestinian people will not get what they deem most important: the fulfillment of their individual rights to return, restitution of their properties, and collective rights of full recognition as a people connected with their own, undivided, territory.

## Notes

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- \* Clinical Professor, Boston University School of Law. The author thanks BUSL law students Eileen Morrison, Emelie Kogut and Chloe Brighton for their invaluable research assistance for this chapter. A short version of the research on Namibia and Palestine appears as a chapter in Noura Erakat & Mouin Rabbani eds., *ABORTED STATE? THE U.N. INITIATIVE AND NEW PALESTINIAN JUNCTURES* (2013). The author also thanks Jeffrey Smith, Robert Sloane, John Dugard and Ingrid Jaradat Gassner for their reviews of, and insightful comments on, the W. Sahara, Tibet, Namibia and Palestine sections respectively; the author takes full responsibility for all her own errors.
- <sup>1</sup> The author is indebted to the work done by others on the subject, in particular, see Stephanie Koury, *The European Community and Member States' Duty of Non-Recognition Under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, in Karin Arts & Pinto Leite eds., *INTERNATIONAL LAW AND THE QUESTION OF W. SAHARA* (2007); Stephanie Koury, *Legal Strategies at the United Nations: A Comparative Look at Namibia, Western Sahara, and Palestine*, in Susan Akram, Michael Dumper, Michael Lynk & Iain Scobbie eds., *INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS BASED APPROACH TO MIDDLE EAST PEACE* (2011); see also John Quigley, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* (2010).
- <sup>2</sup> See Atlantic Charter art. 3, 1941, U.K.–U.S., 55 Stat. 1603.
- <sup>3</sup> Treaty of Peace with Turkey Signed at Lausanne: The Convention Respecting the Regime of the Straits and Other Instruments Signed at Lausanne, 24 July 1923, available at [http://wwi.lib.byu.edu/index.php/Treaty\\_of\\_Lausanne](http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne).
- <sup>4</sup> League of Nations Covenant art. 22, available at <http://www.unhcr.org/refworld/docid/3dd8b9854.html>.
- <sup>5</sup> See Daniel Thurer & Thomas Burri, *Self-Determination*, MEPIL (2013), para. 4, at [http://ilmc.univie.ac.at/uploads/media/self-determination\\_empil.pdf](http://ilmc.univie.ac.at/uploads/media/self-determination_empil.pdf).
- <sup>6</sup> The Council of the League of Nations: The Mandate for Palestine (1922), available at <http://www.fordham.edu/halsall/mod/1922mandate.html>.
- <sup>7</sup> *Id.*
- <sup>8</sup> League of Nations Covenant, *supra* note 4, at art. 22.

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- <sup>9</sup> See Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, 9 MAX PLANCK YEARBOOK OF U.N. LAW 47, 76 (2005).
- <sup>10</sup> *Documents on the League of Nations: Resolution for the Dissolution of the League of Nations, Adopted by the Assembly on April 18, 1946*, 1 INTERNATIONAL ORGANIZATION 246 (1947), 246–51.
- <sup>11</sup> U.N. Charter art. 1, para. 2.
- <sup>12</sup> G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV), 14 December 1960, available at <http://www.un.org/en/decolonization/declaration.shtml>.
- <sup>13</sup> *Id.*
- <sup>14</sup> See Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right*, 11 HUM. RTS. L. REV. 4 (2011), describing how the concept of self-determination is one of the most unsettled terms in international law.
- <sup>15</sup> United Nations High Commissioner for Refugees [UNHCR], *Statelessness in Southern Africa*, (2011), available at <http://www.refworld.org/docid/50c1f9562.html>.
- <sup>16</sup> Refugees International, *Nationality Rights for All: A Progress Report and Global Survey on Statelessness*, at: <http://www.refworld.org/docid/49be193f2.html>.
- <sup>17</sup> International Law Commission, *Articles on Nationality of Natural Persons in Relation to the Succession of States*, Supp. No. 10 (A/54/10) available at <http://www.refworld.org/docid/4512b6dd4.html>; PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (1979).
- <sup>18</sup> William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115 (2009), 118–19.
- <sup>19</sup> Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, available at <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.
- <sup>20</sup> *Id.* at art. 1.
- <sup>21</sup> Quigley, *supra* note 1, at 207–08.
- <sup>22</sup> *Id.* at 119.
- <sup>23</sup> Other examples include the previous Soviet satellite states of Belorussia, now Belarus, and the Ukraine. Bosnia was also admitted as a UN member without having control over territory or independence. S.C. Res. 757, U.N. Doc. S/RES/757, 30 May 1992, at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/16/IMG/NR001116.pdf?OpenElement>. Monaco, though a mini-state (1.95 square kilometers and 5000 citizens), is widely recognized as such, though France controls its domestic and foreign policy through treaty (1918 and 1930). Treaty Establishing the Relations of France with the Principality of Monaco, Fr.-Monaco, 17 July 1918, 981 U.N.T.S. 363. The US Marshall Islands is a UN Member even though the US maintains full authority over defense and security. Compact of Free Association, U.S.-Marsh. Is., 25 June 1983, U.S. Pub. L. 99-239. *Cited in* Quigley *supra* note 1, at 222.

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- <sup>24</sup> Lauri Hannikainen, *The Case of Western Sahara From the Perspective of Jus Cogens*, in Karin Arts & Pedro Pinto Leite eds., *INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA* (2007).
- <sup>25</sup> G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX), 14 December 1974, at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>; see Roger Clark, *Western Sahara and the United Nations Norms on Self-Determination*, in Karin Arts & Pedro Pinto Leite eds., *INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA* (2007), 54–55.
- <sup>26</sup> The Rome Statute of The International Criminal Court, 17 July 1998, 37 I.L.M. 999, available at <http://www.refworld.org/docid/3ae6b3a84.html> [hereinafter Rome Statute].
- <sup>27</sup> International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, Oct. 18, 1907, at <http://www.refworld.org/docid/4374cae64.html> [hereinafter Hague Regulations].
- <sup>28</sup> See *id.* at arts. 52, 53.
- <sup>29</sup> Rome Statute, *supra* note 26. Of course, prosecution of war crimes at the ICC depends on state membership. The issue currently pending at the ICC of whether Palestine can be treated as a state for purposes of acceding to the Rome Statute and to the International Criminal Court (ICC) was not resolved through recognition of statehood. Summary of the Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements, ICC, at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets> (last visited 25 August 2011), providing all the materials submitted to the ICC on the issue that is still before the court and is yet to be decided.
- <sup>30</sup> See Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 49(6), at <http://www.icrc.org/ihl/INTRO/380> [hereinafter Fourth Geneva Convention]; see also Rome Statute, *supra* note 26, at art. 7 (defining deportation or forcible transfer of population as a crime against humanity); Rome Statute, *supra* note 26, at Art. 8 (defining unlawful deportation or transfer as a war crime).
- <sup>31</sup> Art. 4(1) of the Fourth Geneva Convention states that “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals.”
- <sup>32</sup> See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding UNSC Resolution 276, Advisory Opinion, 1971 I.C.J. 53, ¶ 118, 21 June 1971 [hereinafter Namibia Advisory Opinion], at <http://www.icj-cij.org/docket/files/53/5595.pdf> (“South

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Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal....” and “...the presence of South Africa in South West Africa is illegal”); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶ 142, 9 July 2004 [hereinafter *Wall Advisory Opinion*], available at <http://www.icj-cij.org/docket/files/131/1671.pdf>. (“The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law” and discusses what “further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime”); *W Sahara*, Advisory Opinion, 1975 I.C.J. 61, ¶ 162, 16 October 1975 [hereinafter *W. Sahara Advisory Opinion*], available at <http://www.icj-cij.org/docket/files/61/6195.pdf> (finding insufficient legal ties between Morocco and W. Sahara to stifle W. Sahara’s right to self-determination and “those legal ties that the court found to exist at the time of Spanish colonization between W. Sahara and Morocco...were not of such a character as to justify today the reintegration or retrocession of the territory without consulting the people”).

- <sup>33</sup> Robert Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L. L. REV. 107, 144 (2002) (highlighting El Salvador’s efforts to get a draft resolution on the agenda at the UNGA in 1950 to condemn China’s invasion of Tibet as a violation of UN Charter Art. 2(4), an effort that was defeated by the UK, the US, and India).
- <sup>34</sup> G.A. Res. 2621 (XXV), U.N. Doc. A/RES/2621, 12 October 1970, at paras. 5 and 6.
- <sup>35</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1(4).
- <sup>36</sup> See Monique Chemillier-Gendreau, *Resistance, Right to, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [MPEPIL] ¶ 13-14, 2013.
- <sup>37</sup> G.A. Res. 3246 (XXIX), U.N. Doc. A/RES/3246, 29 November 1974: “3. Reaffirms the legitimacy of the peoples’ struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle...7. Strongly condemns all Governments which do not recognize the right to self-determination and independence of peoples under colonial and foreign domination and alien subjugation, notably the peoples of Africa and the Palestinian people...”. The UN has reaffirmed the right to resort to armed struggle for people under colonial and foreign domination in, among others, G.A. Res. 3236 (XXIX), U.N. Doc. A/RES/3236, 22 November 1974: “1. Reaffirms the inalienable rights of the Palestinian people in Palestine, including a) The right to self-determination without external interference b) The right to national independence and sovereignty...2. Reaffirms also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.”; G.A. Res. 33/24 (XXXII), U.N. Doc. A/RES/33/24, 29 November 1978; G.A. Res.

- 34/44 (XX), U.N. Doc. A/RES/34/44, 23 November 1979; G.A. Res. 2672 (XXV), U.N. Doc. A/RES/2672, 8 December 1970; G.A. Res. 2535 (XXIV), U.N. Doc. A/RES/2535 (Dec. 10, 1969); G.A. Res. 41/101, A/RES/41/101, 4 December 1986, “2. Reaffirms the legitimacy of the struggle of peoples for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle...” especially in relation to Namibia and Palestine); G.A. Res. 35/35, A/RES/35/35 (Nov. 14, 1980) (“2. Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle...” in relation to W. Sahara); G.A. Res. 36/9, A/RES/36/9, 28 October 1981: “Takes note of... the decisions of its Implementation Committee to organize and conduct a general and free referendum on self-determination in W. Sahara.”
- <sup>38</sup> Charter of the United Nations Ch. XII: International Trusteeship System, art. 77, available at <http://www.un.org/en/documents/charter/chapter12.shtml> (June 26, 1945); see also G.A. Res. 2145 (XXI) A/RES/2145, 27 October 1966, rejecting and terminating the mandate of South Africa over Namibia placing the territory under the direct responsibility of the United Nations; G.A. Res. 2248 U.N. Doc. A/RES/2248, 19 May 1967, establishing the UN Council as the legal administering authority for Namibia until independence; G.A. Res. 45/21, U.N. Doc. A/RES/45/21, 20 November 1990, reaffirming the inalienable right to self-determination and independence.
- <sup>39</sup> International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 10, 11 July 1950 [hereinafter International Status of South-West Africa Advisory Opinion], available at <http://www.icj-cij.org/docket/files/10/1891.pdf>. Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 7 June 1955 [hereinafter Voting Procedure Advisory Opinion], available at <http://www.icj-cij.org/docket/files/24/2145.pdf> (finding that the UNGA’s practice of 2/3 majority vote on questions regarding Southwest Africa appropriate). Admissibility of Hearings of Petitioners by the Committee on Southwest Africa, Advisory Opinion, 1956 I.C.J. 36, 1 June 1956 [hereinafter Admissibility of Hearings Advisory Opinion], at <http://www.icj-cij.org/docket/files/31/5503.pdf> (granting petitioners oral hearings based on South Africa’s refusal to file reports).
- <sup>40</sup> Namibia Advisory Opinion, *supra* note 32.
- <sup>41</sup> In 1962, Liberia and Ethiopia filed a contentious case in the I.C.J. against South Africa for failing to submit reports and to comply with the League Covenant requirements. The parties claimed that South Africa’s apartheid policies violated the requirements of the mandate. South-West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. Rep. 319, 21 December 1962, at <http://www.icj-cij.org/docket/index.php?sum=286&code=lsa&p1=3&p2=3&case=47&k=f2&p3=5>. The ICJ dismissed the case for lack of standing. South West



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- Africa Cases, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 46 (July 18), at <http://www.icj-cij.org/docket/files/47/4955.pdf>.
- <sup>42</sup> International Status of South-West Africa Advisory Opinion, *supra* note 39.
- <sup>43</sup> Voting Procedure Advisory Opinion, *supra* note 32 (finding the UNGA's practice of 2/3 majority vote on questions regarding Southwest Africa appropriate); Admissibility of Hearings Advisory Opinion, *supra* note 32.
- <sup>44</sup> G.A. Res. 749 (VIII) A, U.N. Doc. A/RES/749 (VIII), 28 November 1953; G.A. Res. 1143 (XII), U.N. Doc. A/RES/1143 (XII), 25 October 1957; S.C. Res. 276, U.N. Doc. S/RES/276, 30 January 1970, first Ad Hoc Committee established on 30 January 1970, and the second on 29 July 1970.
- <sup>45</sup> G.A. Res. 1060 (XI), U.N. Doc. A/RES/1060 (XI), 26 February 1957.
- <sup>46</sup> Koury *supra* note 1, at 148; G.A. Res. 1702 (XVI), ¶ 2, 1083<sup>rd</sup> plen. mtg., 19 December 1961, at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/55/IMG/NR016755.pdf?OpenElement>.
- <sup>47</sup> Stephanie Koury, *Legal Strategies at the United Nations: A Comparative Look at Namibia, Western Sahara, and Palestine*, INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE 148, 149 (Susan M. Akram et al. eds., 2011); see G.A. Res. 2248 (S-V), U.N. Doc. 2248 (S-V), 19 May 1967.
- <sup>47</sup> Namibia Advisory Opinion, *supra* note 32.
- <sup>48</sup> Namibia Advisory Opinion, *supra* note 32.
- <sup>49</sup> Namibia Advisory Opinion, *supra* note 32 (affirming the resolutions and mandates put forth by the UNGA and UNSC).
- <sup>50</sup> S.C. Res. 385, U.N. Doc. S/RES/385, 30 January 1976, "recalling the advisory opinion of the International Court of Justice of 21 June 1971 that South Africa is under obligation to withdraw its presence from the Territory."
- <sup>51</sup> G.A. Res. 1899 (XVIII), U.N. Doc A/RES/1899 (XVIII), 11 November 1963.
- <sup>52</sup> See Ngila R. L. Mwase, *The Repatriation, Rehabilitation and Resettlement of Namibian Refugees at Independence*, 25 COMMUNITY DEV. J., No. 2, 2008, at 113–14.
- <sup>53</sup> See UNHCR, THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 134 (2000) ("From the start, UNTAG considered that the return and peaceful reintegration of the Namibian refugees was a prerequisite for elections and for the successful transformation of Namibia into an independent, democratic country.").
- <sup>54</sup> Proposal for a Settlement of the Namibian Situation, Letter dated Apr. 10, 1978 from the President of Security Council, U.N. Doc. S/12636, 10 April 1978, at <http://www.ucdp.uu.se/gpdatabase/peace/SyA%2019780712.pdf>.
- <sup>55</sup> Mwase, *supra* note 52, at 115.
- <sup>56</sup> THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION, *supra* note 53, at 134–36.
- <sup>57</sup> Tripartite Agreement, Angl.-Cuba-S. Afr., 22 December 1988, at <http://peacemaker.un.org/angola-tripartite-agreement88>.
- <sup>58</sup> Myron Nordquist ed., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (1989) (highlights the role of the UN Council in the

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- accession of Namibia to the 1982 UN Law of the Sea Convention in 1982); Karin Arts, *The Legal Status and Functioning of the United Nations Council for Namibia*, 2 LEIDEN J. OF INT'L L. (1989) describes the establishment, the structure, the functions and the powers of the Council with attention paid to questions concerning the legal status of the UNCN; S.C. Saxena, *Namibia and the United Nations*, in 36 INDIAN J. OF POL. SCI. 3, at <http://www.jstor.org/stable/41854677> critically examines the role of the United Nations in Namibia's struggle for independence; *United Nations Council for Namibia: Decree on the Natural Resources of Namibia*, in 13 Intl. Legal Materials 6 (1974), at <http://www.jstor.org/stable/20691361>, a decree enacted by the UN Council for Namibia declaring the "right of peoples and nations to permanent sovereignty over their natural wealth and resources."
- <sup>59</sup> The UN's position has been affirmed through the recognition of the state of Palestine in the Territories occupied by Israel by 138 Member states voting for its status as a "non-member observer state" in the UNGA.
- <sup>60</sup> 'Mandate Palestine' or 'historic Palestine' as referred to here is the territory known as British mandate Palestine from June 1919-14 May 1948, described by the League of Nations. See the Mandate of Palestine Confirmed by the Council of the League of Nations in Moore [ed.] vol. III, 75-84. References to 'the OPT' or 'occupied Palestine' is to the territories occupied by Israel since 1967. The West Bank and Gaza or the OPT are the approximately 22% of what remains of historic Palestine that remain occupied by Israel since 1967. Only the OPT have been recognized by the UN as comprising the State of Palestine that was voted as a non-member state of the UN by the UNGA in December 2012.
- <sup>61</sup> On Palestinian Nationality as a matter of international law, see Mutaz M. Qafishah, *THE INTERNATIONAL LAW FOUNDATIONS OF PALESTINIAN NATIONALITY* (2008). For cases recognizing Palestinian nationality, see *R. v. Ketter*, 1 K.B. 787 (1940) (UK); *A.B. v. M.B.* 17 ILR 110 (1950) (Israel).
- <sup>62</sup> See *The Council of the League of Nations: The Mandate for Palestine*, *supra* note 6.
- <sup>63</sup> See *id.*; The Balfour Declaration, 2 November 1917, at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Balfour%20Declaration> (last visited 22 August 2011).
- <sup>64</sup> UN Special Committee on Palestine, *Report to the General Assembly*, U.N. Doc. A/364, 3 September 1947, at <http://unispal.un.org/unispal.nsf/0/07175de9fa2de563852568d3006e10f3>.
- <sup>65</sup> G.A. Res 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947), at <http://domino.un.org/unispal.nsf/0/7f0af2bd897689b785256c330061d253>.
- <sup>66</sup> Susan M. Akram and Michael Lynk, *Arab-Israeli Conflict*, in R. Wolfrum ed., 1 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 502 (2012).
- <sup>67</sup> G.A. Res 181 (II), U.N. Doc. A/RES/181(II), 29 November 1947, at <http://domino.un.org/unispal.nsf/0/7f0af2bd897689b785256c330061d253>.
- <sup>68</sup> Henry C. King and Charles R. Crane, *The American King-Crane Commission of Inquiry Report*, in M. Cherif Bassiouni ed., DOCUMENTS ON THE ARAB-ISRAELI CONFLICT (2005).

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- <sup>69</sup> The Declaration of the Establishment of the State of Israel, 14 May 1948, *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> (last visited Aug. 15, 2011).
- <sup>70</sup> U.N. SCOR, 3<sup>rd</sup> year, U.N. Doc. S/PV271, 19 March 1948), *at* <http://unitednationstrusteeshippalestine1948.blogspot.com> (“a temporary trusteeship for Palestine should be established under the Trusteeship Council of the United Nations to maintain the peace and to afford the Jews and Arabs of Palestine, who must live together, further opportunity to reach an agreement regarding the future government of that country”); Kermit Roosevelt, *The Partition of Palestine: A Lesson in Pressure Politics*, in 2 MIDDLE EAST J. 1 (1948), *available at* <http://www.jstor.org/stable/4321940>; Itzhak Galnoor, *The Zionist Debates on Partition*, in 14 ISRAEL STUD. 2 (2009), *at* <http://www.jstor.org/stable/30245854>.
- <sup>71</sup> G.A. Res. 194 (III), U.N. Doc. A/RES/194 (III), 11 December 1948, *at* <http://unispal.un.org/UNISPAL.NSF/0/C758572B78D1CD0085256BCF0077E51A>.
- <sup>72</sup> *See* G.A. Res. 302 (IV), U.N. Doc. A/RES/302 (IV), 8 December 1949, establishing assistance for Palestinian refugees); G.A. Res. 394 (V), U.N. Doc. A/RES/394 (V), 14 December 1950, providing a progress report on establishing repatriation, resettlement, and restitution for Palestinian refugees.
- <sup>73</sup> S.C. Res. 242, U.N. Doc. S/RES/242, 22 November 1967), *at* <http://unispal.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7d35e1f729df491c85256ee700686136?OpenDocument> (“...should include the application of both the following principles: (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force”); S.C. Res. 338, U.N. Doc S/RES/338, 22 October 1973, *at* <http://unispal.un.org/unispal.nsf/0/7FB7C26FCBE80A31852560C50065F878> (“The Security Council 1) calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately...*in the positions they now occupy*; 2) calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts” (emphasis added)).
- <sup>74</sup> The UNSC in the 1970s and 1980s condemned Israeli violations of human rights and international law; affirmed the *de jure* applicability of the Four Geneva Conventions; established committees to study Israeli settlements; appointed fact-finding missions; and requested the Secretary General to report on Israel’s compliance. *See* S.C. Res. 279, U.N. Doc S/RES/279, 12 May 1970; S.C. Res. 298, U.N. Doc S/RES/298, 25 September 1971; S.C. Res. 476, U.N. Doc S/RES/476, 30 June 1980; S.C. Res. 636, U.N. Doc S/RES/636, 6 July 1989. Nevertheless, its approach has been focused on the illegality of Israel’s

- expansion in the Occupied Territories and violations of humanitarian law, but not on the underlying violations of Palestinians' individual and collective inalienable rights as the UNGA has long insisted upon. *See* S.C. Res. 605, U.N. Doc S/RES/605, 22 December 1987). Even concerning international human rights violations, the UNSC has taken no enforcement action, and has vetoed a number of resolutions on such violations. *See* International Crisis Group (ICG), *Curb Your Enthusiasm: Israel and Palestine after the U.N.*, Middle East Report N°112, at <http://www.refworld.org/docid/4e6ef0102.html>. In this last area, though, it was not different from Namibia, in that Namibia was not successful in obtaining UNSC enforcement action on resolutions in its favor.
- <sup>75</sup> *See, e.g.*, S.C. Res 1243, ¶1, U.N. Doc. S/RES/1243, 27 May 1999; S.C. Res. 1605, ¶1, U.N. Doc. S/RES/1605, 17 June 2005. These are just a small number of UNSC Resolutions calling upon the parties to implement resolution 338 (1973).
- <sup>76</sup> Taba Negotiations: The Moratinos Non-Paper, EU SPECIAL REPRESENTATIVE TO THE MIDDLE EAST PROCESS, January 2011, at <http://www.mideastweb.org/moratinos.htm>; The Wye River Memorandum, U.S. DEPT. OF STATE, 23 October 1998, at [http://www.state.gov/www/regions/nea/981023\\_interim\\_agmt.html](http://www.state.gov/www/regions/nea/981023_interim_agmt.html); Declaration of Principles on Interim Self-Government Agreements, ISRAEL MINISTRY OF FOREIGN AFFAIRS, 13 September 1993, at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Principles>; Camp David Accords, ISRAEL MINISTRY OF FOREIGN AFFAIRS (17 September 1978), at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Camp+David+Accords.htm>.
- <sup>77</sup> UN Secretary General, Letter dated 10 April 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/369 (Apr. 10, 2002) (establishing Russia, the US, the EU, and the UN as the Quartet, a group designed to address the escalating conflict in the Middle East).
- <sup>78</sup> The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (The Oslo Peace Accord), Washington DC, 28 September 1995, *available at* [http://foeme.org/www/?module=regional\\_data&record\\_id=4](http://foeme.org/www/?module=regional_data&record_id=4) (last visited 23 August 2011).
- <sup>79</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East, *In Figures: As of 1 Jan. 2013*, UNRWA.ORG (January, 2013), <http://www.unrwa.org/sites/default/files/2013042435340.pdf>.
- <sup>80</sup> *See* Karen AbuZayd's chapter, *An Essay on the Causes and Factors of the Unresolved Palestinian Refugee Problem: A View from an UNRWA Commissioner General*, in this volume.
- <sup>81</sup> G.A. Res 394 (V), U.N.Doc A/RES/394, 14 December 1950, at <http://unispal.un.org/unispal.nsf/d0911f77d9bb1f14852574050052b8d6/2e009c2372d9e9f9852560eb006d0d8c?OpenDocument&Highlight=0,UNCCP> ("Ensure that refugees, whether repatriated or resettled, will be treated without any discrimination either in law or in fact"). United Nations Conciliation

Commission for Palestine (UNCCP), *The Question of Reintegration by Repatriation of Resettlement (Working Paper)*, A/AC.25/W/82/Rev.1, 2 October 1961; United Nations Conciliation Commission for Palestine (UNCCP), *Definition of a "Refugee" under Paragraph 11 of the General Assembly Resolution of 11 December 1984*, A/AC.25/W/61, 9 April 1951, at [http://unispal.un.org/UNISPAL.NSF/0/418E7BC6931616B485256CAF00647C\\_C7](http://unispal.un.org/UNISPAL.NSF/0/418E7BC6931616B485256CAF00647C_C7) (stating that the categories of Palestinian refugees covered by the terms of Res. 194 include 1. 'persons of Arab origin who were Palestinian citizens and, after 29 November 1947, left territory at present under the control of the Israel authorities'; 2. 'stateless persons of Arab origin who after 29 November 1947 left that territory where they had been settled up to that date'; 3. 'persons of Arab origin who were Palestinian citizens and left the said territory after 6 August 1924 and before 29 November 1947'; and 4. 'persons of Arab origin who had opted for Palestinian citizenship, left that territory before 6 August 1924, and retained their citizenship up to 29 November 1947'). See Susan M. Akram, *Palestinian Refugees and Their Status: Rights, Politics and Implications for a Just Solution*, 31 J. OF PALESTINE STUD. 3 (2002) (stating that 'Palestine refugee' is a term used by UNRWA to refer to both Palestine refugees and their descendants and displaced persons and their descendants. According to the UNRWA, Palestine refugees refer to "any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict." Displaced persons refer to those who are not Palestine refugees and fall within the UNGA Resolution 2252, 4 July 1967, and subsequent UNGA resolutions. Michael Fischbach, *The United Nations and Palestinian Refugee Property Compensation*, in 31 J. OF PALESTINE STUD. 2 (2002), available at <http://www.jstor.org/stable/10.1525/jps.2002.31.2.34>, explaining that the primary mandate of the UNCCP was conciliation between the parties as well as refugee repatriation and compensation.

<sup>82</sup> Susan M. Akram and Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L. L.J. 1(Spring 2004), 54–56.

<sup>83</sup> For a summary review of the various definitions of "Palestine refugee" and Palestinian refugees, see Susan M. Akram, *Myths and Realities of the Palestinian Refugee Problem*, in Susan M. Akram et al. eds., *INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE* (2011) 13–44.

<sup>84</sup> See Karen AbuZayd's chapter, *An Essay on the Causes and Factors of the Unresolved Palestinian Refugee Problem: A View from an UNRWA Commissioner General*, in this volume; G.A. Res. 169, U.N. Doc. A/RES/169, 15 December 1980, at art. 66; S.C. Res. 237, U.N. Doc. S/RES/237, 14 June 1967).

<sup>85</sup> U.N. Human Rights Council, *Report of the Human Rights Council on its 7<sup>th</sup> session*, A/HRC/7/78, 14 July 2008, at: <http://www.refworld.org/docid/49997ae80.html>; U.N. Human Rights

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- Committee, *Concluding Observations, Israel*, CCPR/C/79/Add.93, 18 August 1998, at <http://www.refworld.org/docid/3ae6b0284.html>.
- <sup>86</sup> Norwegian Refugee Council/Internal Displacement Monitoring Centre, *Israel: CESCR echoes NGO concerns over displacement*, available at <http://www.refworld.org/docid/4ed8d3360.html> (highlighting NGO concern with Israel's forced evictions and displacement of Palestinians and Bedouins in Israel and the occupied Palestinian Territory); Committee on Economic, Social and Cultural Rights, 19<sup>th</sup> Session, 4 December 1998, explains the substantive violations by Israel.
- <sup>87</sup> U.N. Committee on Economic, Social and Cultural Rights [CESCR], *Concluding Observations, Israel*, E/C.12/1/Add.90, 26 June 2003, at <http://www.refworld.org/docid/3f242abc7.html>; BADIL RESOURCE CENTER & ASYLUM & HUMAN RIGHTS CLINIC, SUBMISSION TO THE COMMITTEE ON ECONOMIC, CULTURAL AND SOCIAL RIGHTS REGARDING ISRAEL'S SERIOUS BREACH OF ITS OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR) (2010), available at <http://www.badil.org/en/documents/category/40-other?download=846%3Abadil-sub-to-cecsr-regarding-israel-icescr-4thsession-nov2010>.
- <sup>88</sup> United Nations Committee on Economic, Social and Cultural Rights [CESCR], *Concluding Observations, Israel*, E/C.12/1/Add.27 (1998); CESCR, *Concluding Observations, Israel*, E/C.12/1/Add.69 (2001); CESCR, *Concluding Observations, Israel*, E/C.12/1/Add.69 (2001); CESCR, *Concluding Observations, Israel*, E/C.12/1/Add.90 (2003); CESCR, *Concluding Observations, Israel*, E/C.12/ISR/CO/3 (2012). Committee against Torture [CaT], *Concluding Observations, Israel*, CAT/C/ISR/CO/4, (2009); CaT, *List of Issues prepared by the Committee prior to the submission of the fifth periodic report of Israel*, CAT/C/ISR/5, (2012). United Nations Human Rights Committee [HRC], *Concluding Observations, Israel*, CCPR/C/79/Add.93, (1998); HRC, *Concluding Observations, Israel*, CCPR/CO/79/ISR, (2003); HRC, *Concluding Observations, Israel*, CCPR/C/ISR/CO/3 (2010). Human Rights Council, *First Special Session*, A/HRC/S-1/3, (2006); Human Rights Council, *3<sup>rd</sup> Special Session: Israeli Military Incursions in Occupied Palestinian Territory*, A/HRC/S-3/2, (2006); Human Rights Council, *6<sup>th</sup> Special Session: Human Rights Violations Emanating from Israeli Military Incursions in the Occupied Palestinian Territory, including the Recent Ones in Occupied Gaza and West Bank of Nablus*, A/HRC/S-6/2 (2008); Human Rights Council, *9<sup>th</sup> Special Session: "The Grave Violation of Human Rights in the Occupied Palestinian Territory including the Recent Aggression in the Occupied Gaza Strip,"* A/HRC/S-9/2, (2009); Human Rights Council, *12<sup>th</sup> Special Session: "The Human Rights Situation in the Occupied Palestinian Territory and East Jerusalem,"* A/HRC/S-12/1, (2009). United Nations Committee on the Rights of the Child [CRC], *Concluding Observations, Israel*, CRC/C/15/Add.195, (2002); CRC, *Concluding Observations, Israel*, CRC/C/OPAC/ISR/CO/1, (2010); CRC, *Concluding Observations, Israel*, CRC/C/ISR/CO/2-4, (2013).

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- United Nations Committee on the Elimination of Discrimination Against Women [CEDaW], *Concluding Comments, Israel*, CEDAW/C/ISR/CO/3, (2005); CEDaW *Concluding Observations, Israel*, CEDAW/C/ISR/CO/5, (2011).
- <sup>89</sup> Committee on the Elimination of Racial Discrimination [CERD], *Concluding Observations, Israel*, CERD/C/ISR/CO/14-16 (2012), *available at* <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>.
- <sup>90</sup> H.R.C. Res. 7/17, U.N. Doc. A/HRC/7/17, 27 March 2008.
- <sup>91</sup> G.A. Res. 3237 (XXIX), U.N. Doc. A/RES/3237, 22 November 1974.
- <sup>92</sup> Quigley, *supra* note 1, makes the case that, with or without majority state recognition, Palestine satisfies all the conditions of the Montevideo Convention—a permanent population, defined territory, government, and the capacity to enter into relations with other states. He concludes that Palestine does not need territorial independence to be a state.
- <sup>93</sup> One hundred and thirty-eight nations voted in favor of Palestinian statehood recognition. *See* Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine “Non-Member Observer State” Status in United Nations, U.N. Press Release G.A./11317, 29 November 2012), *at* <http://www.un.org/News/Press/docs/2012/ga11317.doc.htm>.
- <sup>94</sup> *See* G.A. Res 1874, U.N. Doc. A/RES/1874, 23 June 1963; G.A. Res. 2229, U.N. Doc. A/RES/2229, 20 December 1966.
- <sup>95</sup> *See* G.A. Res. 1514, U.N. Doc. A/RES/1514, 14 December 1960; G.A. Res. 33/31, U.N. Doc. A/RES/33/31, 13 December 1978.
- <sup>96</sup> As Jeffrey Smith and others have pointed out, Spain’s relinquishment of its role in W. Sahara through the 1975 Madrid Accords has actually complicated the decolonization process. The lack of colonial consideration of the treatment of the territory has allowed Morocco to assume the role of primary party responsible for the territory of W. Sahara, not as an occupying state, but by a claim of sovereignty over the territory. *See* Thomas Marks, *Spanish Sahara: Background to Conflict*, 75 AFRICAN AFF. 298 (Jan. 1976), *available at* <http://www.jstor.org/stable/721863>; B.O. Okere, *The Western Sahara Case*, 28 INT’L AND COMP. L. 2 (April 1979), *at* <http://www.jstor.org/stable/758602>.
- <sup>97</sup> The POLISARO Front is an acronym for the Popular Front for the Liberation of Saguia el-Hamra and Río de Oro, in Spanish, Frente Popular para la Liberación de Saguia el-Hamra y Río de Oro.
- <sup>98</sup> W. Sahara Advisory Opinion, *supra* note 32, at ¶ 162.
- <sup>99</sup> W. Sahara Advisory Opinion, *supra* note 32, at ¶ 162 (stating the materials and information show “the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara.”).
- <sup>100</sup> W. Sahara Advisory Opinion, note 32, at ¶ 55.
- <sup>101</sup> The November 1975 Madrid Accords did not provide for local governance or the involvement of the Djemaa. *See* Declaration of Principles on Western Sahara by Spain, Morocco, and Mauritania (November 1975) (stating “Morocco and Mauritania will participate in collaboration with the Djemaa and to which

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will be transferred all the responsibilities and powers referred to in the preceding paragraph.”).

<sup>102</sup> *Id.*

<sup>103</sup> As of 2012, 85 states have given diplomatic recognition to the SADR, and it has been a member of the AU since 1984. Partition of the territory became official in April 1976, but it may have been both a reaction to recognition of the SADR and to the fact that territorial partition was already a reality on the ground. Terrence McNamee & Greg Mills & J Peter Pham, *Morocco and the African Union: Prospects for Re-Engagement and Progress on Western Sahara*, Discussion Paper 1/2013, at

[http://www.thebrenthurstfoundation.org/Files/Brenthurst\\_Commissioned\\_Reports/Brenthurst-paper-201301-Morocco-and-the-AU.pdf](http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commissioned_Reports/Brenthurst-paper-201301-Morocco-and-the-AU.pdf) (holding that the SADR has received diplomatic recognition by 85 states as of 2013, and 40 states have diplomatic relations with the SADR); see Jeffrey Smith’s chapter, *State of Exile: The Saharawi Republic and Its Refugees*, in this volume (highlighting the Mauritania and Morocco treaty regarding the territorial partition, and the international community’s response to the partition. See also Benjamin MacQueen, AN INTRODUCTION TO MIDDLE EAST POLITICS (2013), explaining that the POLISARIO declared the independence of the SADR on 27 February 1976.

<sup>104</sup> Construction began in 1981, and was completed in 1987, physically preventing the armed conflict from continuing across the divided territory. See United Nations Map No. 3691, Rev. 53 U.N. (October 2006), available at <http://www.un.org/Depts/Cartographic/map/dpko/minurso.pdf>.

<sup>105</sup> Organization of African Unity [OAU], *Resolution of the Question of the Question of the Western Sahara*, AHG/Res. 92 (XV), 22 July 1978.

<sup>106</sup> OAU, AHG/Res. 114 (XVI), 6–12 June 1983, cited in Gino Naldi, *Western Sahara: Suspended Statehood or Frustrated Self-Determination?* 13 AFR. Y.B. INT’L L. 11 (2005).

<sup>107</sup> OAU Res. AHG/103 (XVIII), 24–27 June 1981.

<sup>108</sup> OAU, *Resolution on the Question of Western Sahara*, AHG/Dec. 114 (XVI) (October 17, 1979); OAU, *Resolution on Western Sahara*, AHG/Dec. 103 (XVIII) (June, 24-27,1981). See also OAU, AHG/Res. 104 (XIX), 6–12 June 1983 (OAU Peace Plan), at <http://www.africaunion.org/root/au/Documents/Decisions/hog/sHoGAssembly1983.pdf>.

<sup>109</sup> OAU, AHG/Res. 104 (XIX), 6–12 June 1983. See also Naldi, *supra* note 106, at 16–17.

<sup>110</sup> The re-engagement of the U.N. at this time was marked by the intervention of Secretary General Perez de Cuellar himself. See Yahia Zoubir & Anthony Pazzanita, *The United Nations’ Failure in Resolving the Western Sahara Conflict*, 49 MIDDLE EAST J. 4 (September 1995).

<sup>111</sup> Cf. S.C. Res. 1359, U.N. Doc. S/RES/1359, 29 June 2001, with S.C. Res. 1754, U.N. Doc S/RES/1754, 30 April 2007.

<sup>112</sup> See S.C. Res. 621/88, U.N. Doc. S/RES/621/88, 30 September 1988.



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- <sup>113</sup> U.N. Secretary-General, *The Situation Concerning Western Sahara*, ¶ 61, U.N. Doc S/21360.
- <sup>114</sup> S.C. Res. 690, ¶ 4, U.N. Doc. S/RES/690, 29 April 1991, establishing MINURSO); *see, e.g.*, S.C. Res. 2099, ¶ 1, U.N. Doc. S/RES/2099, 25 April 2013, deciding to extend the mandate of MINURSO until April 2014.
- <sup>115</sup> W. Sahara Advisory Opinion, *supra* note 32. *See also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 22 July 2010, *available at* <http://www.icj-cij.org/docket/files/141/15987.pdf>.
- <sup>116</sup> *See also* Res. 2625 (XXV), 1970, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.
- <sup>117</sup> Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. Gen. List No. 84, (June 30), *available at* <http://www.refworld.org/docid/40239bff4.html>.
- <sup>118</sup> The UN did oversee a referendum process for Namibia, but as a pre-requisite for the required outcome of realizing self-determination that incorporated the principle of majority vote for black Namibians, as the I.C.J. had established.
- <sup>119</sup> *See* G.A. Res. 34/35, U.N. Doc. A/RES/34/35, 21 November 1979); G.A. Res. 34/37, U.N. Doc. A/RES/34/37, 21 November 1979, stating that it “deeply deplores the aggravation of the situation resulting from the continued occupation of W. Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania”; G.A. Res. 43/33, U.N. Doc. A/RES/43/33, 22 November 1988.
- <sup>120</sup> *See* John Dugard, *Advisory Opinions and the Secretary General*, in Marcelo Kohen & Laurence Boisson de Chazournes eds., *INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION* 415 (2010).
- <sup>121</sup> Spain had agreements with Morocco over W. Sahara fisheries until 1986, and after that the EU has entered into such agreements. Private corporations including Kerr McGee, Wessex Exploration, Sterling and Premier, have also contracted with Morocco regarding petroleum rights in Saharan territory, an issue on which Sahrawi rights activists are heavily engaged. *See* Helen Campbell, *Oil Companies Very Keen on Western Sahara*, *WESTERN SAHARA RESEARCH WATCH* (May 2005), *available at* <http://www.wsrw.org/a193x1971>.
- <sup>122</sup> Smith notes the additional singular features of Saharawi autonomy such as self-rule, control and governance over the inland part of W. Sahara not occupied by Morocco. *See also* Jeffrey Smith’s chapter, *State of Exile: The Saharawi Republic and its Refugees*, in this volume.
- <sup>123</sup> Hannikainen, *supra* note 24, at 68.
- <sup>124</sup> United Nations Committee on Economic, Social and Cultural Rights [CESCR], *Concluding Observations, Morocco*, E/C.12/1994/5, 30 May 1994, *at* <http://www.refworld.org/docid/3ae6ae6514.html> (“concerned that the right to self-determination has not been exercised...”); CESCR, *Concluding Observations, Morocco*, E/C.12/1/Add.55, 1 December 2000, “With regard to the situation in the W. Sahara, the Committee regrets that there has not been a definite solution to the question of self-determination.”; CESCR, *Concluding*

- Observations, Morocco*, E/C.12/MAR/CO/3, 4 September 2006, at <http://www.refworld.org/docid/45c30ba60.html> (“no clear solution has yet been found to the question of self-determination . . . straitened circumstances endured by people displaced by the conflict . . .”).
- <sup>125</sup> United Nations Committee against Torture [CaT], *U.N. Committee against Torture: Conclusions and Recommendations, Morocco*, CAT/C/CR/31/2, 5 February 2004, available at <http://www.refworld.org/docid/411745864.html>; United Nations Committee on the Rights of the Child [CRC], *U.N. Committee on the Rights of the Child: Concluding Observations, Morocco*, CRC/C/15/RESP/Add.211 (Part I), 1 December 2004, at <http://www.refworld.org/docid/42d284f34.html>.
- <sup>126</sup> United Nations Human Rights Committee [HRC], *Concluding Observations, Morocco*, CCPR/C/79/Add.113, 1 November 1999), at <http://www.refworld.org/docid/3ae6b01218.html>; see also HRC, *Concluding Observations, Morocco*, CCPR/CO/82/MAR (Dec. 1, 2004), at <http://www.refworld.org/docid/42ce96954.html>; HRC, *Concluding Observations, Morocco*, CCPR/CO/C/79/Add.44, at <http://www.refworld.org/docid/3ae6b02724.html>.
- <sup>127</sup> United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Morocco*, A/HRC/21/3, 6 July 2012, available at <http://www.refworld.org/docid/50c997852.html>; Universal Periodic Review 13<sup>th</sup> Session, Joint Report Submitted by RFK Center for Justice and Human Rights & BU Asylum and Human Rights Program (21 November 2011), available at <http://www.scribd.com/doc/95531621/Universal-Periodic-Review-13th-session-RFK-Center>.
- <sup>128</sup> Robert F. Kennedy Center for Justice and Human Rights, *Nowhere to Turn: The Consequences of the Failure to Monitor Human Rights Violations in Western Sahara and Tindouf Refugee Camps* (April 2013), available at <http://rfkcenter.org/images/attachments/article/1884/NowhereToTurnLoRes.pdf> (stating that “in spite of all the evidence of human rights violations, the Security Council has extended MINURSO’s mandate more than 20 times, but has not approved a human rights mandate for MINURSO.”); UNSC Rep. of the Security Council, *Report of the Secretary-General on the situation concerning Western Sahara*, S/2012/197, 5 April 2012), at <http://www.refworld.org/docid/4fbf7a8f2.html>.
- <sup>129</sup> See Jeffrey Smith’s chapter, *State of Exile: The Saharawi Republic and Its Refugees*, in this volume (stating that “the maintenance of the status quo by the Security Council can be seen in its reluctance to consider the addition of a human rights monitoring mandate for MINURSO, notwithstanding that the securing of human rights is implicitly part of the UN’s role to assure the proper conditions for the conduct of a self-determination referendum.”).
- <sup>130</sup> UN Secretary-General, *Report of the Secretary-General on the Situation Concerning Western Sahara*, U.N. Doc. S/2000/131, 17 February 2000.
- <sup>131</sup> Dawn Chatty, ed., *DETERRITORIALIZED YOUTH: SAHRAWI AND AFGHAN REFUGEES AT THE MARGINS OF THE MIDDLE EAST 6* (2010).

- <sup>132</sup> Press Release, UNHRC, Agreement Reached on Increased Family Visits for Long-Separated Sahrawi Families, 3 July 2013), at <http://www.unhcr.org/51d430029.html>.
- <sup>133</sup> There may be consensus among states and civil society that Tibet is a colonized or an occupied nation, at least as an informal matter. See Sloane, *supra* note 33. National courts have issued decisions and judgments that recognize Tibet as an occupied state. See, e.g., *Spanish Court Acknowledges Tibet As An Occupied State Under International Law*, TIBET JUSTICE CENTER, available at <http://www.tibetjustice.org/features/audencia-nacional-ruling/> (last visited 28 October 2013). However, as academics and legal experts have conceded, formal state recognition of Tibet as such remains elusive, including from the UN. See Jayshree Bajoria, *The Question of Tibet*, COUNCIL OF FOREIGN RELATIONS (5 December 2008), available at <http://www.cfr.org/china/question-tibet/p15965#p2>; Barry Sautman, *Tibet's Putative Statehood and International Law*, 9 CHINESE J. INTL. L. 1 (2010); Ellen Bork, *Tibet's Transition: Will Washington Take a Stand?* WORLD AFF. J. (Sept./Oct. 2012), at <http://www.worldaffairsjournal.org/article/tibet's-transition-will-washington-take-stand>.
- <sup>134</sup> See Robert Sloane's chapter, *Tibetan Diaspora in the Shadow of the Self-Immolation Crisis: Consequences of Colonialism*, in this volume; Sloane, *supra* note 33 (arguing that Tibet has been recognized on many levels as being occupied territory and long entitled to independence, as well as explaining historical reasons for Tibet's failure to achieve self-determination, including its political isolation to avoid being colonized by European powers). See also Robert Barnett, *Did Britain Just Sell Tibet?* N.Y. TIMES at A31 (24 November 2008, detailing the British shift of position on Tibet).
- <sup>135</sup> See *The Tibetans*, CONFLICT EARLY WARNING SYSTEMS, UNIVERSITY OF SOUTHERN CALIFORNIA, at <http://www.usc.edu/dept/LAS/ir/cews/database/Tibet/tibet.pdf>.
- <sup>136</sup> Michael C. Davis, *Tibet*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [MPEPIL] ¶ 5, 2013; Michael van Walt van Praag, *THE STATUS OF TIBET* (Wisdom Publications, 1987); Michael van Walt van Praag, *POPULATION TRANSFER AND THE SURVIVAL OF THE TIBETAN IDENTITY* (New York: US Tibet Committee, 1986).
- <sup>137</sup> Minorities at Risk Project, *Assessment for Tibetans in China*, 31 December 2003, at, <http://www.refworld.org/docid/469f3a69c.html> (stating that "no country to date has challenged Beijing's claim that Tibet is a part of China.").
- <sup>138</sup> Davis, *supra* note 136, at ¶ 11.
- <sup>139</sup> Law of the People's Republic of China on Regional National Autonomy 1984 (the Autonomy Law), at <http://www.china.org.cn/english/government/207138.htm>.
- <sup>140</sup> G.A. Res. 1723 (XVI), U.N. Doc. A/RES/1723, 20 December 1961.
- <sup>141</sup> See G.A. Res. 1353 (XIV), U.N. Doc. A/RES/1353, 21 October 1959; G.A. Res. 2079 (XX), U.N. Doc. A/RES/2079, 18 December 1965.

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- <sup>142</sup> INTERNATIONAL COMMISSION OF JURISTS, TIBET: HUMAN RIGHTS AND THE RULE OF LAW (1997), *available at* <http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/> (finding that the Tibetans are a “people under alien subjugation,” entitled to the right of self-determination.); Tenzin Bhagen-Tsang, *Tibet, The United Nations and Human Rights*, JAMES MADISON UNIVERSITY: STUDENT FOR A FREE TIBET, *available at* <http://www.jmu.edu/orgs/tibet/tibetandun.html>; *Countries Support Self-Determination for Tibet at 58<sup>th</sup> U.N. Commission on Human Rights*, INTERNATIONAL CAMPAIGN FOR TIBET, 28 March 2002, *available at* <http://www.savetibet.org/countries-support-self-determination-for-tibet-at-58th-un-commission-on-human-rights/> (stating that Germany, Guatemala, The Netherlands, and Switzerland were among the countries that raised self-determination for Tibet at the UN Commission of Human Rights in 2002).
- <sup>143</sup> See Sloane, *supra* note 33, at 154.
- <sup>144</sup> Committee on the Elimination of Racial Discrimination [CERD], *Concluding Observations, China*, CERD/C/CHN/CO/10-13 (2009); Committee against Torture [CaT], *Concluding Observations, China*, CAT/C/20/Add.5 (1996); Committee Against Torture [CaT], *Concluding Observations, China*, CAT/C/CHN/CO/4 (2008); Committee on the Elimination of Discrimination against Women [CEDaW], *Concluding Observations, China*, CEDAW/C/CHN/CO/6 (2006).
- <sup>145</sup> United Nations Committee on Economic, Social and Cultural Rights [CESCR], *Concluding Observations, China*, E/C.12/1/Add.107 (2005), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/422/45/PDF/G0542245.pdf?OpenElement>.
- <sup>146</sup> Tibet Justice Center and Boston University Asylum & Human Rights Program, *Parallel Report Submitted to the Committee on Economic, Social and Cultural Rights (CESCR) for Consideration of the Report on China Concerning the Rights of the Tibetan People* (April 1, 2013), *available at* [http://www.tibetjustice.org/reports/un/Tibet\\_Parallel\\_Report\\_CESCR\\_2014.pdf](http://www.tibetjustice.org/reports/un/Tibet_Parallel_Report_CESCR_2014.pdf) [hereinafter Parallel Report].
- <sup>147</sup> United Nations Committee on Economic, Social and Cultural Rights [CESCR], *U.N. Committee on Economic, Social, and Cultural Rights: Addendum to the Initial Reports Submitted by States Parties, People’s Republic of China*, E/1990/5/Add.59, *available at* <http://www.refworld.org/docid/45377f760.html>.
- <sup>148</sup> Davis, *supra* note 136, at ¶ 9-10; *see also* Tibet Justice Center, *Tibet’s Stateless Nationals II: Tibetan Refugees in India* (Sept. 2011).
- <sup>149</sup> *See* Foreigners Act No. 31 (1946); Registration of Foreigners Act No. 16 (1939), codified in India Code (1993).
- <sup>150</sup> *See* TIBET JUSTICE CENTER, TIBET’S STATELESS NATIONALS II: TIBETAN REFUGEES IN INDIA 45 (2011). *See also* Namgyal Dolkar v. Ministry of External Affairs, W.P. (C) 12179/2009 (High Court of Delhi) (India) (holding that Tibetans born in India between 26 January 1985 and 1 July 1987 are Indian citizens by operation of the Indian Citizenship Act, which affects 30,000

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Tibetans born in India during those years, while those born before and after remain in ‘foreigner’ and stateless status).

- <sup>151</sup> Parallel Report, *supra* note 146, at ¶ 1, 21 (stating that 114 Tibetans have self-immolated against their treatment under Chinese rule. Nearly all self-immolators who had left behind a final statement had called for “basic rights and freedoms, including the rights to practice their own religions, learn their mother tongue, wear Tibetan clothes and be united.”).
- <sup>152</sup> See Sloane, *supra* note 33.
- <sup>153</sup> G.A. Res. 1353 (XIV), U.N. Doc. A/RES/1353, 21 October 1959.
- <sup>154</sup> G.A. Res. 1723 (XVI), U.N. Doc. A/RES/1723, 20 December 1961.
- <sup>155</sup> Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44:1 NYU J. OF INTL. L. AND P. 1 (2010), available at <http://nyujilp.org/wp-content/uploads/2010/06/44.1-Brilmayer-Tesfalidet.pdf> (third state obligations consist of “a global obligation, on the part of every State, to undertake heroic measures to pressure, prevent or punish every violation of international law.”).
- <sup>156</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, at art. 1-3, Supplement No. 10 (A/56/10), available at <http://www.refworld.org/docid/3ddb8f804.html>. See also Commentary to Article 19 of 1976 Report to the UNGA (“a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression....safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination.”)
- <sup>157</sup> Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT (March 2001), at <http://www.iccnw.org/documents/WritingColombiaEng.pdf>.
- <sup>158</sup> See Namibia, W. Sahara, and Palestine Advisory Opinions, *supra* note 32. See also Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), 2010 I.C.J. Gen. List No. 141 (July 22), ¶ 79 and 82, available at <http://www.refworld.org/docid/4c5151002.html> (*erga omnes* obligations as articulated by the ICJ with respect to Kosovo). See also S.C. Res. 497, U.N.Doc. S/RES/497, 17 December 1981, declaring invalid Israel’s annexation of the Golan Heights.
- <sup>159</sup> See S.C. Res. 497, U.N. Doc. S/RES/497, 17 December 1981, invalidating Israel’s annexation of the Golan Heights; G.A. Res. 2546, U.N. Doc. A/RES/2546, 11 December 1969, “Recalling the humanitarian resolutions regarding the violations of human rights and fundamental freedoms in the territories occupied by Israel”; G.A. Res. 34/37, U.N. Doc. A/RES/34/37, 21 November 1979, reaffirming the inalienable right of the people of W. Sahara to self-determination and independence.
- <sup>160</sup> Namibia Advisory Opinion, *supra* note 32, at paras. 122-124.

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- <sup>161</sup> See S.C. Res. 283, U.N. Doc. S/RES/283, 29 July 1970.
- <sup>162</sup> W. Sahara Advisory Opinion, *supra* note 32, ¶ citing G.A. Res. 2625 at ¶ 2.
- <sup>163</sup> See G.A. Res. 3458 (XXX), U.N. Doc. 3458 (XXX), 10 December 1975; G.A. Res. 31/45, U.N. Doc. A/RES/31/45, 1 December 1976; G.A. Res. 33/31, U.N. Doc. A/RES/33/31, 13 December 1978.
- <sup>164</sup> S.C. Res. 377, U.N. Doc. S/RES/377 (Oct. 22, 1975); S.C. Res. 379, U.N. Doc. S/RES/379, 2 November 1975; S.C. Res. 380, U.N. Doc. S/RES/380, 2 November 1975. See Koury, *supra* note 47, at 153-54.
- <sup>165</sup> W. Sahara Advisory Opinion, *supra* note 32, at ¶¶ 162 (court held that neither Mauritania nor Morocco had any ties of sovereignty, that is, a tenable territorial claim to W. Sahara).
- <sup>166</sup> Wall Advisory Opinion, *supra* note 32, at ¶ 121.
- <sup>167</sup> Wall Advisory Opinion, *supra* note 32.
- <sup>168</sup> *Id.* (The Court's rulings on the main points were almost unanimous. The Justices voted 14 to 1 that the construction of the wall was contrary to international law; 14 to 1 that Israel was under an obligation to immediately terminate its breaches of international law related to the wall construction; 14 to 1 that Israel was under an obligation to make reparation for all damages caused by the wall; 13 to 2 that all states are under an obligation not to recognize the illegal occupation; and 14 to 1 that the United Nations should consider what further action should be taken to resolve the illegal situation).
- <sup>169</sup> *Id.*, at ¶ 75 ("The Security Council, after recalling on a number of occasions 'the principle that acquisition of territory by military conquest is inadmissible'"); at ¶ 88 ("The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the UNGA in Resolution 2625(XXV)..."); at ¶ 89-94 (on the application of the Fourth Geneva Convention to Palestine's occupation).
- <sup>170</sup> See Dugard, *supra* note 119, at 405.
- <sup>171</sup> G.A. Res. ES/10-15, U.N. Doc. A/RES/ES/10-15, 2 August 2004 (150 member states voted yes, 6 member states voted no, with 25 abstentions).
- <sup>172</sup> See Koury, *supra* note 47, at 161-62 (member states to impose sanctions on any entities involved in the wall construction and to deny Israeli settlers' entry to their states as well as refuse settler products in their markets. The Movement also made specific requests to the UNSC and the Secretary-General to take steps to ensure compliance with the I.C.J. Opinion).
- <sup>173</sup> G.A. Res. ES-9/1, U.N. Doc. A/RES/ES-9/1, 5 February 1982.
- <sup>174</sup> G.A. Res. 377(V), U.N. Doc. A/RES/377(V), 3 November 1950.
- <sup>175</sup> U.N. Charter art. 96, para. 1.
- <sup>176</sup> Advisory Opinion on the Wall, ¶¶ 27 and 28.
- <sup>177</sup> See Human Rights Committee, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/22/62* (Dec. 28, 2012); Human Rights Committee, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/20/32* (May 25, 2012); Human Rights Committee, *Human Rights Situation in Palestine and*

- other Occupied Arab Territories*, A/HRC/23/NGP/66, 29 May 2013, available at <http://unispal.un.org/UNISPAL.NSF/0/5708AD7472C846CC85257B7F004D64F1>; UNGA, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/67/379 (Sept. 19, 2012); UN General Assembly, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009; H.R.C. Res. 19/17 [Israeli settlement in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan], U.N. Doc. A/HRC/RES/19/17 (Mar. 22, 2012); United Nations Committee on the Elimination of Racial Discrimination [CERD], CERD/C/ISR/CO/14-16, ¶ 24-38, 9 March 2012, at <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>.
- <sup>178</sup> See Namibia Advisory Opinion (responding to question put forth by the UNSC), *supra* note 32; International Status of South West Africa Advisory Opinion, *supra* note 39. Voting Procedure Advisory Opinion and The Admissibility of Hearings Advisory Opinion, *supra* note 32.
- <sup>179</sup> South West Africa Peoples' Organization (SWAPO), comprising primarily Ovambo people, was established to create a "free, democratic government in South West Africa...and to rid our continent of all forms of foreign domination."; South West Africa National Union (SWANU) was established to "unite and rally the people of South West Africa into one national front...and to lead them in the struggle for national independence and self-determination"; the African National Congress was formed in 1912 to unite all Africans in the struggle for freedom; the Pan-Africanist Congress broke off from the ANC in 1959 to form a separate organization dedicated to the struggle of only black Africans and repudiating collaboration with whites. See John Dugard, ed., *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (1973);
- <sup>180</sup> For views on the effectiveness of these entities, see *id.*; See also Submissions to the United Nations General Assembly Special Political and Decolonization Committee (Fourth Committee), The Question of Western Sahara and the Natural Resources of the Territory (submitted by Jeffrey Smith), New York, 4–6 October 2011, recommending that UNGA Special Political and Decolonization Committee to consider how the creation of a Council of W. Sahara, similar to the Council for Namibia, could govern for and legislate in the case of occupied W. Sahara.
- <sup>181</sup> See League of Nations Covenant, *supra* note 4.
- <sup>182</sup> See UNSC, *Peaceful settlement of the question of Palestine*, 29 November 2004, A/59/574 / S/2004/909\*, at <http://www.refworld.org/docid/426df5754.html>; Iain Scobbie, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory for the Responsibility of the U.N. for Palestine*, 16 EUROPEAN J. OF INTL. L. 5 (2006), available at <http://www.ejil.org/pdfs/16/5/331.pdf>; Moshe Hirsch, *The Impact of the Advisory Opinion on Israel's Future: International Relations Perspective*, 1 J.

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<sup>183</sup> Koury, *supra* note 47, at 156.

<sup>184</sup> *Id.* at 156-57.

<sup>185</sup> Wall Advisory Opinion, *supra* note 32.

<sup>186</sup> See Michael C. van Walt van Praag, *Tibet and the right to Self-Determination*, 26 WAYNE L. REV. 279 (1979).

<sup>187</sup> See, e.g., G.A. Res. 2649 (XXV), ¶5, U.N. Doc. A/RES/2649, 30 November 1970.

<sup>188</sup> Wall Advisory Opinion, *supra* note 32. Although not binding as an advisory opinion, it is a significant decision on major legal issues underlying the Israeli-Palestinian conflict. In coming to the conclusion that the Wall and its associated regime of permits and closures are illegal, the Court dismissed Israel's main arguments undermining the applicability of international humanitarian law and human rights law. The opinion narrowly defined the scope of the necessity defense; confirmed that both international humanitarian law and human rights law apply in the Occupied Palestinian Territories; dismissed the "missing reversioneer" argument to find the Fourth Geneva Convention fully applicable; and placed clear obligations on all signatory states to take measures to enforce the four Geneva Conventions (under *erga omnes* obligations). Further, the ICJ recognized the standing of the PLO to appear in the proceedings; established that Israel was bound by articles of state responsibility and other legal principles to reconstitute Palestinian property. Susan M. Akram and Michael Lynk, *The Wall and the Law: A Tale of Two Judgments*, 24:1 NETHERLANDS Q. OF HUMAN RIGHTS 61 (2006).

<sup>189</sup> Ali Abunimah, *Opinion: Recognizing Palestine?* AL JAZEERA 16:15 (13 April 2011), criticizing the PA's failure to follow up with mobilization and legal strategies after the ICJ Opinion at <http://english.aljazeera.net/indepth/opinion/2011/04/2011413152522296883.html>.

<sup>190</sup> The host of lawsuits that have been filed in domestic courts in many countries on behalf of Palestinian victims and against Israeli defendants or corporations working with Israel in its occupation activities have been the work of private lawyers and non-governmental organizations in the Palestinian solidarity communities. See Matar et al. v. Dichter, 563 F.3d 9 (2nd Cir. 2009); Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008); Corrie et al. v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007); Doe v. State of Israel, 400 F.Supp.2d 86 (D.D.C. 2005); Abu-Zeineh v. Fed. Labs., Inc., 975 F.Supp. 774 (W.D. Pa. 1994).; R (Hassan) v. the Secretary of State for Trade and Industry [2007] EWHC 2630 (Admin) (U.K.). See also The Associated Press, *Dutch Lawyers Seek Arrest of Minister Ayalon for 'War Crimes,'* HAARETZ (7 October 2008), available at <http://www.haaretz.com/news/dutch-lawyers-seek-arrest-of-minister-ayalon-for-war-crimes-1.255137>; *Spanish Court Green-Lights Gaza Probe*, YNET



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- NEWS (27 February 2009), available at <http://www.ynetnews.com/articles/0,7340,L-3678624,00.html>; *War Crimes Suit Filed Against Barak, Livni in Belgium*, YNET NEWS (23 June 2010), available at <http://www.ynetnews.com/articles/0,7340,L-3909745,00.html>.
- <sup>191</sup> See LAURA ZITTRAIN EISENBERG & NEIL CAPLAN, NEGOTIATING ARAB-ISRAELI PEACE: PATTERNS, PROBLEMS, POSSIBILITIES 211 (2010); Jeff Halper, *A Strategy Within a Non-Strategy: Sumud Resistance, Attrition, and Advocacy*, 35 J. PALESTINE STUD. 45 (2006). See also Koury, *supra* note 47.
- <sup>192</sup> Wall Advisory Opinion, *supra* note 32, ¶¶ 109, 110, 112, 133; H.R.C., *Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard*, U.N. Doc. A/HRC/4/17 (29 January 2007); H.R.C., *Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, U.N. Doc. A/HRC/16/72, 10 January 2011.
- <sup>193</sup> See Press Release, Boycott, Divestment and Sanctions (BDS), EU acknowledges obligation to not recognize Israeli colonisation and annexation of occupied Palestinian territory (July 18, 2013), available at <http://www.bdsmovement.net/2013/eu-guidelines-press-release-11211#sthash.MBTcQfJH.dpuf> (“European Investment Bank to stop loans to ‘virtually all’ major Israeli businesses and public bodies. New European Union guidelines will prevent Israeli ministries, public bodies and businesses that operate in occupied Palestinian territory from receiving loans worth hundreds of millions of Euros each year from the European Investment Bank, it emerged today. The EU will also stop awarding grant funding to Israeli ministries, public bodies or private businesses for activities that take place in occupied Palestinian territory, even if they are headquartered inside Israel’s pre-1967 borders.”). The European Commission’s recent directive is clearly meant to bind EU institutions in prohibiting loans to Israeli entities involved in or operating from the occupied territories of Palestine. See Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, OJ 2013/C 205/05, 19 July 2013), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:205:0009:0011:EN:PDF>. See also 2012 O.J. (L-298) 55, at art. 58(1)(c) (the European Investment Bank is a section 58(1)(c) institution and is therefore bound by the 2013 directive).
- <sup>194</sup> Ronnie Hansen [Norwegian Refugee Council], *Generations in Exile from Africa’s Last Colony*, 27 FORCED MIGRATION R. 76 (January 2007), at <http://www.fmreview.org/FMRpdfs/FMR27/51.pdf>.
- <sup>195</sup> W. Sahara Advisory Opinion, *supra* note 32, at ¶ 55. See also Declaration of Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII) A/RES/1803, 14 December 1962. See Stephanie Koury, *The European Community and Member States’ Duty of Non-Recognition Under the EC-Morocco Association Agreement: State Responsibility and Customary*

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*International Law*, in Karin Arts & Pedro Pinto Leite, eds., *INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA* (2007) 171–72.

<sup>196</sup> G.A. Res. 33/182, U.N. Doc. S/RES/33/182 (Dec. 21, 1978); *see also* Vincent Chapaux, *Question of the European Community-Morocco Fisheries Agreement*, in Arts and Pinto Leite eds., *op. cit.*, 231–2.

<sup>197</sup> *See* Koury, *supra* note 196, at 177. *See also* Carlos Wilson, *Foreign Companies Plundering Western Saharan Resources*, in Arts and Pinto Leite eds., *op. cit.*, 249–65.

<sup>198</sup> Wilson, *supra* note 198, at 250–51.

<sup>199</sup> Jeffrey Smith makes the point that the occupation costs Morocco a great deal more than the country's gain in resource extraction from the territory. He estimates military expenditure alone to cost no less than US \$1.5 billion per year. Pedro Pinto Leite and Jeffrey Smith, *The Question of Western Sahara: from Impasse to Independence*, PAMBAZUKA NEWS (Feb. 27, 2013), <http://www.pambazuka.org/en/category/features/86407/print>. *See* Interview with Jonas Gahr Støre, Norwegian Minister of Foreign Affairs, in Norwegian Parliament (23 February 2011), *available at* <http://vest-sahara.no/a123x1646> (stating that “Morocco does not exercise internationally recognized sovereignty with regard to Western Sahara. As a point of departure, therefore, Morocco does not have the right to exploit the area's resources as if they were its own in light of the 1907 Hague Convention.”); Toby Shelley, Address at the Oxford Middle East Studies Centre (18 February 2012), *available at* <http://www.arso.org/TSh180205.htm> (making an initial assessment of what Morocco has lost and gained by holding and settling W. Sahara).

<sup>200</sup> *See, e.g.*, Jeffrey Smith, *Fishing in Self-Determination: European Fisheries and Western Sahara – The Case of Ocean Resources in Africa's Last Colony*, in Aldo Chircop et al. eds. *OCEAN YEARBOOK 27* (2013).

<sup>201</sup> Smith argues that one major UN agency of particular interest to the Sahrawi is UNFAO, in which he urges their participation in fisheries surveys on the Saharan coastline.