

THE RIGHT TO RESISTANCE AND THE WESTERN SAHARA: A TWAIL ANALYSIS OF THE INTERNATIONAL LEGAL ORDER AND ITS CONSTRAINTS ON DECOLONIZATION

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The Western Sahara is often called the “Last Colony in the World,” in reference to its anachronistic status as a territory deemed to have self-determination by the United Nations and ICJ, but still under the rule of another country. Scholarship on the Western Sahara tends to concentrate on the protracted stalemate in their war of independence against Morocco, highlighting the roles of several individual actors, such as France, the United States, the United Nations, and the Polisario, and how these actors create a particular structure to the conflict. This Note focuses on the role of the International Legal Order, as created and upheld by actors such as the United Nations and the United States, in developing and maintaining the stalemate. First, this Note examines the way the rules on the prohibition on the use of force have asymmetrically limited the ability of the Sahrawi people and the Polisario to respond to colonial violence and to pursue their right to self-determination. Second, this Note examines how the principles of self-determination as defined by the International Legal Order further the power imbalances which allow the oppression of the Western Sahara to continue. Following in the tradition of Third World Approaches to International Law, this Note highlights the displacement of the local legal order in the Western Sahara, and aims to demonstrate that by stifling the right to resistance in the Western Sahara, the International Legal Order merely perpetuates the power imbalances of colonialism.

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* Duke University School of Law J.D./L.L.M. '24; King's College London M.A. World History and Cultures '21; The University of Texas at Austin B.A. '19. I must thank the editors on the Duke Journal of Comparative & International Law who, through their patience and diligence, made this article a truly collaborative effort; the Western Sahara Campaign for their efforts to advocate for the Sahrawi people and the many academics cited in this piece who do the same; and those who support the right to resistance for oppressed and displaced people everywhere.

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I. INTRODUCTION

Several Third World Approaches to International Law (TWAIL) scholars have proposed that the international legal order continues the power imbalances of colonialism into the present day, largely due to the inherent and reinforced economic and political power structures that replicate the colonial system. These arguments reference, but rarely discuss, how the international legal order itself constrains the resistance efforts of anticolonial movements. This note presents the resistance movement in the Western Sahara as a case study to illuminate this phenomenon, first highlighting the displacement of the indigenous and local legal system by the United Nations, and then exploring how two predominant legal frameworks in the territory — the prohibition of the use of force and the doctrine of self-determination — have limited the effectiveness of the independence movement in the Western Sahara. Both of these frameworks not only perpetuate colonial power imbalances and further Western-centric ideology, but also limit the ability of the Sahrawis to resist colonization and effectively fight for independence.

This article borrows the critical language of TWAIL to explain the

theoretical basis for these legal frameworks, before demonstrating their effects in practice in the Western Sahara. TWAIL is a broad “legal studies discipline” which opposes the international law regime as a form of governance for the Third World.¹ TWAIL bases this opposition on the theory that international law is neither universal nor premised on a fundamental truth.² Instead, TWAIL asserts that international law is essentially derived from European principles of justice, legality, and governance.³ TWAILian scholars, such as Makau Mutua, explain that problematic Eurocentric traditions are continued into the present day through the International Legal Order (ILO).⁴ TWAIL scholars argue that the ILO and its legal frameworks have been forced onto the citizens of the Third World⁵ in much the same way as colonial law was — the citizens of the Third World have had their legal systems displaced and replaced, and these citizens have been forced to assimilate to a rule of law determined by, and enforced by, the Western colonial powers.⁶

A prominent feature of the ILO is the United Nations (UN) and its

1. See Makau Mutua & Antony Anghie, *What Is TWAIL?*, 94 PROC. OF ASIL ANN. MEET. 31, 31 (2000) (defining TWAIL as an emerging discipline and discussing the foundations and theory of the movement). See also Larissa Ramina, *TWAIL – “Third World Approaches to International Law” and Human Rights: Some Considerations*, 5 J. CONST. RESEARCH 261–262 (2018) (“[TWAIL] has been defined as a scholarly community and/or a political movement; a methodology; a set of approaches; a chorus of voices; a theory; a network of scholars; a political grouping; a strategic engagement with international law; an intellectual community; a school of thought; a rubric ... TWAIL is both a political and intellectual movement and, therefore, has multiple perspectives.”); Elif Yildiz, *Postcolonial Approaches to International Human Rights Law: The TWAIL Case*, 43 PUB. & PRIV. INT’L L. BULL. 353 (2023) (“TWAIL is characterized as a heterogeneous construct due to [its] various orientations.”).

2. See Mutua & Anghie, *supra* note 1 (contradicting the positivist universalist approach).

3. See, e.g., *id.* at 33 (“International law claims to be universal, although its creators have unambiguously asserted its European and Christian origins... international law is premised on Europe as the center, Christianity as the basis for civilization, capitalism as innate in humans, and imperialism as a necessity.”).

4. See Nicholas Greenwood Onuf, *International Legal Order as an Idea*, 73 AM. J. INT’L L. 244–66 (1979) (describing the conceptual development of the international legal order in depth, and distinguishing the Westphalian, post 1945, and post 1990, ILOs). The ILO is the combination of global legal institutions and international legal doctrines enforced globally, typically through the UN. *Id.*

5. See Mutua & Anghie, *supra* note 1, at 35 (defining the “third world” as a political status which “describes a set of geographic, oppositional, and political realities that distinguish it from the West,” distinguished particularly by a dialectical relationship with the West, and a “stream of similar historical experiences across virtually all non-European societies.”). See also Martin Gallié, *Les Théories Tiers-mondistes du Droit International (TWAIL)— Un Renouveau?*, 39 REVUE ÉTUDES INTERNATIONALES 17, 26 (2008) (asserting that TWAILians put an emphasis on the ever- structuring dialectic between the Third World and the former colonial powers).

6. See Gallié, *supra* note 5, at 27 (arguing that there is an emergence of an “Imperial Global State” due to the transfer of sovereignty from Third World States to international institutions “controlled by a transnational capitalist class.”).

Security Council.⁷ Mutua observes that the UN was formed after the Second World War by “the dominant Western powers” of the time with the purposes of creating and maintaining “global order through peace, security, and cooperation among states.”⁸ He explains that this new global order has two important “legitimizing features.”⁹ The first legitimating feature is self-determination. Under the UN’s regime, “non-European powers were now recognized as having the right to self-determination,” thus repudiating direct colonialism. The second legitimating feature is the International Human Rights Law framework imposed on member states.¹⁰ The UN specifically furthers the universalization of European principles and norms through the spread of human rights law, a body of law which has grown out of Western liberalism and jurisprudence.¹¹

A. Summary

Section II provides an overview of the political and cultural landscape of the Western Sahara prior to examining the legal order in the territory. First, this section provides a brief history of the Western Sahara prior to the entry of the United Nations. This section begins by discussing the political and cultural practices of the nomadic tribes who lived in the territory prior to Spanish intervention, including the relationships among and within the Bedouin and Arabic tribes, and the early relationships these tribes had with Morocco’s Sharifian Empire beginning in the sixteenth century. Next, this section presents the major political and cultural changes which occurred in the formation and transformation of the Spanish Sahara under Spanish imperial rule, including the Spanish project to sedentarize the population and eradicate nomadism through the development of cities. Finally, this section briefly addresses the Spanish-Sahrawi War and the formation of the Frente Popular de Liberación de Saguía el Hamra y Río de Oro, more commonly known as the Polisario, as the primary Western Saharan independence movement. This section also describes the establishment of the Western Sahara by the Polisario in 1976, and transition into the war with Morocco, as well as the purported basis for Morocco’s claims to the territory.

Section III addresses the role of the UN in establishing the international legal order in the Western Sahara. To do this, the UN not only imposed its

7. See Mutua & Anghie, *supra* note 1, at 34 (“European hegemony over global affairs was simply transferred to the big powers—the United States, Britain France, the Soviet Union, and China—which allotted themselves permanent seats at the Security Council, the most powerful UN organ.”).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

own legal and judicial systems, but also displaced existing indigenous systems. This section focuses on the UN's Mission for a Referendum in the Western Sahara (MINURSO), as well as the tribal legal systems which it replaced.

Section IV presents several relevant legal frameworks currently governing the Western Sahara through a critical lens, including the UN's prohibition on the use of force and its limits on self-defense, its limitations on a state's ability to exercise self-determination, and the shortcomings of international human rights law. Through the application of these frameworks in the Western Sahara, this article demonstrates the inability of the international legal order to address the needs of Third World and post-colonial states in decolonial conflicts.

As often as possible, this note will refer to the nomadic people who have resided or still reside in the Western Sahara by their specific tribal names. This in part recognizes the important cultural and political distinctions among the tribes, which do not constitute a homogenous entity.¹² The tribes primarily addressed in this note include the Ouled Delim and the Imraguen, which may also be transliterated as Oulad Dalim and Imeraguen.¹³ Although the general term "Sahrawi" is now accepted by most of the tribespeople of the Western Sahara, before 1950, it was a Spanish catch-all reference for the peoples whom Spanish colonizers encountered in the region.¹⁴ Because of the term's history, it is often an inappropriate label for the nomadic tribes prior to 1950, who did not identify as Sahrawi and were only called so by the Spanish.¹⁵ However, due to the expansion of "Sahrawi Nationalism" and the Sahrawi national identity in the 20th Century, "Sahrawi" is now often used generally to refer to any people coming from the Western Sahara or descending from the tribes historically connected to the territory.¹⁶ This note

12. Joshua Castellino & Elvira Dominguez-Redondo, *The Identity Question: Who are the Sahrawis and What is Their Home?*, in PERSPECTIVES ON WESTERN SAHARA: MYTHS, NATIONALISMS, AND GEOPOLITICS 48 (Anouar Boukhars & Jacques Roussellier eds., 2014) (explaining that although there was ethnic similarity throughout the history of the Western Sahara, it is very hard to give a cohesive "identity" to large region with several tribes and units of tribes, and it was only recently that the Sahrawis did so themselves).

13. There are many other tribes in the Western Sahara which have been influential to the history and culture of the territory. For an overview of these tribes, see JULIO CARO BAROJA, ESTUDIOS SAHARIANOS (1955) (describing the tribes and their histories after living with them for two years in the 1950s).

14. See ALICE WILSON, SOVEREIGNTY IN EXILE: A SAHARAN LIBERATION MOVEMENT GOVERNS 37–58 (describing ever-changing nature of sovereignty for the Sahrawi tribes) (2016).

15. *Id.*

16. Matthew Porges & Christian Leuprecht, *The Puzzle of Nonviolence in Western Sahara*, 2 DEMOCRACY AND SECURITY 65, 70 (2016) (quoting Stephen Zunes and Jacob Mundy) ("The term

uses the term Sahrawi to mean, approximately, a “Western Saharan” who does not identify as Moroccan.

The territory called the Western Sahara is also known as the Sahrawi Arab Democratic Republic or “SADR.”¹⁷ This note will use the term “Western Sahara” for consistency, although some sources and direct quotations still refer to the SADR. It suffices to note here that these terms can be considered interchangeable.

The territory was known as the Spanish Sahara from 1885 to 1975.¹⁸ The boundaries of the former Spanish colony to the present-day Western Sahara are not exact,¹⁹ and there are several important political and cultural differences between the Spanish Sahara and the Western Sahara which will be explored further in this note.²⁰ When referring specifically to the Spanish colony, it is more appropriate to use the term Spanish Sahara due to the distinctions between these two.

II. THE WESTERN SAHARA

A. Overview of Modernized Western Sahara

The Western Sahara is a “non-self-governing territory”²¹ located in the Northwest of Africa.²² The territory is governed by the Polisario through a single party government system.²³ The Polisario effectively governs the “free” or “liberated” territories from Tindouf, Algeria,²⁴ where the displaced

Sahrawi . . . is often used to mean “indigenous Western Saharan,” although this equivalent is not accurate. Indeed, it is sufficient on most accounts that an “ethnic” Sahrawi only has to claim descent from one of the recognized major or minor social groupings — “tribes” or “confederations” — in or overlapping the former Spanish Sahara . . . The most pragmatic definition of Sahrawis is that they are the Hassaniyyah-speaking peoples who claim membership among at least one of the social groupings found in and around the area now known as Western Sahara.”)

17. See Stephen J. King, *The Emergence and Politics of the Polisario Front*, in PERSPECTIVES ON WESTERN SAHARA, *supra* note 12, at 93 (explaining that The Sahrawi Arab Democratic Republic (SADR) was declared on February 27, 1976 by the Polisario with the intention for the SADR to become internationally recognized as a nation state).

18. José A. Rodríguez Esteban & Diego A. Barrado Timón, *Los Procesos de Urbanización en el Sahara Español (1884-1975): Un Componente Esencial del Proyecto Colonial*, 24–25 LES CAHIERS D’EMAM (2015).

19. See STEPHEN ZUNES & JACOB MUNDY, WESTERN SAHARA: WAR, NATIONALISM, AND CONFLICT IRRESOLUTION 5 (2d ed. 2022) (discussing the additional annexed land in the Madrid Accords).

20. See discussions *infra* 0.

21. Human Rights Watch, *Off the Radar: Human Rights in the Tindouf Refugee Camps* 18 (2014).

22. *Id.*

23. See WILSON, SOVEREIGNTY IN EXILE, *supra* note 14, at 73 (describing the Polisario as a state-movement akin to a state-party).

24. King, *supra* note 17, at 91.

Sahrawi people live as refugees.²⁵ The Tindouf refugee camp is expansive, with several districts and annexes,²⁶ and is so isolated that it functions almost as its own state.²⁷ The remaining Sahrawi territory, controlled by Morocco, is called the Southern Provinces by Morocco and the annexed zone by the Sahrawis.²⁸

The Western Sahara is called the “last colony,” as it is considered one of the only non-self-representing states remaining in the world.²⁹ The Western Sahara was under the colonial rule of the Spanish from 1884–1976,³⁰ and has been under Moroccan occupation since the Spanish withdrawal in 1975.³¹ Spain’s renouncement of the colony is largely attributed to the effective battle strategy of the Polisario, which fought an effective war against Spain from 1973–1975.³² Further contributing to Spanish withdrawal was the International Court of Justice’s (“ICJ”) Advisory Opinion on the Western Sahara, published in 1975, in which the ICJ determined that the Sahrawi people and the Western Sahara had a right to self-determination.³³ Although Spain promised to designate the land to the Polisario as the representatives of the Western Sahara, it instead signed the Madrid Accords,³⁴ which annexed the territory of the Western Sahara to Morocco and to Mauritania and maintained some economic benefits of the territory with Spain.³⁵ Mauritania made some claims to the territory in the early 1970s, but eventually ceded their territorial claims to Morocco, which had been making claims on the territory since the mid-twentieth century.³⁶

25. See ZUNES & MUNDY, *supra* note 19, at xxiii (“Nearly half the native population has lived as refugees in Algeria since 1976.”).

26. HUMAN RIGHTS WATCH, *OFF THE RADAR*, *supra* note 21, at 15.

27. See ZUNES & MUNDY, *supra* note 19, at xxiii (quoting United Nations census reports from 2000 claiming that roughly “40% of Native Western Saharans were resident in the refugee camps,” and a 2018 United Nations report putting “the total population of those camps at 173, 600.”). Zunes and Mundy extrapolate the total native population to be over 430,000. *Id.*

28. *Human Rights in Western Sahara and the Tindouf Refugee Camps*, HUMAN RIGHTS WATCH (Dec. 19, 2008), <https://www.hrw.org/report/2008/12/19/human-rights-western-sahara-and-tindouf-refugee-camps> (“Moroccan authorities consider the ‘Southern Provinces’ (their term for the contested territory) part of Morocco, subject to the same laws and administrative structures as the rest of the country.”).

29. ZUNES & MUNDY, *supra* note 19, at xxiii.

30. *Id.* at xxix.

31. Maria Stephan & Jacob Mundy, *A Battlefield Transformed*, 8 J. MIL. & STRAT. STUD. 29–30 (2006) (describing the history and experiences of the Moroccan occupation).

32. *Id.* at 5.

33. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) [hereinafter ICJ Advisory Opinion on the Western Sahara].

34. Stephan & Mundy, *supra* note 31, at 5.

35. ZUNES & MUNDY, *supra* note 19, at 5.

36. Susan Gilson Miller, *A History of Modern Morocco* 145–151 (2013).

The 1975 ICJ decision led the King of Morocco, King Hassan II, to spread false propaganda to his citizens and encourage the Green March, a large demonstration wherein 350,000 unarmed Moroccans entered the territory³⁷ and began the ongoing Moroccan Occupation.³⁸ On October 31, 1975, a few months after the Green March, war between the allied Moroccan and Mauritanian forces, and the Polisario forces began.³⁹

Contemporary international observers felt confident in Morocco's upper hand, and the war was expected to be a short conflict.⁴⁰ This prediction was soon proven wrong, and the Polisario immediately took on a winning position in the war.⁴¹ Polisario fighters were highly adept at both guerilla tactics and diplomacy;⁴² Tony Hodges, a journalist who travelled with the Polisario during the height of the war in 1979, reported that approximately half of the "guerillas" had served in the Spanish Tropas Nomadas.⁴³ "There is little about the desert," he explained, "or how to fight a war in it, that these men don't know."⁴⁴ In addition to their guerilla tactics, the Polisario developed an invaluable alliance with Algeria.⁴⁵ The Polisario was housing its population and government in Tindouf, and organizing its soldiers and artillery on the Algerian side of the border.⁴⁶ Because of this, Morocco could not effectively combat and defeat the "insurgents" without invading Algeria.⁴⁷ The Polisario's strategy was highly effective, and Morocco's ally, Mauritania, withdrew from the war in 1979.⁴⁸

This victory was short-lived, however, as Morocco developed new defensive strategies with significant funding from the United States and Saudi Arabia.⁴⁹ By the mid-1980s, the Polisario and Morocco had entered a

37. Jerome B. Weiner, *The Green March in Historical Perspective*, 33 MID. E. J. 29 (1979).

38. Stephan & Mundy, *supra* note 31, at 6.

39. ZUNES & MUNDY, *supra* note 19, at 6.

40. *Id.*

41. *Id.* at 9 (explaining that in the late 1970s into the 1980s, the Polisario maintained the upper hand in the war, and perspectives shifted to believe they might soon win the war and the territory entirely).

42. *Id.*

43. Tony Hodges, *With the Polisario Guerillas*, NEW AFRICAN, May 1979 (on file with School of Oriental and African Studies, UCL, Western Sahara Campaign Archive).

44. *Id.*

45. ZUNES & MUNDY, *supra* note 19, at 9.

46. *Id.* at 24.

47. *Id.* at 9.

48. In 1979, Mauritania signed a treaty to give its share of the Western Sahara to the Polisario Front. Instead, Morocco annexed Mauritania's territory. *Id.* at 11.

49. See *id.* at 21–26 (describing new Moroccan defensive strategies, including the use of landmines to limit mobility through the desert, as factors in establishing the stalemate). See also WILSON, SOVEREIGNTY IN EXILE, *supra* note 14, at 19 (describing the effects of the berm wall in limiting the Polisario's movement through the desert).

stalemate.⁵⁰

The UN's mission to hold a self-determination referendum in the Western Sahara, wherein "the people of Western Sahara would choose between independence or integration with Morocco,"⁵¹ was initiated in 1985, but it has never been accomplished.⁵² While the UN did successfully negotiate a ceasefire agreement in 1991,⁵³ the ceasefire ended in 2020.⁵⁴ Many scholars attribute the protracted conflict to the lack of a referendum, arguing that these failed processes prevented the Western Sahara conflict from arriving at any legitimate solution.⁵⁵ The role of the UN in brokering the ceasefire and the referendum is explored further in Section II of this note.⁵⁶

B. Demographic and Cultural Background

Prior to the colonization of Morocco by France and the Western Sahara by Spain, the Western Sahara was a borderless region home to several nomadic tribes.⁵⁷ This region was distinguished from Morocco to the North and Mauritania to the South by its Hassaniya dialect of Arabic.⁵⁸ Additionally, the residents of the Western Sahara, the Hassanophone Bedouins (or Sahrawi tribes), have different ancestral origins from their neighbors in Morocco.⁵⁹ These ethnic and cultural differences can be traced to the thirteenth century, when Arab tribes moved from Yemen to the Northwestern Sahara.⁶⁰ Although there is ethnic continuity throughout the

50. See ZUNES & MUNDY, *supra* note 19, at 24.

51. Western Sahara — MINURSO, BETTER WORLD CAMPAIGN, <https://betterworldcampaign.org/mission/western-sahara-minurso#:~:text=These%20tensions%20led%20to%20the,independence%20and%20integration%20with%20Morocco> (last visited Jan. 20, 2024).

52. Yahia H. Zoubir, *Stalemate in Western Sahara: Ending International Legality*, 14:4 MID. E. POL. 158, 158 (2007).

53. ZUNES & MUNDY, *supra* note 19, at 23. Morocco and the Polisario agreed to the "Settlement Proposals" in 1988, which included the provisions of the ceasefire, but the ceasefire was not successfully implemented until 1991.

54. Sharif Paget & Mitchell McCluskey, *Western Sahara Independence Leader Declares the End of a 29-Year-Old Ceasefire with Morocco*, CNN, <https://www.cnn.com/2020/11/15/world/polisario-front-morocco-western-sahara-ceasefire-intl> (6:35 PM EST, Nov. 15, 2020) ("[Brahim Ghali], the leader of the Western Sahara's independence movement has vowed to end a 29-year-old ceasefire with Morocco, citing recent Moroccan border operations as a provocation.").

55. See, e.g., Zoubir, *supra* note 52, at 164, 174.

56. See discussion of UN referendum processes, *infra* Section III.

57. See WILSON, *SOVEREIGNTY IN EXILE*, *supra* note 14, at 16.

58. See *id.* at 13 (explaining that the Hassanophone region is different from its neighbors).

59. *Id.* (noting that the Hassanophone Bedouins have more similar ethnic and ancestral origins to the Mauritanian Moors).

60. *Id.*

history of the Western Sahara, it is nearly impossible to conjure a succinct and cohesive “identity” for the people of the multi-tribal, and widely dispersed, region.⁶¹

It was only recently that the Sahrawis began to organize themselves as one people, as they have historically been highly nomadic and refused to recognize a central political authority.⁶² As the Spanish set up new systems of governance and expanded their economic interests in the territory, a particular “Western Saharan identity emerged to counteract Spain’s.”⁶³ This identity began to develop further as a result of increasing Spanish and French colonization,⁶⁴ which created boundaries for these tribes and changed their lifestyles in many ways.⁶⁵ Under Spanish rule, many Sahrawis joined the Spanish militias or other government businesses,⁶⁶ and the tribes became sedentary as Spain built cities like Elayounne (Layounne) and developed colonial projects to encourage nomadic Sahrawis to settle.⁶⁷

By the 1950s, the nomadic lifestyle inherent to desert tribes in the Western Sahara was, for the most part, abandoned.⁶⁸ Tribal distinctions began to fade, and the Sahrawi identity seemed to emerge as an identity centered around nationalism.⁶⁹ As further explored in Section II, “Sahrawi nationalism” became a central part of Sahrawi culture and of the independence platform promoted by the Polisario Front.⁷⁰

III. LAW AND GOVERNANCE IN THE WESTERN SAHARA

Several different legal systems governed the territory of the Western Sahara before the Spanish conquest and throughout the colonial period.⁷¹

61. Castellina & Dominguez-Redondo, *supra* note 12, at 38.

62. WILSON, SOVEREIGNTY IN EXILE, *supra* note 14, at 15.

63. King, *supra* note 17, at 72.

64. *Id.*

65. *Id.*

66. See JÁNOS BESENYŐ, WESTERN SAHARA 57 (2009) (describing the Tropas Nómadas, the contingent of nomadic troops employed by the Spanish). See also PABLO SAN MARTÍN, WESTERN SAHARA: THE REFUGEE NATION 34 (2011) (explaining that similarly to the Tropas Nómadas, the police force was staffed by the local indigenous population, but its officials and officers were Spanish).

67. See WILSON, SOVEREIGNTY IN EXILE, *supra* note 14, at 16.

68. King, *supra* note 17, at 72.

69. See ZUNES & MUNDY, *supra* note 19, at 118 (critiquing how “early assertions” that tribalism had been “superseded” by nationalism served to cover power imbalances within the Polisario governance structure).

70. See discussion of Sahrawi Nationalism, *infra* Section 0.

71. Castellina & Dominguez-Redondo, *supra* note 12, at 48–54 (describing various systems of law and government in the pre-colonial Western Sahara, including the Sheridian Empire and the Bilad Shinguitti).

These indigenous and local legal systems have been recognized by the ICJ;⁷² however, these systems were not respected or prioritized by the UN and the ILO when they established the post-colonial legal order in the territory. Instead, the UN created the Mission for a Referendum in the Western Sahara (MINURSO), which was tasked with establishing international law in the territory and monitoring violations of that law.⁷³

The legal history of the Western Sahara supports the critique by TWAIL scholar that the international legal order displaces the indigenous and local legal systems of the colonized people, mirroring the exclusion of non-European or non-Western countries from participation in international lawmaking during the colonial period.⁷⁴ Several authors have noted that international law has been weaponized, much like European law in the period of European colonialism.⁷⁵ Then, as now, the West used international law to “civilize” the Third World.⁷⁶ Thus, according to these scholars, international law has the consequence of creating a legal framework for post-colonial states which “lacks basic moral and legal legitimacy.”⁷⁷ Without legitimacy, these frameworks and the governing systems which uphold them often fail.⁷⁸ Additionally, the imposition of an external system on colonized people is another form of subjugation, and may be experienced as cultural and

72. The ICJ found that the Sahrawi people were “clearly organized politically and socially under chiefs to represent them.” ICJ Advisory Opinion on the Western Sahara, *supra* note 33.

73. *Ceasefire Monitoring*, MINURSO, UNITED NATIONS, <https://minurso.unmissions.org/ceasefire-monitoring> (last visited Dec. 15, 2023).

74. See James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 40–42 (2011) (describing distinctions of local law versus international law and the hierarchies intrinsic in the ILO).

75. See, e.g., *id.* at 40 (explaining a key TWAIL assertion that the rules of international law originated in and continue to play a role in “justifying the oppression of non-European peoples from slavery to colonialism and beyond.”). TWAIL aims to expose the role of international legal doctrines “in normalizing and justifying repressive and racist outcomes” and to challenge whether ideas such as self-determination and human rights are sufficient to overcome this paradigm in international law. *Id.* at 40–41.

76. See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001) (describing the continuing history of IHRL as a dialectic relationship of the West to the Third World wherein the Western States perceive themselves as saviors in an often classic white savior archetype, rescuing human rights abuse victims from the savages – who are often the product of Third World governments or cultures); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 23 (1999) (discussing the historical trend towards “excluding the uncivilized states” from the law of nations).

77. Makau Mutua, *Conflicting Conceptions of Human Rights: Rethinking the African Post-Colonial State*, 89 PROC. ASIL ANN. MEET. 487, 487 (1995).

78. *Id.* But see BONNY IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY* (2007) (arguing that the history of rights discourses on the African continent extends long before the U.N. Declaration of Human Rights in 1948, and that pre-colonial African societies have their own human rights traditions and histories since time immemorial).

lawmaking violence.⁷⁹

A. Precolonial Legal Order: Tribal Law and the Djemma

Prior to the Spanish colonization of the territory of the Western Sahara, it had its own legal order, with caste-based rules⁸⁰ and several adjudicative bodies.⁸¹ The Ait Arbajn, or Council of the Forty, handled internal conflicts.⁸² These internal conflicts were often related to “claims and directed common enterprise,”⁸³ such as “disputes about the use of wells.”⁸⁴ In times of inter-tribe conflict or war, special war councils were established.⁸⁵ These councils, or “assemblies,” developed the rules of war among tribes, as well as the legal systems to be used by the council.⁸⁶ They also often made judgments regarding permissible defensive strategies in external conflicts, such as in the Reguibat-Tadjaken War, which lasted for more than 30 years.⁸⁷

Another important decision-making body in the pre-colonial Sahara was the “Djemma,” an advisory council “made up of the delegates of various tribes.”⁸⁸ The Djemma operated as a lawmaking body as well as an adjudicative body.⁸⁹ Its decision-making was treated like lawmaking, although the standing of the decisionmaker within the tribal caste system had a large role in whether the tribes followed the Djemma’s rules.⁹⁰

The doctrine of the tribes’ legal order included a strict caste system focused on warfare, and an adherence to the hierarchies and rules of Islamic or Sharia law. For example, the distinct hierarchies and caste systems within and among the Sahrawi tribes typically dictated citizens’ occupations.⁹¹ The roles ascribed to the tribes included warrior tribes, teacher or holy tribes, and

79. For a further discussion of colonial violence, see *infra* Section 0.

80. See BESENYÖ, *supra* note 66, at 29–32 (describing the ethnographic hierarchy of the tribes in the Western Sahara, and the fixed social stratification within each tribe). See also ZUNES & MUNDY, *supra* note 19, at 94 (explaining that colonially supported anthropology had historically used a “caste-based” model to describe the Sahrawi tribes).

81. See Castellina & Dominguez-Redondo, *supra* note 12, at 31–39 (describing various systems of law and government in the pre-colonial Western Sahara).

82. BESENYÖ, *supra* note 66, at 34.

83. Anne Lippert, *Emergence or Submergence of a Potential State: The Struggle in Western Sahara*, 1 AFR. TODAY 41–60 (1977) (citing Djeghloul Abdelkader, *La Colonisation Espagnole et les Luites Saharoules 1884-1958*, 3 MAJALLAT ET TARIKH (1976)).

84. BESENYÖ, *supra* note 66, at 34.

85. *Id.*

86. Castellina & Dominguez-Redondo, *supra* note 12, at 57.

87. BESENYÖ, *supra* note 66, at 34.

88. *Id.*

89. *Id.*

90. *Id.*

91. See *id.* at 29 (describing the development and form of the caste system for the nomadic tribes of the pre-colonial Sahara).

tributary (or tax-paying) tribes called *zenaga*.⁹²

B. Colonial Legal Order: Blending Tribal, Islamic, and European Legal Structures

There was a blend of tribal, Islamic, and European laws and court systems during the Spanish colonial period.⁹³ Spain claimed the Spanish Sahara in the “Scramble for Africa,” and it was granted the territory at the 1884 Berlin Conference.⁹⁴ Originally, Spain had only been interested in the coastline of the Spanish Sahara in order to protect its “interests on the Canary Islands.”⁹⁵ Due to this narrow focus, Spain did not initially enforce the same societal and cultural overhaul seen in the French colonies of Mauritania and Morocco.⁹⁶

Even as the Spanish expanded and aimed to develop the territory, the pre-existing tribal legal order was not completely eliminated.⁹⁷ In 1967, the Spanish recreated the Djemma (called the Asamblea General del Sahara by the Spanish) and packed it with important members of Sahrawi society.⁹⁸ These members were not democratically elected but instead were representatives who “were either ex officio or chosen by the [D]jemaas of tribal fractions.”⁹⁹

The Asamblea General could not enforce its decisions through state action, and it had no true legislative capacity as a Spanish governmental or judicial structure.¹⁰⁰ However, its decision-making capacity was respected by the tribal system. Sahrawis would call on the Djemma for dispute resolution, and the Djemma was allowed to decide legal matters outside of the Spanish judicial system.¹⁰¹ Despite the availability of Sharia law and the tribal judicial body, most tribesmen chose to resolve matters through the Spanish system, largely because its punishments were less severe.¹⁰²

92. For example, one prominent warrior tribe was the Ouled Delim, whose members were known as “People of Arms.” The Ouled Delim would provide protection to other tribes in return for a tax. The Imraguen, who fished on the Dakhla shore, was a tributary tribe. Conquered by the Ouled Delim, the Imraguen was *zenaga*. BESENYÖ, *supra* note 66, at 24–30.

93. *See, e.g., infra* note 102.

94. Castellina & Dominguez-Redondo, *supra* note 12, at 56.

95. *Id.* at 58.

96. *Id.*

97. *See* Lippert, *supra* note 83, at 45 (describing the Djemma in the colonial period).

98. *Id.*

99. Tony Hodges, *The Origins of Saharawi Nationalism*, 5 THIRD WORLD Q. 28, 37 (1983).

100. Stephen Zunes, Nationalism and Non-Alignment: The Non-Ideology of the Polisario, 34 AFR. TODAY 33, 41 (1987).

101. *See id.* *See also* JOHN MERCER, SPANISH SAHARA 150 (1976).

102. The Sahrawis had the option of having their case heard before the tribal court under Sharia law,

C. The UN's Influence: The Emergence of the International Legal Order

At the end of Spanish colonization in 1975, both the Polisario and the ILO emerged to govern the territory. While the Polisario intended to govern the territory through its government-in-exile, largely modeled after the pre-colonial Saharan democratic systems, the ILO would govern through Western international law jurisprudence and effectuated through the UN.

The role of the ILO in the Western Sahara was indirect at the beginning of the Morocco-Polisario conflict, and it can be distinguished by a lack of action.¹⁰³ This ambivalence is demonstrated by the international response to the Green March.¹⁰⁴ Although the ICJ “dismissed Morocco and Mauritania’s historical claims to the territory” in 1975,¹⁰⁵ the Moroccan invasion of the Western Sahara a few days later¹⁰⁶ did not lead to any legal or normative repercussions.¹⁰⁷ Also notable is the lack of response by the UN and the ILO to the Madrid Accords, in which Spain betrayed its commitment to withdraw from the territory and give sovereignty to the Polisario, and instead divided the land of the Spanish Sahara between Morocco and Mauritania.¹⁰⁸ Spain did not face any repercussions from the ILO, even though the Madrid Accords gave Spain territorial and resource benefits of its former colony in a clear violation of international law.¹⁰⁹

By 1985, international law began to have a more concrete governing presence in the Western Sahara, primarily through the involvement of the

where the punishment for theft was to lose a hand. Under the Spanish system and in Spanish court, the punishment was a few days in prison. The Sahrawis would choose to use the legal system that gave them the best outcome. See MERCER, *supra* note 101, at 150.

103. See Zoubir, *supra* note 52, at 162 (citing the November 6, 1975 UNSC Resolution 380, wherein the security council “deplored the holding of the march” and “call[ed] upon Morocco immediately to withdraw from the Territory of Western Sahara all the participants in the march,” but noting that instead, Morocco has become a stronger presence in the territory and increased their occupation through the support of the United States and France).

104. See ZUNES & MUNDY, *supra* note 19, at 5 (explaining that the UN failed to act against the announced invasion).

105. *Id.*

106. ICJ Advisory Opinion on the Western Sahara, *supra* note 33.

107. Some authors suggest this could be considered an international act of aggression. See Zoubir, *supra* note 52, at 171 (“UN Resolution 3458 of December 10, 1975, declared unequivocally that the Generally Assembly Reaffirms the inalienable right of the people of Spanish Sahara to self-determination, in accordance with General Assembly resolution 1514 (XV) But international legality did not prevent Morocco and Mauritania from invading Western Sahara More than 350,000 Moroccans invaded the territory on November 6, 1975.”). See also Abigail Byman, *The March on the Spanish Sahara: A Test of International Law*, 6 DENV. J. INT’L L. & POL’Y 95, 99 (1976) (providing a contemporary analysis of the applicable international law the Green March).

108. ZUNES & MUNDY, *supra* note 19, at 5–6.

109. Zoubir, *supra* note 52, at 159 (“The transfer of that administrative power to Morocco under the Madrid Accords has no legal validity, and indeed the UN has never recognized the Madrid Accords of November 14, 1975.”).

UN.¹¹⁰ The UN intended to implement a referendum for self-determination and a ceasefire in the territory, adhering to the opinion of the ICJ.¹¹¹ The Organization of African Unity (OAU), the precursor to the African Union, had been attempting to impose these processes since the early 1980s.¹¹² This process was stalled, however, as in 1984, the OAU gave recognition to the Western Sahara and admitted it as a full member, leading Morocco to withdraw from the organization in protest.¹¹³

In 1985, the UN secretary general, Javier Pérez de Cuéllar, began developing a UN organized referendum, successfully encouraging both King Hassan II and the Polisario to agree to referendum and to a ceasefire negotiation.¹¹⁴ From 1985, per the recommendation of the General Assembly, Perez de Cuéllar led “proximity talks” between the Polisario and Morocco at the UN headquarters in New York.¹¹⁵ The two parties did not see each other or speak directly, instead speaking through Perez de Cuéllar as an intermediary.¹¹⁶ While these talks ultimately failed,¹¹⁷ between 1986–1988, further efforts to organize a referendum continued, primarily working with the OAU and through the UN General Assembly.¹¹⁸ In 1988, Perez de Cuéllar completed the first draft of the referendum and presented it to the Polisario and Morocco.¹¹⁹ This proposal would go on to be amended several times, but the original version demonstrates that very early on, the UN contemplated having a large and influential presence in the Western Sahara.¹²⁰

In 1990, a new plan was proposed which expanded the UN’s presence and power even further. This called again for a “cessation of hostilities between Morocco and the [Polisario] . . . troop withdrawals,” “the establishment of a UN force - the United Nations’ Mission for the

110. Yahia H. Zoubir & Anthony G. Pazzanita, *The United Nations’ Failure in Resolving the Western Sahara Conflict*, 4 MID. E. J. 614–28 (1995).

111. *Id.* at 616.

112. *Id.*

113. *Id.*

114. ZUNES & MUNDY, *supra* note 19 at 175.

115. Zoubir & Pazzanita, *supra* note 110, at 616.

116. *Id.*

117. ZUNES & MUNDY, *supra* note 19, at 175.

118. *Id.*

119. *Id.*

120. The 1988 UN Settlement Plan demonstrated the UN’s intention to integrate itself into the territory. The plan called for “the partial withdrawal and/or confinement to supervised bases of the Moroccan and POLISARIO armies, the deployment of about 2,000 UN peace-keeping troops, civil police, and administrators to maintain a comprehensive cease-fire, and a plebiscite.” The UN would also conduct surveys of the population to for voter eligibility purposes. Zoubir & Pazzanita, *supra* note 110, at 616–617.

Referendum in Western Sahara (MINURSO),” “the establishment of an Identification Commission to assemble and publish a list of eligible Sahrawi voters,” and “a referendum to be held about 24 weeks after the beginning of the process.”¹²¹ In 1991, Morocco and the Polisario finally entered the UN brokered ceasefire agreement.¹²² Under UN supervision, both sides also agreed that there would be a self-determination referendum.¹²³

This referendum gave the Sahrawi people a choice between “integration with Morocco and independence,”¹²⁴ and would be monitored and enforced by MINURSO.¹²⁵ The MINURSO mandate called for several actions by MINURSO personnel which enmeshed the UN in the legal governance of the territory, including: monitoring the ceasefire; monitoring the confinement of Moroccan and Polisario troops to designated locations; taking steps to ensure the release of all Western Saharan political prisoners; identifying and registering qualified voters; and perhaps most consequentially, organizing and ensuring a free and fair referendum and proclaiming the results.¹²⁶

There were many problems with the implementation of the ceasefire by the UN, largely due to the biases of the UN Security Council in favor of Morocco, which was a strategic North African ally for several countries within the Security Council.¹²⁷ Additionally, between 1985–1991, neither the Polisario nor Morocco were able to meet the standards demanded by international law for a ceasefire.¹²⁸ Importantly, there was also a striking lack of Polisario involvement during the early stages of the referendum process.¹²⁹ The Western Sahara was subject to the international law imposed

121. Zoubir & Pazzanita, *supra* note 110, at 617 (“The terms of the referendum were listed as so: ‘The choice for the Sahrawi people was to be between integration with Morocco and independence. Upon the announcement of the results of the plebiscite, either the Moroccan troops would have to withdraw from the Territory, or, if the voters favored integration with Morocco, the POLISARIO forces would then have to be disbanded.’”).

122. UNITED NATIONS, *Ceasefire Monitoring*, *supra* note 73.

123. Porges & Leuprecht, *supra* note 16, at 71.

124. Zoubir & Pazzanita, *supra* note 110, at 617.

125. *Id.*

126. *MINURSO: Mandate*, UNITED NATIONS (Oct. 26, 2016), <https://minurso.unmissions.org/mandate>.

127. See ZUNES & MUNDY, *supra* note 19, at 59–62 (explaining the “Franco-American Consensus”—the long-standing alliance of France-USA-Morocco).

128. Ben Saul, Many Small Wars: The Classification of Armed Conflicts in the Non-Self-Governing Territory of Western Sahara (Spanish Sahara) in 1974–1976, *AFR. Y.B. INT’L HUMANITARIAN L.* 4, 11 (2017) (Sydney Law School Research Paper No. 17/33 at 4).

129. See Alice Wilson, *Going Under the Radar in Western Sahara*, in *NORTH AFRICAN POLITICS: CHANGE AND CONTINUITY* 128–42, 131 (Yahia Zoubir & Gregory White eds., 2016) (“If these changes pass all too easily under the radar of formal politics, this is one of many means by which the people of

on the conflict, but its people had very little representation or input within UN peace discussions.¹³⁰

D. The Polisario's Unrecognized Legal Structure

The Polisario is considered by Sahrawis and the international system to be the governing body of the Western Sahara and the representative of the Sahrawis.¹³¹ At the dissolution of the Spanish legal order, the Djemma ceded its authority to the Polisario as the representative of the Sahrawis, and disbanded itself in order to fully recognize that authority.¹³² The Polisario later reconstructed the Djemma, which now acts as the legislative arm of the government from the refugee camps in Tindouf.¹³³ Under the Polisario, and somewhat removed from the pre-colonial Djemma, the judicial function is now separate from the legislative function of the government.¹³⁴ Now, the judicial system consists of several courts and prisons managed by the Polisario, subject to the laws and constitution of the SADR,¹³⁵ as well as Sharia law judges (qadi's) who maintain jurisdiction over "personal status and family law issues."¹³⁶

The ILO's displacement of the Polisario government and legal system arguably began in the early postcolonial period when the UN imposed international law and its own adjudicative and policing bodies in the territory through the establishment of MINURSO.¹³⁷ In doing so, the UN failed to

Western Sahara have been all too often overlooked in their own conflict. The irony of this tendency is poignant, given that, at least in international law, the Western Sahara dossier hinges upon the right of the people of Western Sahara to self-determination.").

130. Although the Polisario was not overtly excluded from governance, many decisions regarding the implementation of UN law within the territory did not require its input. *See, e.g.*, U.N. Secretary-General, *The Situation Concerning Western Sahara*, U.N. Doc. S/22464 (Apr. 19, 1991), S.C. Res. 690 (Apr. 29, 1991) (unanimous adoption by the security council).

131. Anthony Pazzanita, *Morocco Versus Polisario: A Political Interpretation*, 32 J. MOD. AFR. STUD. 265, 270–72 (1994) (describing the wide global recognition of the Polisario); ZUNES & MUNDY *supra* note 19, at xxiii ("The Polisario is now the UN recognized representative of the Sahrawi people.").

132. Lippert, *supra* note 83, at 47. *See also* Enrique Tirado & Francesco Correale, *Modernising Violence and Social Change in the Spanish Sahara (1957–1975)*, 44 ITINERARIO 33, 47 (2020) ("On 12 October 1975, the higher ranks of Sahrawi society, represented by sheikhs—including a number of representative notables from the Yemáa or the Francoist courts—surrendered their authority to the young members of the Polisario Front in Ain Ben Tili, a small military settlement on the northern frontier of Mauritania with Western Sahara.").

133. Castellino & Dominguez-Redondo, *supra* note 12, at 37.

134. *See* Constitution de la RASD [Constitution of the SADR] (amendments adopted Sept. 4, 1999) (providing for the separation of powers among the legislative, executive, and judicial branches of the central government).

135. HUMAN RIGHTS WATCH, *Off the Radar*, *supra* note 21, at 5.

136. *Id.* at 15.

137. *See* S.C. Res. 690, *supra* note 130, (establishing MINURSO per the settlement agreement accepted by Morocco and the Polisario in August 1988).

recognize the indigenous history intrinsic to these structures.¹³⁸ This demonstrates another TWAILian critique of the ILO from authors such as Rémi Bachard, who argues that the ILO treats liberal democracies as the only valid system of governance.¹³⁹ This leads to the exclusion of indigenous governments, which often have non-democratic political and lawmaking structures.¹⁴⁰

Due to the UN's preference for liberal democracies, the Polisario has rejected its early associations with socialism to maintain the support of the ILO.¹⁴¹ The tribal resistance to the Spanish presence began in the late 1800s, long before the Polisario was established, and grew alongside the colonial project.¹⁴² In the mid-20th century, as the Spanish set up new systems of governance and expanded their economic interests in the territory, a Western Saharan identity began to emerge beyond tribal distinctions.¹⁴³ Simultaneously, the Sahrawis were surrounded by wars of independence in the late 1950s and 1960s, including the Algerian War of Independence and the Liberation War in Morocco.¹⁴⁴ Many Sahrawis participated in these wars of national liberation, eventually inspiring their own independence movements against Spanish colonial rule.¹⁴⁵ The most successful of these was the Polisario Front, which came to be known simply as the Polisario.¹⁴⁶

The Polisario has often been called a communist or socialist movement, but it is unclear whether this is accurate.¹⁴⁷ The early Polisario employed “revolutionary, socialist discourses” which emphasized “the centrality of the

138. See *supra* Section III for a discussion on the development of the tribal legal order.

139. Ramina, *supra* note 1, at 265 (citing Rémi Bachard, *Critical Approaches and the Third World — Towards a Global and Radical Critique of International Law*, Speech at McGill University (Mar. 24, 2010)).

140. Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401, 402 (2007) (“[I]ndigenous peoples have existed as a peculiar entity throughout modern, international legal history — never quite recognized as legitimate international actors and usually the receiving party of biased, hegemonic policies which have subjected these peoples to a status quo system masked in the rhetoric of humanitarianism and equal rights.”).

141. King, *supra* note 17, at 94.

142. *Id.* at 87.

143. *Id.* at 92.

144. See generally BESENYÖ, *supra* note 66 (discussing the conflict throughout the mid-twentieth century).

145. Hodges, *supra* note 99, at 32.

146. ZUNES & MUNDY, *supra* note 19, at xxiii.

147. See SAN MARTÍN, WESTERN SAHARA, *supra* note 66, at 101–02 (explaining that although the Polisario was inspired by the Libyan and Algerian revolutions and drew on “ideological elements from the leftist revolutionary traditions,” Polisario leadership has maintained that its project was never strictly socialist or communist, and San Martín proposes that the focus of the Polisario nationalist movement was equality).

role of the popular masses for revolutionary change,”¹⁴⁸ and at its inception, the Polisario was inspired by Gaddafi’s revolution in Libya.¹⁴⁹ However, the Polisario’s admiration of Gaddafi’s movement was limited to the movement’s direct political democracy, its engagement in “tight internal political controls,” and its guerilla tactics.¹⁵⁰

The Polisario’s qualified admiration did not prevent other states from continuing to associate the Polisario with socialism and communism, an impression that was bolstered by the Polisario’s alliance with Algeria.¹⁵¹ While this alliance was imperative for the Polisario’s strategy during the war,¹⁵² the Polisario later distanced itself from both Algeria’s revolutionary past and its socialist ideology.¹⁵³ The Polisario did this by embracing the principles of international human rights law (“IHRL”) as a means of showing its support and adherence to the legal norms of the West.

The use of IHRL rhetoric is seen throughout the history of the Polisario, beginning with its founding. In 1974, at the second Congressional meeting of the Polisario,¹⁵⁴ the Polisario claimed it would establish the “abolition of slavery, emancipation of women, and prohibition of tribes” in the SADR.¹⁵⁵ These policies were presented as an act of revolution and had two important effects. First, these policies linked the liberation movement with classic Western ideologies of democracy, rights, and self-determination. Second, this platform bound all Sahrawis to the independence struggle and to the growing Sahrawi nationalist movement.

One strategy of many nationalist movements to gain popularity and support has been to deploy rhetoric regarding the protection of human rights, even if this rhetoric is not supported by the movements’ actions.¹⁵⁶ While

148. Joanna Allan, *Natural Resources and Intifada: Oil, Phosphates and Resistance to Colonialism in Western Sahara*, 21 J. N. AFR. STUD. 645, 648–49 (2016).

149. WILSON, *supra* note 14, at 23.

150. *Id.*

151. ZUNES & MUNDY, *supra* note 19, at xxvi (explaining that the involvement of Algeria is large, but often overemphasized for rhetorical purposes).

152. *Id.* at 9.

153. *See id.* at 17–32 (describing how the Polisario made strategic efforts to retain Algeria as its ally while avoiding any comparison to the Algerian revolution). *See also* Jeffrey S. Ahlman, *The Algerian Question in Nkrumah’s Ghana, 1958-1960: Debating “Violence” and “Nonviolence” in African Decolonization*, 57 AFR. TODAY 67, 68–69 (2010) (describing the bloodiness of the Algerian revolution and explaining that Westerners feared this revolution as an example of the worst-case-scenario of decolonization).

154. The “Popular General Congress” is the permanent administrative body of the Polisario organization. TONY HODGES, *WESTERN SAHARA: ROOTS OF A DESERT WAR* 164 (1983).

155. *Id.* at 164–65.

156. Gráinne de Búrca & Katharine G. Young, *The (Mis)Appropriation of Human Rights by the New Global Right: An Introduction to the Symposium* 1–4 (N.Y.U. L. Sch. Pub. L. & Legal Theory Research Paper Series, Working Paper, No. 23-32, 2023), <https://ssrn.com/abstract=4335288>.

IHRL rhetoric has been deployed regularly by the Polisario, it is unclear whether these values are authentic to its platform and ideology. For example, while the Polisario declared the importance of ending slavery,¹⁵⁷ Human Rights Watch has reported that the Tindouf refugee camps still have evidence of slavery.¹⁵⁸

The Polisario likely began to rely on IHRL rhetoric not only because of its benefits to the popularity of its cause, but also because of its desire for the support of the United States, which became a pivotal actor in the region during the Cold War.¹⁵⁹ While the Polisario has historically argued that the United States should support its cause due to IHRL principles of self-determination and democracy,¹⁶⁰ the stakes for the movement became more severe during the subsequent War on Terror, particularly as the United States increased its engagement in the region.¹⁶¹ Securities studies reports often paint the Western Sahara as a place of potential growth for Islamic extremism, claiming that there is collaboration or coordination with Al Qaeda in the Islamic Maghreb (AQIM).¹⁶² While there is no evidence of any coordination or collaboration between the Polisario and AQIM,¹⁶³ the United States is still drawing on possible terrorism concerns as a reason to continue its support for Morocco. For example, Ambassador J. Peter Pham, the Former United States Special Envoy for the Sahel and Great Lakes Region

157. HODGES, *supra* note 154, at 164–65.

158. See HUMAN RIGHTS WATCH, *supra* note 21, at 24. See also *Human Rights in the Western Sahara and in the Tindouf Refugee Camps*, HUMAN RIGHTS WATCH (Dec. 19, 2008), <https://www.hrw.org/report/2008/12/19/human-rights-western-sahara-and-tindouf-refugee-camps> (discussing evidence of continued slavery).

159. Abdel-Rahim Al-Manar Slimi, *The United States, Morocco and the Western Sahara Dispute*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 17, 2009), <https://carnegieendowment.org/2009/06/17/united-states-morocco-and-western-sahara-dispute-pub-23275> (discussing the United States' historic involvement in the region, including how the Reagan administration "viewed the conflict in the Western Sahara as part of the Cold War, branding the Polisario Front a Soviet ally").

160. For example, in a 1978 interview with Omar Hadrami, a Polisario leader, the Africa Report asked his opinion of the United States' role in the conflict. In response, Hadrami stated that "[t]he Saharan people are fighting for their liberty. We think that the American people also fought for their freedom ... [t]here's a very serious problem of human rights to which the American government cannot remain insensitive ... [and] there's a pure and simple problem of decolonization; and so it is a matter of which the US, as a world power, must use its authority so that no other country threatens peace and security ... by interfering flagrantly against a small people fighting for their most legitimate rights." *Interview with Omar Hadrami*, AFRICA REPORT, March-April 1978, at 43. [The title of the newspaper article is "Interview with Omar Hadrami"]

161. ZUNES & MUNDY, *supra* note 19, at 74. For a description of the United States' significant involvement in the Maghreb through anti-terror spending and policies, see ALEXIS ARIEFF, CONG. RSCH. SERV., R45387, MOROCCO: BACKGROUND AND U.S. RELATIONS (Sept. 30, 2021).

162. Porges & Leuprecht, *supra* note 16, at 68.

163. See *id.* ("All available evidence suggests a wholesale rejection of radical political Islam by both Polisario and Sahrawis in the occupied zone.")

of Africa,¹⁶⁴ has argued that Islamic militantism is on the rise in the Sahrawi refugee camps.¹⁶⁵ He has also argued that the only way to prevent this from spreading further is through Moroccan control over the Western Sahara.¹⁶⁶ The potential backlash to any demonstrations against Morocco or transgressions of the ceasefire requirements has limited the resistance movement; “most Sahrawis, especially those who are most politically engaged, are acutely aware of the potential for their struggle to be cast as terroristic.”¹⁶⁷

IV. THE LEGAL FRAMEWORKS IN THE WESTERN SAHARA

This section examines two relevant legal frameworks imposed by the ILO on the Western Sahara: first, the prohibition on the use of force under International Humanitarian Law (IHL), and second, the doctrine of self-determination under International Human Rights Law (IHRL). Through their application in the Western Sahara, these frameworks showcase the shortcomings of the ILO in Third World and Postcolonial states, and the power imbalances inherent in ILO legal structures.

A. Prohibitions on the Use of Force

The UN’s legal framework restricts violent action, primarily through the “prohibition of the use of force,” a customary international legal rule codified in the UN Charter that requires States to refrain from “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁶⁸ The prohibition against the use of force is considered one of the key rules of international law,¹⁶⁹ to which the only exception is self-defense.¹⁷⁰ To qualify for this exception, there must have been an armed provocation, and UN member states must report any actions taken in self-

164. *Ground Truth Briefing: U.S. Interests and Engagement in the Sahel: Current State, Key Issues, and the Way Ahead*, WILSON CTR., <https://www.wilsoncenter.org/event/ground-truth-briefing-us-interests-and-engagement-sahel-current-state-key-issues-and-way> (last visited Feb. 16, 2024).

165. See Per Liljas, *There’s a New Terrorist Threat Emerging in Western Sahara, and the World Isn’t Paying Attention*, TIME (August 8, 2014), <https://time.com/3085464/theres-a-new-terror-threat-emerging-in-western-sahara-and-the-world-isnt-paying-attention/>.

166. *Id.* (“An independent Western Sahara would be an even bigger breeding ground for terrorists.”).

167. Porges & Leuprecht, *supra* note 16, at 76.

168. U.N. Charter art. 2, ¶ 4.

169. See RALPH ZACKLIN, *THE UNITED NATIONS SECRETARIAT AND THE USE OF FORCE IN A UNIPOLAR WORLD: POWER V. PRINCIPLE* xii–xiii (2010) (“No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4 Secretaries-General confront many challenges in the course of their tenures but the challenge that tests them and defines them inevitably involves the use of force.” (quoting Kofi Annan)).

170. U.N. Charter art. 51.

defense to the Security Council.¹⁷¹

The legitimacy of the use of force by decolonizing states, such as the Western Sahara, is a lingering question of international law. Some scholars favor a “strict interpretation” of the self-defense provision, which requires that there be an “armed attack” before the self-defense exception may be used.¹⁷² Two arguments against this strict reading have emerged among critical law scholars since the provision was written. The first argument works within the provision, asserting that responding to colonial violence, even if that violence is not an “imminent” or “armed” attack, is still an act of self-defense.¹⁷³ The second argument goes around the provision, claiming that defending one’s right to self-determination should allow for the use of force because of the importance and the weight of that right.¹⁷⁴

1. Responding to Colonial Violence as an Act of Self-Defense

Decolonizing states and TWAILian legal scholars have argued that responding to colonial violence is a form of self-defense, even if the violence is not an armed attack.¹⁷⁵ One challenge posed to this argument is that understanding “colonial violence” requires deconstructing the typical Western understanding of violence reflected in international law.¹⁷⁶ Violence is generally understood as an “act” that is carried out by actors or agents who can be identified.¹⁷⁷ Because of this, specific acts with identifiable agents, such as wars, battles, and individual attacks, are the focus of international

171. *Id.*

172. See Robert E. Gorelick, *Wars of National Liberation: Jus Ad Bellum*, 11 CASE W. RES. J. INT’L L. 71, 73 (1979) (citing scholarship by Hans Kelsen and Ian Brownlie).

173. See *id.* at 74 (explaining that many states were opposed to colonialism, but understood that colonialism was not in itself “an armed attack” or “imminent use of force,” leading many Third World states to argue for changes to the “very notion of what constituted use of force which would justify the exercise of the right of self-defense”). These states wanted to expand the meaning of the provision and maintain the existing text. *Id.* (“There was a growing consensus among the Third World States that article 51 must be given a wide interpretation by the expansion of the definition of ‘force.’”); See, e.g., *id.* at 76 (describing the argument by Syria that “aggression” should be read broadly to include peoples “oppressed, colonized, or expelled from the land of their birth.”); *id.* at 77 (describing the argument by Egypt that “colonialism in itself constituted a use of force.”); Mithi Mukherjee, *The “Right to Wage War” Against Empire: Anticolonialism and the Challenge to International Law in the Indian National Army Trial of 1945*, 44 L. & SOC. INQUIRY 420, 436 (2019) (illustrating the arguments made in favor of Goa in the Indian National Army Trial of 1945, which included self-defense based on prior colonization).

174. Gorelick, *supra* note 172, at 81.

175. See Mukherjee, *supra* note 173, at 428–30 (describing the defense’s argument in the Indian National Army Trial of 1945 which focused on the right to wage war for liberation unrelated to an armed attack, and to end an occupation).

176. Deana Heath, *Colonial Violence*, LIVERPOOL UNIV. PRESS, <https://liverpooluniversitypress.manifoldapp.org/read/colonial-violence/section/71c632a8-6ae0-4de5-8c42-f4cca41f45d8> (last visited Jan. 15, 2024).

177. *Id.*

law.¹⁷⁸ In contrast, colonial violence is often “invisible.”¹⁷⁹ Invisible violence lacks a clear causal actor, and is often structural and social.¹⁸⁰ Unlike the specific acts highlighted above, this form of violence may look like normalcy, progress, or the status quo.¹⁸¹

The Sahrawis experienced both overt, physical violence through specific acts, as well as “invisible” violence used to create structural and societal change under both Spain and Morocco.¹⁸² One way that Spain enacted violence against the Sahrawis was through the imperial sedentarization project.¹⁸³ This project aimed to settle the Sahrawi nomads, enabling Spain to control their movements and their lifestyles.¹⁸⁴ From the 1930s into the early 1940s, the Spanish successfully moved tribal nomads into houses and small neighborhoods created for the burgeoning workforce, primarily through jobs as troops.¹⁸⁵ By the mid-1950s and 1960s, Spain began to use aid and benefits to entice the local population, often those who were experiencing particular hardship, into living in cities such as Villa Cisneros.¹⁸⁶ This strategy was highly effective, and in 1953 the first large-scale urbanization project came to Villa Cisneros, when 125 buildings were erected in the town.¹⁸⁷

The success of the sedentarization project was a result of colonial violence, both visible and invisible.¹⁸⁸ Some of the most identifiable and specific violent acts by the Spanish included bombing the countryside, which left the Sahrawi people in need of food, water wells, and housing.¹⁸⁹

178. *Id.*

179. *Id.*

180. *See generally id.* (drawing on theories of “objective” and “subjective” violence by Slavoj Žižek). For further discussion on invisible violence, *see generally* SLAVOJ ŽIŽEK, *VIOLENCE: SIX SIDEWAYS REFLECTIONS* (2008).

181. Heath, *supra* note 176.

182. *See, e.g.,* Tirado & Correale, *supra* note 132, at 35 (“Spanish authoritarian social engineering, including policies of sedentarisation [such as] [t]he introduction of wage labour, limiting women’s roles to those within the home, and the establishment of physical borders would not have been possible without the arbitrary use of power and repressive police control.”).

183. *See id.* at 35, 39 (explaining that Spain wanted to sedentarize the population and eradicate nomadism).

184. *Id.* at 33.

185. MERCER, *supra* note 101, at 119.

186. Tirado & Correale, *supra* note 132, at 38–39.

187. Esteban & Timón, *supra* note 18.

188. *See* Tirado & Correale, *supra* note 132, at 35 (explaining how the indiscriminate bombing during the Ifni-Sahara War had disastrous consequences for the livelihoods of pastoral nomads. These consequences, including the destruction of pastures and wells, and obstacles to trans-Saharan trade, opened the door to “Spanish authoritarian social engineering,” including policies of sedentarization).

189. *See id.* (describing the bombing strategy by Spain).

Additionally, while the territory experienced a severe drought,¹⁹⁰ Spain gave state aid to the Sahrawis who moved to the cities,¹⁹¹ coercing the sedentarization of the population through incentives.¹⁹² Other elements of the sedentarization project, including the enforcement of wage labor, were only possible because of “the arbitrary use of power and repressive police control.”¹⁹³

By eradicating nomadic ways of life, the Spanish also erased key elements of Sahrawi culture.¹⁹⁴ One example of the effect of sedentarization on this aspect of nomadic culture is in the tribes’ changing relationship with nature.¹⁹⁵ The Sahrawi tribes, including the Ouled Delim and Imraguen, engaged with nature as the host of spiritual beings.¹⁹⁶ Good spirits, called *yannun*, were said to reside in the hills or oases of the desert.¹⁹⁷ Evil *yennun* lived in the hyenas and windstorms of the desert.¹⁹⁸ The landscape of the desert, including its vegetation and form, was mystical and predetermined—the dunes and the hills were spirits which could not be manipulated by the nomads.¹⁹⁹ These spirits were seen to be the cause of all illnesses and injuries in the tribe.²⁰⁰ The remedies for physical injuries were thus a “blend of the magical of the practical,” and the vegetation of the region was attributed with a magical ability.²⁰¹

The Spanish colonial project emphasized the development of farming and employed Sahrawis on these farms.²⁰² The Spanish farms, through their introduction of new vegetation, caused many traditional uses for desert plants to be forgotten, and the industrialization of the territory by the Spanish fundamentally altered the relationship of the tribes with nature.²⁰³ This type

190. See Thomas Arkell, *The Decline of Pastoral Nomadism in the Western Sahara*, 76 GEOGRAPHY 162, 163 (1991) (describing how drought was a major factor in leading Sahrawis to move to cities).

191. See Tirado & Correale, *supra* note 132, at 38–39 (describing the Spanish policy to give aid only to cities).

192. *Id.* See Zunes & Mundy, *supra* note 19, at 101 (“Settlement in the metropolitan centers, however, resulted from drought as much as from material enticements.”).

193. Tirado & Correale, *supra* note 132, at 35.

194. See, e.g., BESENYÖ, *supra* note 66, at 35 (“The Saharawians are proud of their origin and although they still keep in evidence where they come from, the tribal ties are much looser today especially among town dwellers and also because of the different ways of living they lead.”).

195. See SAN MARTÍN, WESTERN SAHARA, *supra* note 66, at 54 (explaining how the cycles and systems of Sahrawi society no longer revolved around nature, but around “waged employment”).

196. MERCER, *supra* note 101, at 139.

197. *Id.*

198. *Id.*

199. *Id.* at 139–140.

200. *Id.* at 148.

201. *Id.*

202. *Id.* at 170.

203. Arkell, *supra* note 190, at 163.

of cultural erasure is considered a kind of violence by many scholars,²⁰⁴ and could be construed to create a lasting trauma in colonized societies that could be irreparable.²⁰⁵

The sedentarization project could be characterized, further, as a component of Spain's "lawmaking violence."²⁰⁶ Lawmaking violence is explained by Walter Benjamin in his essay, *Critique of Violence*.²⁰⁷ He proposes that lawmaking theories, such as natural law and positive law, are justifications to codify violence into law.²⁰⁸ In essence, the governing power will always "make law" that allows it to be violent, regardless of whether there is actual natural or positive law to support its actions.²⁰⁹ Benjamin explains that this phenomenon happens out of necessity — the governing body must develop a legal monopoly on violence to maintain control of the population.²¹⁰

In the Western Sahara and many other colonies, lawmaking as structural violence can be seen as going a step further, because the new legal governance system imposed by the colonial power places the colonial subjects in a lower position than the colonists themselves. After the start of the Spanish project, one tribal elder (who would be considered among the highest-ranking members of pre-colonial Saharan society) spoke to Julio Caro-Baroja, stating: "We are all zenaga [Znaga] now."²¹¹ Adopting Benjamin's theory of "law-preserving-violence,"²¹² postcolonialism scholars have observed that colonial lawmaking violence is especially "brutal" because it is predicated on race,²¹³ and the division of the "civilized" from the "uncivilized."²¹⁴ The colonized subject could never be seen as an equal to the colonizer, "because to do so would be to destroy the justification

204. See, e.g., ELISA NOVIC, THE CONCEPT OF CULTURAL GENOCIDE: AN INTERNATIONAL LAW PERSPECTIVE 4–5 (2016) (describing cultural genocide as a systematic destruction of traditions, values, language, and other elements that make one group of people distinct from another).

205. *Id.*

206. WALTER BENJAMIN, CRITIQUE OF VIOLENCE (1921), *reprinted in* 1 Walter Benjamin: Selected Writings 1913–1926, 236 (Michael W. Jennings ed., 1996).

207. See Duncan Stuart, *Walter Benjamin's "Critique of Violence" is a Revolutionary Call to Arms*, JACOBIN (Aug. 19, 2021), <https://jacobin.com/2021/08/walter-benjamin-critique-of-violence-revolution-working-class-kapp-putsch>.

208. *Id.*

209. *Id.*

210. *Id.*

211. SAN MARTÍN, WESTERN SAHARA, *supra* note 66, at 54.

212. Heath, *supra* note 176 citing BENJAMIN, *supra* note 206 (explaining that the ultimate aim of monopolizing violence is "that of preserving law onto itself.>").

213. Heath, *supra* note 176.

214. *Id.*

for colonialism.”²¹⁵

Another justification presented for expanding the self-defense exception in the decolonial context is the theory of colonialism as “permanent aggression.” The argument asserts that when the colonial regime was installed, it was an act of aggression.²¹⁶ Acts of aggression are not allowed under IHL and trigger the affected state’s ability to act in self-defense.²¹⁷ Continuing the colonial regime is a continuation of this aggression, constituting a permanent aggression.²¹⁸

The concept of colonialism as permanent aggression has, unsurprisingly, not been accepted by the ILO.²¹⁹ Western lawyers and scholars have argued that because most colonies were established by contract, they could not be considered unlawful aggressions.²²⁰ In 1961, after the Invasion of Goa, India argued before the U.N. Security Council that the colonization of Goa by Portugal, although initially by contract, was illegal *ab initio*.²²¹ India argued that Portugal had gained its rights in Goa from an “unabashed application of force, chicanery, and trickery inflicted on the people of India 450 years ago . . . it was a process of pure and simple conquest.” India reasoned that “if the vivisection of India was immoral and illegal *ab initio* how can it be moral and legal today?”²²² Many of the Western States, including the United States, did not respond to the theory of continued aggression in this matter²²³ but did as a general rule reject any theory of self-defense that did not respond to an armed attack as originally envisioned by Article 51.^{224 225}

Another argument against the permanent aggression theory is that, for the most part, at the time of the initial colonization or conquest, both colonization and conquest were legal.²²⁶ This includes even violent

215. *Id.*

216. Gorelick, *supra* note 172, at 77.

217. *Id.*

218. *Id.*

219. *See id.* at 78 (explaining the Western States found this argument “far-fetched.”).

220. *Id.*

221. 6 U.N. SCOR, 987th mtg. at 8 ¶ 37, U.N. Doc. A/P.V. 987 (Dec. 18, 1961) (India arguing Portugal’s colonization of Goa was illegal *ab initio*).

222. Gorelick, *supra* note 172, at 78.

223. *Id.* at 78.

224. *Id.* at 80.

225. One argument by India in the India National Army Trial was that Portugal had gained its rights in Goa from an “unabashed application of force, chicanery, and trickery inflicted on the people of India 450 years ago . . . it was a process of pure and simple conquest.” India’s counsel reasoned that “if the vivisection of India was immoral and illegal *ab initio* how can it be moral and legal today?” *Id.*

226. *See id.* at 78 (“The Western States regarded self-defense against an aggression committed 450

conquests – under the universalist interpretation of law, European armies were supported by law that was “right.”²²⁷ This argument implicates scholars’ assertions regarding the violent and imperialist origin of the ILO generally.²²⁸ During the colonial period, a colonized country had its territorial rights and native legal system usurped by the European law which was considered superior. Thus, according to TWAILian scholars, a type of colonization is still occurring through the ILO, applied by the original colonial powers that committed these acts in the first place. TWAIL scholars note this as the primary reason why the international legal system, as a continuation of the Western European legal philosophy, is ill-suited to govern post-colonial nations.²²⁹

Similar to other colonized territories, the Western Sahara was initially ceded to Spain through contracts. In the early 1880s, Emilio Bonelli, a Spanish merchant, acquired several tribal agreements to post “shore stations” along the Saharan coast.²³⁰ After discussions with the Spanish government, Bonelli returned to the Western Sahara in 1884 to acquire a more substantial tract of land for Spain.²³¹ He succeeded, and in a tribal agreement signed later that year, the tribes “apparently ceded the Río de Oro peninsula by a treaty signed by Lanzarote by Saharawi chiefs.”²³² By 1885, Bonelli had established three ports under these conditions.²³³ However, in 1885, similarly to many other imperial projects, Bonelli expanded beyond the region in the contract and conquered part of the Dakhla peninsula, where he established Villa Cisneros.²³⁴ As noted above, none of these actions would grant the Sahrawis recourse to use self-defense because the Spanish colonization of the Western Sahara, albeit through trickery, was legal under contract principles.²³⁵

years ago, and which was, at the time, legal, as being far-fetched... Its main fault seems to have been the difficulty of providing that military conquest was a *delicta juris gentium* during a time when this method of territorial acquisition was not only legally respectable, but even morally compelling.”); Alice L. Conklin, *Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895-1914*, 103 AM. HIST. REV. 419, 419 (1998) (“[Western colonialization] during this period was in large part an act of state-sanctioned violence.”).

227. See Conklin, *supra* note 226, at 419.

228. See Mukherjee, *supra* note 173, at 432 (“International law thus developed as the primary tool in the forging of a legal basis for the occupation and annexation of “native” lands and for the subjugation of indigenous peoples in the Americas and later in Asia and Africa.”).

229. See, e.g., Mutua & Anghie, *supra* note 1.

230. SAN MARTÍN, WESTERN SAHARA, *supra* note 66, at 28.

231. *Id.*

232. MERCER, *supra* note 101, at 106. For more details on these contracts and the ensuing contracts with France, see SAN MARTÍN, WESTERN SAHARA, *supra* note 66, at 29–31.

233. SAN MARTÍN, WESTERN SAHARA, *supra* note 66, at 30.

234. *Id.*

235. Gorelick, *supra* note 172, at 78.

2. Responding to Violations of Self-Determination Through the Use of Force

The argument that decolonizing states should have a right to use force when pursuing their right to self-determination has been presented in two primary ways. The first emerged in the 1960s, as Third World states advocated for the UN Charter's use of force provision to be interpreted broadly, including violations of the right to self-determination within the definition of "force."²³⁶ This would allow decolonizing states to respond to violations of their self-determination by exercising their right to self-defense.²³⁷ Nearly all of the Afro-Asian states supported this revision to the UN Charter,²³⁸ but their arguments were flatly rejected by the Western States.²³⁹ In the alternative, several states have argued that rather than expanding the definition of force, a different exception should exist to allow for the use of force when the right to self-determination is being subverted.²⁴⁰ Essentially, this argument states that decolonizing states should have a right to use force²⁴¹ when pursuing their self-determination because this right is so important that it warrants its own exception to the prohibition of the use of force.²⁴² In other words, the right to revolution to protect self-determination should be an "inherent" right.²⁴³

TWAILian scholars have also rejected this "right to revolt" argument.²⁴⁴ While the Western states took issue with the argument that revolution was a natural, moral, or inherent right because they could find no legal justification for this argument,²⁴⁵ TWAILian scholars were concerned with the consequences of seeking a legal justification for self-determination and for revolution in the first place,²⁴⁶ an argument explored further in

236. *Id.* at 74.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 81.

241. Or, as the Soviet States presented it, "The Right to Revolt." *Id.*

242. *Id.*

243. *Id.*

244. See Mutua & Anghie, *supra* note 1, at 31 (arguing that the international law regime "legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West" and that "universality of the international law or its promise of global order and stability justify it").

245. *Id.* See also Mukherjee, *supra* note 173, at 432 ("European exceptionalism anchored the discourse of rebellion and resistance within the republican tradition. Republican theory assumed that political liberty was the birthright of people of European descent; the colonized and so-called "uncivilized" peoples of Asia and Africa, by contrast, did not enjoy this inherent right but rather had to be tutored in its exercise.").

246. See, e.g., Mutua & Anghie, *supra* note 1, at 31.

Section IV.B.²⁴⁷ These scholars argue that the legalization of self-determination through the ILO has given Western powers the authority to declare which states have the right to self-determination.²⁴⁸ This legal framework takes agency away from the emerging states²⁴⁹ and perpetuates an imperialist strata, wherein some colonized nations are worthy of statehood, and others are not.²⁵⁰

B. Self-Determination

TWAIL scholars are concerned that the legal framework of self-determination gives the international legal order and its constituent states too much power over decolonizing states.²⁵¹ As seen in the case of the Western Sahara, a powerful international legal order leads to restrictions on resistance movements' ability to fight for independence.²⁵² One primary TWAIL critique of the system of self-determination promulgated by the international legal order, specifically by bodies such as the UN and ICJ, is that reliance upon the international legal order to define and delegate who is entitled to self-determination only creates the illusion of self-determination. In reality, it furthers the "continued dependence of the Third World on the West."²⁵³ TWAIL scholars also argue that this reliance legitimizes the authority of an international legal body to determine the rights of a colonized people, when it may be very ill-equipped to do so.²⁵⁴ Two ways that this legitimization may be occurring in Western Sahara are through the application of the international law of armed conflict in the territory, and through the democratic and self-determination-based rhetoric used by the Polisario to gain and maintain support for their cause.

1. Self-Determination as the Foundation for Resistance Movements

Despite the lack of clarity and support for an enumerated or enforceable "right" to self-determination for decolonizing states by the international legal order, the concept of self-determination has been used by anti-colonialists as a "rallying call" for their members. It has also been used as a legal argument to support their resistance movements, decolonization wars, and a call for

247. See discussion *infra* Section IV.B.

248. This *TWAILian* perspective asserts that the UN aimed to create a global order by defining, and therefore limiting, states' self-determination. See Mutua & Anghie, *supra* note 1, at 34.

249. Anghie, *supra* note 76, at 479.

250. *Id.* at 23.

251. See discussion *supra* note 244.

252. See discussion of MINURSO and the UN, *supra* Section III.

253. Mutua & Anghie, *supra* note 1, at 32.

254. *Id.*

Western aid and support.²⁵⁵

Several scholars suggest that the international legal order's current understanding of self-determination began after World War I, although the concept can also be attributed to the French Revolution.²⁵⁶ The term "self-determination" was first used in 1916, in a British memorandum.²⁵⁷ The term was embraced by the United States in 1918, in Woodrow Wilson's Fourteen Points Address, which defined it as:

V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.²⁵⁸

Unsurprisingly, the Allied Forces only associated "self-determination" with "the disintegration and dissolution of the German, Austro-Hungarian, Turkish, and former Russian empires;" and they did not apply the principle to their own colonies.²⁵⁹ After the first World War, the concept of self-determination was infrequently referenced,²⁶⁰ eventually re-emerging in the UN Charter in 1945.²⁶¹

The UN Charter treats the right as a generalized principle, rather than a legally defensible right.²⁶² Article 1(2) of the Charter most prominently refers to "the principle of equal rights and self-determination of all peoples."²⁶³ Article 55, which deals with international economic and social cooperation, also refers to self-determination as a principle and not a right.²⁶⁴ Article 73 similarly defines a "non-self-governing territory" as one

255. See Mukherjee, *supra* note 173, at 431 ("Erez Manela has argued that Woodrow Wilson's description of self-determination as a key principle in international relations at the end of the First World War became a rallying call for anticolonial movements worldwide.").

256. Byman, *supra* note 107, at 99.

257. *Id.* See also David B. Knight, *Territory and People or People and Territory? Thoughts on Postcolonial Self-Determination*, 6 REVUE INTERNATIONALE DE SCIENCE POLITIQUE 248 (1985) (discussing the origins of the term and concept of self-determination, with both supposedly appearing first in a 1916 memorandum by the British Foreign Office on post-war conditions wherein self-determination is called an "essential condition" of peace).

258. See Woodrow Wilson, *Fourteen Points Address (1918) as reprinted in Trygve Throntveit, The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination*, 35 DIPL. HIST. 445, 447 (2011).

259. Byman, *supra* note 107, at 99.

260. *Id.*

261. *Id.* ("The phrase was not referred to in the peace treaties of 1919, nor in the Covenant of the League of Nations, but was reincarnated in the Charter of the United Nations.").

262. *Id.*

263. U.N. Charter art. 1, ¶ 2.

264. U.N. Charter art. 55.

“whose peoples have not yet attained a full measure of self-government.”²⁶⁵ Additionally, the Universal Declaration of Human Rights of 1948 does not list self-determination as a legal right.²⁶⁶

Despite this shaky foundation, the “right” to self-determination is considered the legal foundation of the Western Sahara’s continuing claims of independence by the UN, justifying the continued effort toward a referendum,²⁶⁷ and the MINURSO project.²⁶⁸ The UN’s role in imposing and promoting self-determination in the territory began in 1963 with Article 73 of the Charter of the United Nations, which included the Spanish Sahara in its list of territories.²⁶⁹ Soon after that, in December 1966, the first UN General Session resolution on the Western Sahara was passed, requesting Spain to take all measures to decolonize the territory, and to enter negotiations “on problems of sovereignty.”²⁷⁰ The UN adopted seven more resolutions regarding the Western Sahara between 1966 and 1973, all of which recognized the need for a referendum allowing the Sahara to obtain self-determination.²⁷¹ In 1975, the UN General Assembly requested the ICJ’s advisory opinion on the sovereignty status of Western Sahara.²⁷² The ICJ held that the Western Sahara qualified for self-determination, stating that it:

... did not find the existence of legal connections that could impact the application of Resolution 1514 (XV) of the UN General Assembly of 14 Dec. 1960, concerning granting independence to colonial countries and nations, in particular the application of the principle of self-determination through free and genuine expression of the will of the people inhabiting the given territory.²⁷³

The Polisario has cited this ICJ decision to obtain international support

265. U.N. Charter art. 73. *See also* Byman, *supra* note 107, at 99.

266. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). *See also* Byman, *supra* note 107, at 99.

267. *See generally* MINURSO, UNITED NATIONS, <https://minurso.unmissions.org/background> (describing the history and intentions of the continuing MINURSO project) (last visited Jan. 20, 2024).

268. *See* U.N. Secretary-General, Budget for the United Nations Mission for the Referendum in Western Sahara for the period from 1 July 2022 to 30 June 2023, U.N.Doc. A/76/692 (Feb. 11, 2022) (approving the MINURSO budget for July 2023 - June 2024).

269. U.N. Charter art. 73.

270. G.A. Res. 2983 (XXVII), at 64 (Dec. 20, 1966).

271. *See, e.g.*, G.A. Res. 2229 (XXI) (Dec. 20, 1966) (reaffirming “the inalienable right of the peoples of Ifni and Spanish Sahara to self-determination” and demanding that Spain as “the administering power” determine “at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding a *referendum* under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination.”).

272. BESENYÖ, *supra* note 66, at 84.

273. ICJ Advisory Opinion on the Western Sahara, *supra* note 33.

for its resistance efforts.²⁷⁴ While this has been effective in its advocacy and diplomacy with the UN²⁷⁵ and with international NGOs,²⁷⁶ this strategy has also had the effect of rhetorically legitimating the ICJ's authority to declare when a state or people has the right to self-determination.²⁷⁷ Additionally, TWAILian criticism may suggest that by citing the UN's referendum process as its ultimate goal, the Polisario also legitimizes the restrictions created by the ILO to how movements may pursue and obtain their independence.²⁷⁸

Complicating this analysis is the fact that the Western Sahara is unique compared to many post-colonial and colonial states, due to the Sahrawis' long-standing support of democracy,²⁷⁹ which suggests that the Polisario's self-determination argument was homegrown, rather than imported by the UN and the international legal order.²⁸⁰ Indeed, the Sahrawi people and the Polisario leadership have publicly prided themselves on a "democratic ethos" since the start of the independence movement.²⁸¹

The Sahrawis trace their historical support for democracy back to the pre-colonial, tribal governance systems in the pre-colonial Hassanophonic Sahara, and the democratic systems found within and among the tribes.²⁸² While some observers have cast doubt on the depth of this democracy,²⁸³ these critiques fail to recognize the legitimacy of different visions of democracy.²⁸⁴ For example, as discussed in Section II, the pre-colonial Saharan tribes had well-documented "consultative and decision-making bodies" at the tribal and intertribal levels.²⁸⁵ These were largely restricted by

274. See, e.g., Kamal Fadel, *A New Year Message from the POLISARIO Front*, Newsletter, WESTERN SAHARA CAMPAIGN UK (Jan. 1999) (on file with School of Oriental and African Studies, UCL, Western Sahara Campaign Archive) ("Our People are determined to continue their struggle for freedom, justice, and democracy." ... "We value and need more than ever before your support and solidarity." ... "The Western Sahara question is an issue of decolonization.").

275. See Zoubir & Pazzanita, *supra* note 110, at 270–73 (describing the successful diplomatic strategies of the Polisario).

276. See *id.* at 275 (describing the relationship of the Polisario with NGOs).

277. See Mutua & Anghie, *supra* note 1, at 34 (describing the process and means of legitimating the ILO).

278. *Id.* at 34–36 (describing the role of self-determination in legitimating the ILO). TWAIL scholars also critique IHRL as a means of legitimizing the international legal order. See, e.g., *id.* at 34.

279. WILSON, *supra* note 14, at 32.

280. *Id.* at 32.

281. *Id.* at 52.

282. *Id.*

283. See, e.g., Mohamed A. El-Khawas, *Book Review*, 24 AFR. STUDS. REV. 170–72 (1981) (reviewing VIRGINIA MCLEAN THOMPSON & RICHARD ADLOFF, *THE WESTERN SAHARANS – BACKGROUND TO CONFLICT* (1980)) (critiquing Adloff & Thompson's assertion that the Polisario and the Sahrawi liberation movement was based on the discovery of phosphates in the region).

284. Ramina, *supra* note 1, at 265.

285. WILSON, *supra* note 14, at 52.

tribal castes,²⁸⁶ however, and thus don't conform to the Western definition of a liberal democracy.²⁸⁷

Even so, the democratic ideology shared among the Sahrawis does seem to have its roots in the pre-colonial Sahara. Alice Wilson conducted an extensive ethnographic study of the region, speaking to hundreds of Sahrawis.²⁸⁸ In these interviews, Wilson explains, several Sahrawis described the presence and influence of democratic and semi-democratic bodies prior to colonization and under the Polisario.²⁸⁹ Because of the oral history keeping tradition of the Sahrawis, this is substantial evidence that the region had a democratic history.²⁹⁰

Wilson's interviewees also demonstrated an appreciation for the concepts and ideologies of democracy as a form of pride in their history.²⁹¹ Wilson posited that the Sahrawis' pride in their democratic history, even if unfounded, has caused many refugees to express support for the Polisario's implementation of democratic systems, in addition to their participation in a referendum vote facilitated by the UN.²⁹² Wilson's conclusions²⁹³ may suggest that the Western Sahara's widespread support for the UN's referendum and self-determination process is based on the Sahrawis' own histories and ideologies, rather than external Western values.

Even with the Sahrawis' embrace of democracy and self-determination on their own terms, the overarching problem imposed on the territory by the international legal order still persists because of the inequality inherent in the UN's referendum system.²⁹⁴ While TWAIL scholarship supports the principle of self-determination for colonial states,²⁹⁵ several authors have also noted that international human rights law has been used much like European law in the period of European colonialism — then, as now, the West is using this law to “civilize” the Third World.²⁹⁶

The UN referendum would perpetuate re-colonialization

286. BESENYŐ, *supra* note 66, at 29–30.

287. *See* citation and discussion *supra* note 140.

288. WILSON, *supra* note 14, at 81–83.

289. *Id.*

290. *Id.*

291. *Id.* at 53.

292. *Id.* at 32.

293. *Id.*

294. *See, e.g.,* TOBY SHELLEY, *ENDGAME IN THE WESTERN SAHARA 600* (2004) (explaining that voting eligibility was to be based on a 1974 Spanish census of the territory and would also include the region's residents who had turned 18 in the time since). Notably, only two out of seven high ranking Polisario members would have been able to vote. *Id.*

295. *See* Yildiz, *supra* note 1, at 360–61 (describing the history of the “third generation” of TWAIL).

296. *See* examples cited *supra* note 76.

geographically. The plan for the UN referendum is based on the physical lines of the Spanish colony.²⁹⁷ Prior to Spanish colonization, there had been no lines in the desert, and no concept of the territory as a political entity.²⁹⁸ Should the referendum succeed, the Sahrawis will not be receiving whatever land is rightfully theirs, but the land that the Spanish thought would be best suited to their empire. Spain would still retain a portion of the resources from the Sahrawi land and its dividends.²⁹⁹

2. Self-Determination and the Law of International Armed Conflict

The application of the international law of armed conflict demonstrates a practical consequence of legalizing the right to self-determination for decolonizing states. Under this framework, a conflict's designation as an international armed conflict depends on a state or UN recognition of sovereignty,³⁰⁰ or a special status by the UN under Article 1(4) of the Additional Protocol I of 1977.³⁰¹ When a conflict is designated international or non-international in scope, it triggers different rules and requirements under the Geneva Convention.³⁰²

An international armed conflict can arise when there are armed hostilities between two or more states, or where one state partially or totally occupies the territory of another state regardless of whether the state meets this occupation with armed resistance.³⁰³ A territory is "occupied" when the

297. See citation and accompanying text *supra* note 19.

298. See Porges & Leuprecht, *supra* note 16, at 71 ("[The concept of a political entity] roughly contiguous with present-day Western Sahara formally began in 1884, with the establishment of a Spanish protectorate that was gradually expanded over the years along with Spanish possessions in present-day Morocco itself.").

299. See Zunes, *supra* note 100, at 36 ("It has always been surmised that one of the stipulations of the Madrid Accords was that Spain would retain a 35% share of the phosphate mining company and port facility, Fosbucraa.").

300. Int'l Comm. Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper (Mar. 2008) 1–2 ("An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.").

301. *Id.* at 2 ("Additional Protocol I extends the definition of IAC to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).").

302. *Id.* at 1, 3.

303. *Categorization of Armed Conflict*, UN OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/e4j/zh/terrorism/module-6/key-issues/categorization-of-armed-conflict.html> (last visited February 22, 2024) ("Under Common Article 2 of the Geneva Conventions, the two determining factors [for an International Armed Conflict] are: (1) the legal status of the belligerent parties to the conflict (normally states), and (2) the nature of the military confrontation between them (e.g. declared war, partial or total occupation of the territory of a State party to the Geneva Convention)."). See also *International Armed Conflict*, *The Practical Guide to Humanitarian Law*, MEDECINS SANS

local authority is removed or replaced, and the territory is “placed under the authority of the hostile army.”³⁰⁴ All four articles of the 1949 Geneva Convention apply to international armed conflicts, while only Article 3 applies to non-international armed conflicts.³⁰⁵ Additionally, if a conflict is defined as international, *both* parties are placed under the governance of all four Geneva Conventions.³⁰⁶ In the ILO, declaring a conflict as “international” may also give the rhetorical impression of legitimizing the claims of sovereignty of each nation state in the conflict.³⁰⁷ In turn, refusing to label a conflict as an international armed conflict may not only withhold some of the benefits of the international legal system from the parties,³⁰⁸ but it is also a *de facto* declaration of their status under IHL and the ILO.³⁰⁹

Article 1(4) of the UN’s Additional Protocol I of 1977 establishes that “self-determination struggles” also qualify as international conflicts.³¹⁰ This protocol was made in recognition of the difficulties that the “state-centric” formulation of the Geneva Conventions had created in the post-colonial world, and was intended to be a “meaningful expansion” of the applicability of international humanitarian law.³¹¹ The amendment was not, however, an expansion of sovereignty or the requirements to recognize statehood. Instead, Article 1(4) is a “legal mechanism that can ‘internationalize’ a

FRONTIERS, <https://guide-humanitarian-law.org/content/article/3/international-armed-conflict-iac/> (last visited February 22, 2024) (explaining that the law of international armed conflict applies the all partial or total occupations of a High Contracting Party, including occupations that do meet armed resistance or result in any armed clashes); *International Armed Conflict*, U.N. OFFICE FOR DISASTER RISK REDUCTION, [https://www.undrr.org/understanding-disaster-risk/terminology/hips/so0001#:~:text=International%20armed%20conflict%20is%20conceptually,war%20\(ICRC%2C%202016%20\(an%20International%20Armed%20Conflict%20may%20arise%20even%20if...the%20use%20of%20armed%20force%20is%20unilateral.\)](https://www.undrr.org/understanding-disaster-risk/terminology/hips/so0001#:~:text=International%20armed%20conflict%20is%20conceptually,war%20(ICRC%2C%202016%20(an%20International%20Armed%20Conflict%20may%20arise%20even%20if...the%20use%20of%20armed%20force%20is%20unilateral.)) (last visited Feb. 14, 2024).

304. *Occupation and International Humanitarian Law*, ICRC, Apr. 8, 2004, <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>.

305. See Saul, *supra* note 128, at 4 (“Common Article 3 requires that people taking no active part in hostilities, whether civilians or members of armed forces who have laid down their arms or are out of combat (*hors de combat*) [because of sickness, wounds, detention, or other causes], shall in all circumstances be treated humanely and without discrimination. In respect of such persons, it further prohibits violence to life, murder, mutilation, cruel treatment and torture; hostage taking; and outrages upon personal dignity, particularly humiliating and degrading treatment. It also guarantees fair trial and that the wounded and sick be collected and cared for.”).

306. *Id.*

307. Edward Kwakwa, *The Use of Force by National Liberation Movements: Trends Toward a Developing Norm?*, 14 Y. J. INT’L L. 199, 208 (reviewing HEATHER WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* (1988)).

308. *Id.*

309. *Id.*

310. Geneva Protocol Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 233, 240 [hereinafter Art. 1(4)].

311. Dominic Gattuso, *The Polisario Front and the Future of Article 1(4)*, 99 TEX. L. REV. 1201, 1202 (2020-2021).

conflict.”³¹²

Even so, for several Western states in the UN, this amendment edged too close to recognizing the sovereignty of self-determining states and their liberation movements.³¹³ The passage of the amendment was disputed by a “vocal minority” in the UN and as of 2021, the United States has still refused to ratify it.³¹⁴ Several countries, including “the United States, the United Kingdom, the Netherlands, Canada, and Switzerland” attacked Art. 1(4), reasoning that it “inappropriately introduced subjective standards.”³¹⁵ Additionally, the United States proposed concerns that “heightened legal recognition of these non-state actors would validate and encourage terrorism.”³¹⁶

The Western reluctance to define a post-colonial state’s struggle for self-determination as an “international armed conflict” also reflects the historical refusal by Western states to characterize decolonial conflicts as “wars.”³¹⁷ For the majority of European history, imperial powers did not cast “decolonization conflicts” as wars, instead using labels such as “emergency” or “rebellion.”³¹⁸ One reason for this is because of the particular understanding of war in the imperial ages of Europe as a “holy” or “just” endeavor.³¹⁹ War and soldiering were historically connected with honor and with God,³²⁰ and during the colonial era, was characterized as a “civilizing mission.”³²¹ Because of this, only the enlightened and civilized countries could engage in legal warfare.³²²

312. *Id.* at 1202.

313. *See id.* (“Countries like the United States, the United Kingdom, the Netherlands, Canada, and Switzerland attacked Article 1(4) on the basis that it inappropriately introduced subjective standards, and the United States held the position that the heightened legal recognition of these non-state actors would validate and encourage terrorism.”).

314. *See id.* at 1201–02 (“Even though the paragraph still managed to enter AP(I) by vote in 1977, a vocal and influential minority strongly objected to its inclusion.”). *See also* Message from the President of the United States, Jan. 29, 1987, S. Treaty Doc. No. 100-2 as reprinted in Gattuso, *supra* note 311, at 1201 n.2 (“In a letter of transmittal to the United States Senate, President Ronald Reagan claimed it “would undermine humanitarian law and endanger civilians in war” and recommended the Senate not ratify the Protocol in its entirety.”).

315. Gattuso, *supra* note 311, at 1202.

316. *Id.* at 1202–03 (explaining that it didn’t, in fact, and people called it “dead letter.”).

317. MARTIN THOMAS, *Grand Narratives: Decolonization and Its Wars*, 42 WAR & SOC’Y 60, 61 (2023).

318. *Id.*

319. Melvin B. Endy, Jr., Just War, Holy War, and Millennialism in Revolutionary America, 42 WM. & MARY Q. 3, 7–9 (1985).

320. *Id.* at 8.

321. Conklin, *supra* note 226, at 419–20.

322. *See* Mukherjee, *supra* note 173, at 432 (explaining how historically, the only “just wars” were those fought by sovereign European states, which recognized each other as equals and played by the same rules).

The Western refusal to recognize the legitimacy of colonial wars has also had the rhetorical effect of minimizing the scale, complexity, and severity of the violence leveraged against colonized people.³²³ In Western discourse, labelling incidents as “insurgencies” and “rebellions” also serve to position the colonial power as the legitimate power, against whom the colonized people are inappropriately rebelling.³²⁴ This is another example of lawmaking violence – under this paradigm, the colonial power has the legal right to wage war and make violence, but the colonial people do not.³²⁵ Traditional historical accounts also support the Western viewpoint of these conflicts, using a European definition of warfare to define conflicts as wars, with European military terms attached.³²⁶ Meanwhile, wars of national liberation have been minimized as counterinsurgencies and small wars.³²⁷ Historical framing of decolonial conflicts has further entrenched the notion that the colonial people were incapable, either legally or militarily, of fighting a legitimate war.³²⁸ Although a Western military might see a single “counterinsurgency” fight as an isolated incident, the decolonization conflict is in fact constant.³²⁹ For instance, in terms of the conflicts in the Western Sahara, the Polisario fighters certainly considered themselves at war, and the Sahrawi people reflect on the current struggle and previous violence as a war, but the Western powers did not acknowledge the conflict as a war.³³⁰

V. CONCLUSION: THE IMPERIAL LEGAL ORDER

In addition to perpetuating colonial violence in the Western Sahara, the international legal order is inconsistent in its application of its own legal values. This has real world implications beyond the theories of TWAIL or international law discussed here. The Sahrawis have faced human rights abuses from Morocco since the start of the conflict and into the present day,

323. Thomas, *supra* note 317, at 61–62.

324. *Id.* at 61.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. See Thomas, *supra* note 317, at 61 (“Analysts of colonial violence remind us that decolonization also connotes a process of contestation in which the actuality or threat of violence, physical, psychological, and sexual, but also cultural and epistemic, might vary in incidence and intensity, but was ever-present.”).

330. See WILSON, SOVEREIGNTY IN EXILE, *supra* note 14, at 132. See also Thomas, *supra* note 317, at 63 (“Decolonisation conflicts might originate in social protest, in localised rebellions, or in exile-led insurgencies, but, whatever international law might – or might not – acknowledge, those engaged in resisting or repressing were fighting wars as well.”).

including the disappearance of activists and torture of political prisoners,³³¹ and the use of chemical weapons on refugees.³³² Morocco's strategic position and utility to the Security Council and to the United States³³³ has caused the Security Council, permanently made up of the five most powerful UN states,³³⁴ to overlook human rights abuses and to manipulate the rules of the international legal order to apply selectively.³³⁵ The Security Council has not included a human rights monitoring mandate in any of the MINURSO renewals applying to the Western Sahara because any proposals to that end have been vetoed by Morocco's allies.³³⁶ This reluctance flies in the face of several states' calls to investigate Morocco for human rights violations against Sahrawis, including from the UN Commission on Torture.³³⁷ By selectively enforcing the law, the UN Security Council is complicit in Morocco's human right abuses, delegitimizing the whole international legal order.³³⁸ The ability of the Security Council to functionally overrule all the other states in the UN arguably distinguishes any notions of the UN as an egalitarian body and further demonstrates the problems with its governance of postcolonial territories.³³⁹

The Sahrawis' ultimate deprivation, however, is their continued lack of self-determination. The liberation movement faces stagnation, with disagreement among the Polisario and the resistance groups in the Annexed Territories on how to continue their struggle,³⁴⁰ and with the brunt of these legal frameworks placed upon the Sahrawis alone. The Sahrawi Liberation

331. See Stephan & Mundy, *supra* note 31, at 7–8 (chronicling violations of human rights in King Hassan's reign, including "systematic torture of political prisoners and widespread "disappearances" of suspected Sahrawi activists, their associates and their relatives...").

332. Lippert, *supra* note 83, at 41.

333. Annie Slemrod, *Western Sahara's Moment in the Sun*, THE NEW HUMANITARIAN (Apr. 14, 2016), <https://www.thenewhumanitarian.org/analysis/2016/04/14/western-sahara-s-moment-sun>. ("Anytime Morocco is feeling the pressure on Western Sahara, they probably find ways of making themselves very useful to the United States.")

334. Security Council, UNITED NATIONS, https://www.un.org/securitycouncil/about_test1#:~:text=to%20maintain%20international%20peace%20and,harmonizing%20the%20actions%20of%20nations (last visited Jan. 21, 2024).

335. Wilson, *Under the Radar*, *supra* note 129, at 5.

336. Meriem Naili, The Absence of a Human Rights Monitoring Component in the Minurso Mandate: A Qualitative Analysis of the UN Narrative Regarding Human Rights in Western Sahara, 12 L'OUEST SAHARIEN 81 & 83–84 (2022).

337. Wilson, *Under the Radar*, *supra* note 129, at 5.

338. See Mutua & Anghie, *supra* note 1 (describing the process of legitimating the ILO and the UN's role).

339. See *id.* at 34–35 ("The use of the United Nations is an affront by the big powers.").

340. See Wilson, *Under the Radar*, *supra* note 129, at 5–6 (describing the distinctions of the "annexed Sahrawi" liberation movements and the Polisario Front).

Movement has been known as a non-violent movement,³⁴¹ but this is now being challenged from within. Groups in the Annexed Territories are moving toward more active mobilization and resistance,³⁴² and the refugee camps are seeing increased displeasure over the lack of change under the non-violent methods of the Polisario.³⁴³ This has led to backlash from the ILO, however. The Gdeim Izik protest, for example, a “deviation from the nonviolent strategy,”³⁴⁴ gave the Western states the opportunity to distance themselves from the typically peaceful movement.³⁴⁵ No matter that the violence was initiated and more severe from the Moroccan authorities at Gdeim Izik.³⁴⁶

Even though MINURSO and the UN’s referendum have not borne out, the ILO has given the Sahrawis no means to carve their own paths to independence, instead putting the burden of international law on their struggling movement, and continuing their subjugation.³⁴⁷

341. Stephan & Mundy, *supra* note 31, at 2 (detailing how after the entry of MINURSO and the imposition of the ceasefire, and into the early-2000s, there was a “transformation of the Sahrawi pro-independence movement’s strategy from one based on armed struggle and diplomacy conducted by the Polisario, to one based on civilian-led nonviolent resistance led by Sahrawis living inside the occupied territory and in southern Morocco.”).

342. *Id.* at 8.

343. See WILSON, SOVEREIGNTY IN EXILE, *supra* note 14, at 234 (explaining that to pursue self-determination through the referendum, the Sahrawis had to give up other freedoms, and while their democratic processes demonstrated a support for this strategy for many years, the elections of the past decade have demonstrated a shift away).

344. Porges & Leuprecht, *supra* note 16, at 72 (“In the aftermath of Gdeim Izik, young Sahrawi men did engage in violent acts in response to the incitement and brutality of the Moroccan security forces. The range of intensity included physical attacks against security forces, intentionally hitting a security officer with a car, throwing rocks, and setting fire to buildings.”). See also Wilson, *Under the Radar*, *supra* note 129, at 4–6 (describing the Gdeim Izik camp and protest).

See *id.* (explaining that this event attracted negative attention, and “damaged international perception of the Sahrawi cause.”).

346. See *id.* (“While the response from the Moroccan security forces was equal or greater in its brutality and violence, the acts of violence undertaken by Sahrawis were harmful to the message and the success of the largely peaceful movement by playing into the continuing cycle of violence . . . [t]he original demonstration was meant to be fully nonviolent, the violence perpetrated against the demonstrators did produce a violent response.”). See also Wilson, *Under the Radar*, *supra* note 129, at 6 (“The Moroccan authorities highly restricted access to the protest camps for outsiders. They suspended the Moroccan office of *Al Jazeera* news channel on 29 October 2010 and with the exception of one international security officer being allowed in on 4 November, Morocco otherwise prevented UN monitors from accessing the site.”).

347. For an egregious example of this, see Special Committee on Decolonization, Taking Up Question of Western Sahara, Some Speakers in Special Decolonization Committee Call for Urgent Self-Determination Referendum, Voice Concern over Human Rights Abuses GA/COL/3370 (June 13, 2023), <https://press.un.org/en/2023/gacol3370.doc.htm> (members of the special committee on decolonization proposing giving the territory to Morocco because of the alleged human rights abuses by the Polisario).