Peacekeeping and International Human Rights Law: Interrogating United Nations Mechanisms through a Study of the UN Mission for the Referendum in Western Sahara

Photo by Meriem Naili – Smara refugee camp, Algeria, February 2017

Submitted by Meriem Naili to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Security, Conflict and Human Rights, February 2022.

UNIVERSITY OF EXETER

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This PhD dissertation is dedicated to **my deceased father, Amara Naili**, a man who spent the 94 years of his life without knowing how to write or read and remains the driving force behind my every achievement.

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ABSTRACT

The UN Mission for the Referendum in Western Sahara (MINURSO) was created by UN Security Council (UNSC) Resolution 690 in 1991. This resolution provided for the appointment of a Special Representative, the declaration of a cease-fire and the organisation of a self-determination referendum on the status of the territory, i.e. independence or integration with Morocco, which had invaded it in 1975. Since then, the UNSC has extended MINURSO's mandate 59 times without incorporating any human rights monitoring and/or reporting components nor any support from the Office of the High Commissioner for Human Rights (OHCHR). As such, MINURSO stands out as the only post-Cold War multidimensional UN peacekeeping operation (PKO) deprived of a human rights dimension. To date, no referendum has been organised and the mission is still in place.

This research project examines the impacts of human rights components in UN peacekeeping, or the absence thereof, and conflict (ir)resolution with a focus on the case of a self-determination conflict such as Western Sahara. Besides shedding more light on the conflict in Western Sahara, the thesis aims to empirically explore the human rights protection-peacekeeping-conflict resolution nexus in this deviant single case study. It further investigates a possible remedy using the relevant legal methodology tools through the existence of a norm of customary international law, requiring systematic inclusion of human rights monitoring components into PKOs.

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LIST OF ABBREVIATIONS

AU	African Union
CHR	Commission on Human Rights
CJEU	Court of Justice of the European Union
DARIO	Draft Articles on the Responsibility of International Organizations
DFS	Department for Field Support
DPA	Department for Political Affairs
DPKO	Department of Peacekeeping Operations
DPO	Department of Peace Operations
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
HRC	Human Rights Council
HRDDP	UN Human Rights Due Diligence Policy
HRMC	Human Rights Monitoring Components
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IR	International Relations
ITA	International Territorial Administration
ICJ	International Court of Justice
MINUCI	United Nations Mission in Côte d'Ivoire
MINUJUSTH	United Nations Mission for Justice Support in Haiti
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINURSO	Mission des Nations Unies pour le Referendum au Sahara Occidental
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSTAH	United Nations Stabilization Mission in Haiti
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NGO	Non-Governmental Organisation
NSGT	Non-Self-Governing Territory
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
OIOS	United Nations Office of Internal Oversight Services
ONUC	United Nations Operation in the Congo
ONUSAL	United Nations Observer Mission in El Salvador
PCIJ	Permanent Court of International Justice
PE	Personal Envoy
PKO	Peacekeeping Operation
POLISARIO	Frente Popular para la Liberación de Saguia el-Hamra y Rio de Oro
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly

UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTAG	United Nations Transition Assistance Group
ONUB	United Nations Operation in Burundi
SADR	Sahrawi Arab Democratic Republic
SR	Special Rapporteur
SRSG	Special Representative of the Secretary General
UNAMET	United Nations Mission in East Timor
UNAMIC	United Nations Advance Mission in Cambodia
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNAMSIL	United Nations Mission in Sierra Leone
UNDOF	United Nations Disengagement Observer Force
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNIFIL	United Nations Interim Force in Lebanon
UNISFA	United Nations Organization Interim Security Force for Abyei
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan
UNMISET	United Nations Mission of Support in East Timor
UNMISS	United Nations Mission in the Republic of South Sudan
UNMIT	United Nations Integrated Mission in Timor-Leste
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNOCI	United Nations Operation in Côte d'Ivoire
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNPROFOR	United Nations Protection Force
UNSMIS	United Nations Supervision Mission in Syria
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTAG	United Nations Transition Assistance Group
UNTSO	United Nations Truce Supervision Organization

INTRODUCTION

Research background

In order to fulfil its objective of maintaining international peace and security, the United Nations (hereinafter, UN) has created and deployed peacekeeping operations (hereinafter, PKOs) since the late 1940s. Most UN PKOs currently operational – especially those established in the last two decades – are provided with some human rights protection mechanisms as part of their mandates (Capella Soler 2011, 2). In practical terms, this entails the presence of civilian personnel on the ground who are duly appointed, trained, and entitled or mandated to report violations that they witness and/or investigate violation claims that are brought to their attention (O'Flaherty 2004, 47-48; Hannum 2006, 73). However, as much as the protection of human rights also remains a primary objective of the UN, these human rights components have not been systematically included in all PKOs. This remains the case for the UN Mission for the Referendum in Western Sahara (hereinafter, MINURSO), even three decades after the end of the Cold War, when mandates started to diversify in terms of tasks and incorporate more and more human rights language and protection mechanisms.

The puzzle guiding this doctoral research project emerges in light of the several attempts by UN departments to institutionalise the role of human rights in peacekeeping. These efforts include principally the recommendations of the 2000 Report of the Panel on United Nations Peace Operations (hereinafter, Brahimi Report)[1] as well as the 2011 Policy on Human Rights in UN Peace Operations and Political Missions co-drafted by the Office of the High Commissioner for Human Rights (OHCHR), the Department of Peacekeeping Operations (DPKO), the Department for Political Affairs (DPA) and the Department for Field Support (DFS).[2] The 2011 Policy addresses questions of human rights components in UN peacekeeping operations in a context which has seen the UN increasingly focusing on reforming how peace operations are carried out when it comes to international human rights and humanitarian law (Junk, Mancini, Seibel & Blume

[1] The Panel on United Nations Peace Operations, chaired by Lakhdar Brahimi, reported to the U.N. Secretary-General on 17 August 2000: *U.N. Doc. A/55/305,* available from https://undocs.org/en/A/55/305, Annex III, pp.70-74.
[2] United Nations OHCHR, DPKO, PDA and DFP, Human Rights in United Nations Peace Operations and Political Missions, (2011), available from https://issat.dcaf.ch/download/127368/2601658

2017). Most UN statements do not touch upon the case of peacekeeping missions lacking a human rights monitoring mandate, an omission that can suggest that these are implicitly considered to be a deviation from the norm. For instance, the Brahimi Report's recommendations solely refer to the benefits for "more extensive use of geographic information systems technology […] for applications as diverse as […] human rights monitoring"[3]. Yet, it recalls the "essential importance of the UN system adhering to and promoting international human rights instruments and standards, and international humanitarian law in all aspects of its peace and security activities".[4] Human rights issues have been indeed central to the review of peacekeeping operations that led to the recommendations in the report.

In this regard, MINURSO has not been provided with such authority regarding human rights and seems to stand as an exception in today's peacekeeping. Indeed, it is the only operating UN PKO deployed after the fall of the Berlin wall that is not equipped with a human rights dimension (Zunes & Mundy 2010, 149; Capella-Soler 2011, 8; Khakee 2014; 457; Torrejon Rodriguez 2020, 52). At the same time, it is yet to fulfil its originally envisioned principal task: the "organization and the supervision, by the UN in cooperation with the Organisation of African Unity, of a referendum for self-determination of the people of Western Sahara".[5]

The mission has been deployed in a context of a derailed decolonisation process for which the UN has failed to provide a just and lasting solution. The conflict over Western Sahara can be described as a case of self-determination which has become frozen over the past two decades – including after the collapse of a long-standing ceasefire with a return to armed conflict in late 2020. The territory of Western Sahara – roughly the size of the United Kingdom - is located in North-West Africa, bordered by Morocco in the north, Algeria and Mauritania in the east and the Atlantic Ocean to the west. A former Spanish colony, it has been listed by the UN since 1963 as one of the 17 remaining non-self-governing territories, yet standing out as the only such territory without an acknowledged administrating power.[6] Morocco has been claiming sovereignty over the entire

[3] Ibid. Note 1, p.58 para. c)
[4] Ibid. Note 1, p.1 para e)
[5] UN Security Council resolution S/RES/690 (30 April 1991) available form https://digitallibrary.un.org/record/112199
[6] Spain unilaterally rejected any international responsibility towards the territory in a letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary General, (A 31/56, S/11997). The declaration has been archived amongst UN Secretariat Working Papers on Non-Self-Governing Territories (NSGTs).

territory of Western Sahara since becoming independent in 1956, and has since the late 1970s formally annexed around 80% of this territory, over which it exercises de facto control in contravention of the conclusions reached by the International Court of Justice (hereinafter, ICJ). In its 1975 advisory opinion, the Court concluded Morocco had no "legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory" (para. 129, 162).[7] The Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (hereinafter, POLISARIO) is the internationally recognised national liberation movement representing the indigenous people of Western Sahara. In part through the self-proclaimed Sahrawi Arab Democratic Republic (hereinafter, SADR), it has been campaigning since its creation in May 1973 in favour of independence through a referendum on self-determination to be supervised by the UN. A war broke out between POLISARIO and Morocco and Mauritania following these two neighbouring countries' invasion in November 1975 and lasted until an UN-sponsored cease-fire was agreed sixteen years later, in 1991, with the deployment of a MINURSO tasked to organise the referendum.

Today, the population of Western Sahara is geographically divided between the territory under Moroccan occupation, the refugee camps near Tindouf in Algeria, and the diaspora in exile in Europe, mainly in Spain. Exact figures vary depending on sources, but it is believed that 510,713 people lived in the territory of Western Sahara (including Moroccan settlers) based on the Kingdom's latest census of 2014,[8] and an estimated 173,600 refugees in Algeria as of 31 December 2017 according to a 2018 census-like report issued in March 2018 by the UN High Commissioner for Refugees (hereinafter, UNHCR).[9] At the time of writing, the people of Western Sahara have yet to express their right to self-determination through popular consultation or any other means, whether or not agreed between the parties. The conflict therefore remains unresolved since the 1991 cease-fire and has been described as "frozen" (Fernandez-Molina & Ojeda-Garcia 2019,

[7] *Western Sahara* (1975), Advisory Opinion, I.C.J. Reports 1975, p.12 §129, §162 available from https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf
[8] Royaume du Maroc, *Population Légale Des Régions, Provinces et Prefectures du Royaume Par Milieu, d'Après Les Résultats Du RGPH 2014 (16 Régions)*, 8 avril 2015, available from https://rgph2014.hcp.ma/downloads/Resultats-RGPH-2014_t18649.html
[9] UNHCR Official Report, *Sahrawi Refugees in Tindouf, Algeria: Total In-Camp Population*, March 2018, available from https://www.usc.gal/export9/sites/webinstitucional/gl/institutos/ceso/descargas/UNHCR_Tindouf-Total-In-Camp-Population_March-2018.pdf

86). The General Court and the Court of Justice of the European Union (hereinafter, CJEU), have recently reaffirmed the legal status of Western Sahara as a non-self-governing territory (hereinafter, NSGT), set by the UN in 1963 following the last transmission of information on Spanish Sahara by Spain under Article 73 *e* of the UN Charter. These courts have rejected any claims of sovereignty by Morocco by confirming Western Sahara's distinct status.[10] Yet, the majority of the territory has remained under Morocco's military and administrative control since the late 1970s.

In October 2022, although no referendum on self-determination had yet been organised, the UN Security Council (hereinafter, UNSC), unanimously extended the mandate of MINURSO for the 59th time since its creation in 1991, once again without a human rights monitoring or reporting component.[11] This was despite the fact that abuses have been committed by the two parties to the conflict according to reports from major international NGOs (Amnesty International 2019; Human Rights Watch 2019) and the UN Secretary General's annual reports on the situation in Western Sahara, which include a section on human rights.[12] As a result of the stalemate in the referendum process in the last two decades, the people of Western Sahara - through POLISARIO, Sahrawi civil society and following the lead of international human rights NGOs (Fernandez-Molina 2016, 68) - have started to pinpoint the absence of human rights monitoring prerogatives for MINURSO. Indeed, following the rejection by Morocco of the UN-arranged Peace Plan for Self-Determination of the People of Western Sahara (known as Baker Plan II) and the complete suspension of UN referendum preparation activities in 2003, Morocco's proposal for autonomy of the territory under its sovereignty in 2007 crystallised the stalemate. Baker Plan II had envisioned a four or five-year transitional power-sharing between an autonomous Western Sahara Authority and the Moroccan state before the organisation of a self-determination referendum in which the entire population of the territory could

[10] Front Polisario v Council of the European Union, CJEU Case C-104/16 P (21 December 2016) available from http://curia.europa.eu/juris/document/document.jsf?text=&docid=186489&doclang=EN and WSCUK v Commissioners for HMRC, Secretary of State for Environment, Food and Rural Affairs, CJEU Case C-266/16 (28 February 2018), available from http://curia.europa.eu/juris/document/document.jsf;jsessionid=12651D5C50A963F787523ECC0EEBD2CA?text=&docid=199683&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7698162

[11] UN Security Council resolution S/RES/2654 (27 October 2022) available from https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/660/40/PDF/N2266040.pdf?OpenElement

[12] UN Secretary General report S/2022/733 (3 October 2022) on the Situation in Western Sahara – Part V Humanitarian activities and Human Rights available from https://minurso.unmissions.org/sites/default/files/sg_report_october_2022_0.pdf

decide on its final status – including an option for independence. It was 'supported' by the UNSC in resolution S/RES/1495[13] and reluctantly accepted by POLISARIO but rejected by Morocco.

Subsequently, the push for including human rights monitoring components (hereinafter, HRMC) in MINURSO's mandate gained greater momentum following the November 2010 events in Gdeim Izik. That November 8, a protest camp established by Sahrawis near Laayoune (capital of Western Sahara) was dismantled by the Moroccan police. The camp had been set up a month earlier in protest of the ongoing discrimination, poverty, and human rights abuses against Sahrawis. In the dismantling of the camp, gross human rights violations were reported. This episode revived the international community's interest in the situation of human rights in Western Sahara and therefore strengthened the demand by Sahrawi activists to extend the mandate of MINURSO to monitor human rights (Fernandez-Molina 2015, 243). Such extension was close to being achieved in April 2013, when an UNSC resolution drafted by the US unprecedentedly incorporated this novelty, although later removed. This failed venture remains to date the most serious attempt to add human rights monitoring mechanisms to MINURSO (Fernandez-Molina 2016, 70-71). Supporters of any such amendment to the mandate face the opposition of Moroccan officials who hold that it is not the *raison d'être* of the mission and that it could jeopardize the negotiation process. It therefore appears necessary to assess whether this demand for extension would indeed contribute to advance the conflict towards a peaceful resolution and strengthen peacekeeping practice or rather antagonise the parties further. In this context, a study that will empirically establish why MINURSO constitutes an anomaly as a post-Cold War UN PKO lacking human rights monitoring provisions, examining what this anomaly entails – or is perceived to entail – in terms of conflict (ir)resolution outcomes, is of significant importance.

Research questions and relevant scholarly debates

[13] UN Security Council resolution S/RES/1495, (31 July 2003), available from https://digitallibrary.un.org/record/499978?ln=fr

The research project will therefore examine the following primary question: *To what extent and why is Western Sahara/MINURSO an outlier case in terms of human rights provisions in UN peacekeeping operations?*

Amongst the four operations currently deployed that are totally deprived of human rights monitoring components or even general human rights prescriptions (UNFICYP in Northern Cyprus, UNIFIL in Lebanon, UNDOF in the Israeli-Syrian sector and MINURSO), MINURSO stands out as not having attained its purpose through the organisation of a referendum. In parallel, among the missions that did organise popular consultations or referendums (namely UNTAG in Namibia and UNAMET in East Timor), all had some sort of human rights oversight mechanism stemming from their mandates. This research intends to understand the extent to which the absence of human rights monitoring components is an anomaly in today's peacekeeping practice. It will further examine the reasons for this anomaly in the case of MINURSO and how international law can contribute to peacekeeping and conflict resolution. These are questions that concern the relationship between international law and international politics, in order to bring the analysis beyond the traditional power politics arguments which feature prominently in the literature on the Western Sahara conflict. Indeed, realist theories are mainly used to explain the conflict resolution process current deadlock at the UNSC as well as the consequent failure of MINURSO to succeed in its mandate. Realist theories rely on the idea that politics are fundamentally about shifting dynamics of competition for power. The permanent absence of a global government and overarching legal system able to supress conflict is the emphasis of realist thinkers (Cunliffe 2020, 32). Yet, international law is also invoked to justify or strengthen certain positions and is part of the way political power is used or limited (Koskenniemi 2011, 50). In the case of Western Sahara, two of the permanent and veto-holding members never had a real interest in facilitating self-determination. The US, in a context of Cold War and post-Cold War, favoured stability in Morocco and the region, while France maintained a strong post-colonial link with the Kingdom, which later translated into extensive economic and financial ties (Zoubir 2007, 168; Zunes & Mundy 2010, 143). The chief legal response to the challenges faced by realists' theories is the reconceptualization of the relationship between international law and politics (Slaughter-Burley 2001, 152). Rather than viewing international law and power

politics as antagonist forces, the thesis will view them as co-constitutive elements of conflict (ir)resolution in the case of Western Sahara by collecting and assessing empirical evidence demonstrating the role of international law in a specific conflict.

The role that human rights protection can play in peacekeeping and conflict resolution in general is part of wider debates regarding the theorisation of peacekeeping in international relations (hereinafter, IR). As Bures pointed out, most studies have analysed the design, conduct, and outcomes of individual PKOs, while paying relatively little attention to analysing the concept of peacekeeping itself (Bures 2007, 407). The thesis does not intend, however, to make a substantive contribution to IR or provide a normative IR dimension. It will, instead, question the coherence of the current peacekeeping mission procedure in the UN documentation whereby the inclusion of enforceable components of human rights monitoring is dependent on the UNSC, by including a legal analysis of the matter. Yet, asserting MINURSO as an anomaly in peacekeeping in this regard should not constitute the limit of scholarly engagement with peace operations.

Alongside peacebuilding, peace-making and peace enforcement, peacekeeping forms part of the broader policy field of conflict resolution. As a conflict resolution tool, peacekeeping would benefit from being studied on the basis of theoretical and empirical developments in the broader field of conflict resolution (Fetherston 2000, 192). This is apparent in three ways in this thesis. Firstly, peacekeeping operations no longer represent simple instruments of conflict control or conflict management on a limited term basis. In the case of MINURSO, the deployment of the mission had managed to curtail hostilities on the ground for nearly thirty years but has not led to any political solution being found and contributed to the maintenance of the status quo (which includes a breach of international law, namely, annexation of a NSGT). Therefore, its analysis – not only as an institution but rather, as an actor in the wider context of a territorial dispute and conflict resolution process - can show how conflict resolution can fail when conflict management can - even partially - succeed. Secondly, the analysis of MINURSO further explains how conflict management can stand in the way of conflict resolution and tell us about the transformative nature of conflict resolution in

theory. Thirdly, this study allows for the assessment of the coherence of the collective security system of the UN Charter in the achievement of two major objectives of the United Nations: the maintenance of international peace and security, and respect for human rights. It is clear from the UN Charter that the protection of human rights is perceived to be essential – as well as a purpose - to its work generally, and to the maintenance of international peace and security in particular. Both the Charter's preamble and article 1(3) express such importance.[14] This has translated into efforts to incorporate specific mechanisms regarding human rights into PKO mandates in a more systematic manner since the end of the Cold War. This study ultimately intends to show the extent through which, the UN succeeds in merging this dual objective of protecting human rights (conflict management) and maintaining peace (conflict resolution) through peacekeeping operations.

Consequently, a set of sub-questions derive from the main research question: To what extent can international law contribute to the debate between conflict resolution resolvers and human rights practitioners? And what does the deviance from the norm in the case of MINURSO imply in terms of conflict (ir)resolution outcomes?

Aims and objectives

This research project has both an empirical and a normative-legal dimension. Firstly, it aims to establish to what extent and why MINURSO is an outlier case in terms of human rights provisions in peacekeeping practice. A related research objective will be to explore whether actors and observers perceive any relationship between this absence of explicit human rights components in MINURSO's mandate and the (ir)resolution of the Western Sahara conflict through the expression of the right to self-determination of the people of the territory. Secondly, based on legal doctrine and legal analysis methodology, it will explore the ways in which this absence of explicit language in the mandate is or can be remedied in practice. The general normative-legal aspect of human rights components in UN PKOs beyond the case of MINURSO will be examined in order to ascertain the potential existence of a norm of customary international

[14] United Nations, *Charter of the United Nations*, (26 June 1945), 1 UNTS XVI, available at https://treaties.un.org/doc/publication/ctc/uncharter.pdf

law requiring such components to be included systematically, regardless of the political positions dominating the UNSC (PKO-mandating authority). By establishing the emergence of such a norm, the thesis will therefore be able to reveal the highly atypical nature of MINURSO, with lessons for organisation-wide policy and practice.

The aim of the research is not to explain why human rights protection is an emancipatory element to conflict resolution and should be part of peacekeeping practice systematically. It is rather to place the anomaly of MINURSO (and non-monitoring of human rights in general) in a wider context of peacekeeping scholarship using a critical approach. More precisely, it is to explain why MINURSO is a remarkable case in a context where the UN increasingly places protection of human rights at the heart of conflict management and conflict resolution. It is, additionally, to understand whether this absence of human rights monitoring components has any consequence or perceived consequence for the conflict resolution in Western Sahara.

As a result, rather than a disciplinary contribution to IR and IR theory – which is beyond the scope of this research – what will be at stake here is the intricate relationship between international law and international politics, as illustrated by the bi-dimensional empirical and normative-legal approach chosen. Both fields of study are equally relevant in the examination of this particular conflict. Therefore, the research project seeks to be inter-disciplinary as the legal aspect will help contribute to the wider political and IR debates. In evaluating the benefits of human rights policies through a legal interpretation, this research could potentially help in enhancing the diplomatic process and moving it forward, and therefore improve the situation for the people of Western Sahara.

Originality and contribution of the research

This research project aims to make an original contribution to the scholarship concerning the human rights/peacekeeping connection as well as the Western Sahara conflict. A clarification ought to be made with regards to the nature of MINURSO as a subject of research. As case study research on a specific mission, the main contribution of this thesis relates to the knowledge and understanding of MINURSO as an institution. Firstly, the literature review on the

Western Sahara conflict - from the dozens scholarly volumes and policy documents, to the archival and public statements of particular States - reveals that it not only lacks media coverage, but that academic research and scientific publications are also scarce (Errazzouki 2013).

Among the major scholarly works on the Western Sahara conflict, Zunes & Mundy's (2010, 2022) offers a thorough analysis of the tasks of MINURSO and the failed venture in identifying voters and organising the referendum, yet making no mention of the actual or potential role that human rights monitoring, or the absence thereof, would have played in the process. The apparent ease of politicization (often partial) rather contributed to isolating the analysis of the conflict in Western Sahara from the wider literature in various fields of study, encouraging a disciplinary concentration in the areas of international law, international relations and, to some extent, anthropology as detailed in the literature review. Only a handful of publications have tackled the specific question of human rights protection in MINURSO (Durch 1993; Chopra 1994; Capella Soler 2011; Khakee 2014; Ruiz Miguel & Blanco Souto 2020; Torrejon Rodriguez 2020). In the first academic volume focusing on MINURSO and comprehensively addressing all aspects regarding the mission, which has only been published in December 2022 (Besenyo, Huddleston & Zoubir, 2022), only a single chapter is dedicated to the issue of human rights and the political implications of the human rights issue in the conflict. As the literature on PKOs in general has not addressed the anomaly of the Western Sahara case and the (sparse) literature on the conflict itself simply has not approached questions of human rights, especially from a more legal angle (with the exception of the right to self-determination); this research aims to add substance to both fields of study.

Secondly, and as far as the normative-legal analysis is concerned, this research project is the first comprehensive study focusing on the human rights aspect of the MINURSO as a UN peacekeeping mission and the first to explore the legal argument whereby human rights monitoring is already possible based on customary international law. The legal analysis does not cover the continuing absence of such a mandate, but rather, the obligations that the UN has for such decision to amend the mandate. The idea that the most powerful obligations toward human rights monitoring in PKOs are also those of an *erga omnes* duty

incumbent upon the UN (i.e., as obligations owed towards the community of States as a whole, therefore not requiring the explicit incorporation in a PKO mandate) has never been explored in a scholarly context.

Beyond an analysis of the mission as an institution, the thesis will lastly provide an examination of MINURSO as a tool of conflict resolution process, i.e., as an aspect of a wider self-determination and territorial dispute. As such, its main contribution is to enrich the current academic debate between advocates of two distinct approaches to the peaceful settlement of disputes: human rights protection and conflict resolution. Members of the latter group focus on achieving a negotiated settlement to a conflict with minimum human losses and fail to give sufficient weight to the relevance of human rights issues to the long-term success of their work. One the other hand, the former group undervalues the pressures under which mediators and other intermediates operate to bring an immediate end to the violence (Lutz, Babbitt & Hannum 2003, 173). The study of MINURSO and the examination of a perceived relationship between human rights protection, peacekeeping and successful conflict resolution by the main actors involved offer a perspective on how the two fields interact.

An initial review of the literature on the human rights-conflict resolution relationship indicates that over the years the debate has come from postulating a direct, inherent tension between the two, to recognizing a more complementary relationship. The literature reveals that, since the war in the former Yugoslavia, the idea that the normative-legal nature of human rights standards may complicate the practical demands of peace-making has been a recurrent theme in discussions on the relationship between human rights and conflict resolution. However, over time, human rights have come to be considered as important in the generation, manifestation, resolution, and prevention of violent conflict (Parlevliet 2009, 4). The release of the UN's Brahimi Report in 2000 followed by the events of 9/11 – perceived as a defining moment in thinking about international security and the nature of the international system – have fostered the discourse and literature of peace operations (Johnstone 2005). As such, all attempts by the UN to institutionalise human rights in peacekeeping were carried out after the year 2000.[15] By determining whether the absence of human rights

[15] Namely, the OHCHR Manual on Human Rights Monitoring (2001); the UNSG Report on "Strengthening of the UN: An Agenda for Further Change" (2002), the Memorandum of Understanding between DPKO and OHCHR (2002), the DPKO "Handbook on UN Multidimensional Peacekeeping Operations" (2003), the Capstone Doctrine (2008), the Human Rights

components in the case of Western Sahara constitutes an anomaly in UN peacekeeping, the analysis will provide insights to both human rights advocates and conflict resolution practitioners, who, at times, adopt contradictory approaches to the same problem. This research will offer a fresh perspective on the UN peacekeeping approach, which currently seems to be lacking consistency with regards to the role of human rights reporting and protection components.

Methodology

In a first instance, the research will address the question of the extent to which, and why Western Sahara/MINURSO is an outlier case in terms of human rights provisions in peacekeeping operations. It therefore focuses on MINURSO and the Western Sahara conflict using the single case study methodology. Additionally, the research will be conducted on the basis of classical social sciences methods for empirical analysis - which includes primary sources and semi-structured interviews – as well as doctrinal legal research methods based on primary and secondary sources.

Firstly, the reasons behind the use of a single case study research are multiple. Situations or examples selected for case study analysis are identified by their distinct status, and their choice involves a consideration of the "cross-case characteristics" of a group of potential other cases (Gerring 2007, 12). From a comparative perspective, Western Sahara can be considered a deviant case for various reasons. Firstly, it is a conflict where a referendum on self-determination in a context of decolonisation has not taken place as expected, in contrast to the similar cases of Namibia and East Timor. Secondly, the case of Western Sahara remains also a prime case of unresolved or "frozen" conflict for which both the UNSC and the UN General Assembly (hereinafter UNGA) Fourth Committee on Decolonisation are mobilised. Lastly and most importantly, it is managed by a UN PKO for which no human rights components have been added unlike the rest of 'new generation' operations set up after the end of the Cold War. This anomaly is the specificity on which this thesis focuses. Beyond the exploratory aim of using the single case study, the purpose of using the case of MINURSO is to outline

Council Resolution 9/9 on the "Protection of Human Rights of Civilians in Armed Conflicts" (2008) and the UN Secretariat "Human Rights Due Diligence Policy on UN Support to non-UN Security Forces" (2011).

and explain the contradictions and shortcomings in the UN peacekeeping practice. As “an empirical enquiry that investigates a contemporary phenomenon in depth and within its real-life context” (Yin 2009, 14), a single case study on MINURSO allows for a thorough analysis of the complex nature of human rights components in peacekeeping operations. The purpose of the research being to explain “why” MINURSO stands as an outlier case in the field of human rights and peacekeeping, it calls for a case study method. Indeed, a “why” question is being asked about a contemporary set of events. Such questions deal with the tracing of operational processes over time, rather than mere frequencies or incidence. Finally, as a single case study cannot lead to the conclusion of universal truth, the aim of this research is not to generalise the potential causal mechanisms between the non-monitoring of human rights on conflict resolution from this particular case, but rather to challenge current theories and doctrine regarding the role that human rights components play in peacekeeping and conflict resolution. Contrasting the lessons from the case study analysis with the prevailing explanations of power politics in Western Sahara can also probe new ways for achieving conflict resolution in this particular case.

Secondly, given the two-fold dimension of the project, a selection of different methods will be adopted to collect and analyse information, namely:

(i) empirical dimension; and
(ii) normative-legal dimension.

(i) Answering the research question requires a scene-setting exercise regarding the UN human rights approach to peacekeeping. Empirical evidence of the role of human rights in the UN’s approach to the Western Sahara conflict in general and the operations of MINURSO in particular will also be required. Therefore, I firstly establish the legal framework of human rights components in UN peacekeeping. I will secondly assess whether human rights language (including monitoring, protection, and promotion) is totally absent from the mechanisms in place in MINURSO/Western Sahara and the extent to which this constitutes an exception. I do this through a qualitative document analysis focusing on references to human rights used in relevant UN documentation regarding peacekeeping on the one hand and MINURSO on the other. This allows me to

evaluate the importance given to human rights in peacekeeping and conflict resolution in general, and Western Sahara/MINURSO in particular.

Additionally**,** semi-structured interviews have been conducted with twenty-two UN officials and national diplomats involved (or, to the extent possible, previously involved) at the UNSC and MINURSO level in the drafting of resolutions related to the functioning of the mission and its renewal as well as representatives from international, Moroccan and Sahrawi organisations dealing with human rights. The former were interrogated on what they see as the reasons behind the use or non-use of human rights clauses and language and its relevance to resolving the conflict. The latter were asked about the impact that their work has had on the actual monitoring of the situation on the ground regarding human rights violations and the impact of this work on the negotiation process. Thirty-nine individuals had been contacted for the purpose of this exercise: six declined to participate, while eleven did not provide any response. The interviews were conducted between May 2019 and April 2021. These interviews aimed at mapping the current debate around the issue of HRMC and how the main actors justify their absence and potential introduction. There has also been a 'displaced' activity regarding human rights monitoring in Western Sahara from intergovernmental structures onto other actors like NGOs. Arguably, this involvement in human rights questions by other actors enables UN agencies to avoid the problem: if third party observers and organisations are to take ownership of human rights protection in Western Sahara, how can such capacity be enhanced while avoiding its relinquishment by MINURSO? The interviews helped to better understand these dynamics and the rationale behind the use of human rights issues particularly given that negotiations behind closed doors are a common practice in the context of mandates renewal and UNSC negotiations. In sum, while the textual analysis mentioned above aims at detecting the presence and nature of human rights issues in the MINURSO mandate, the semi-structured interviews help identify their role and implementation in practice.

(ii) In order to explore the potential strengthening of UN peacekeeping deployments through a re-writing of the mandate or its re-interpretation, I apply a doctrinal legal research method using the primary sources of international law: treaties; custom; general principles of law; jurisprudence and scholarly writing.

The unprecedented review of the existence of a norm of customary international law requiring a systemic inclusion of human rights monitoring to peacekeeping operations is performed using this methodology. Going further, the idea that the most powerful obligations toward human rights monitoring in PKOs must include or account for the *erga omnes* duty incumbent on the UN organisation and the international community as a whole, can also be explored. Theoretically, this would mean that States are to support non-self-governing peoples to attain self-determination no matter how the relevant peacekeeping operation is performing as the ICJ suggested in 2004.[16] In this regard, the notion of self-determination itself is being reconsidered in the light of this conflict. Not only does the protection of human rights seem to have an impact on the resolution of a conflict, but the dynamics of a dispute can influence the reformulation of a basic principle of human rights law. This examination outlines the paradox of safeguarding human rights in a case of self-determination, where the parties accept some possibility of an elected political independence for a people, but less or even not at all their protection in order to reach this outcome. Western Sahara is a situation which predates the current sensitivity about the role of human rights components in PKOs.

To conclude, the study will rely upon a multimodal research method which will include qualitative analysis of documents and semi-structured interviews. All sources will serve to provide essential background on the core research questions, shed light on the current relevance of the topic and provide several points of view through which I can fully analyse the origins and holistic effects of human rights observation and reporting in peacekeeping missions and conflict resolution in the case of Western Sahara.

Structure

The first chapter will outline the current state of play regarding the debate on the integration and role of human rights components in UN PKOs in the relevant literature. It will address the extent to which these questions have been discussed and what was their outcome(s). Chapter two will present an overview of the existing literature on the conflict in Western Sahara and MINURSO with a

[16] ICJ, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, (9 July 2004), available at: https://www.refworld.org/cases,ICJ,414ad9a719.html §155, 156 & 157

particular focus on the issue of human rights components in its mandate. The empirical analysis is then addressed in four subsequent chapters. Here, chapter three will set out the necessary historical elements to understand the background against which MINURSO has come to be analysed as an anomaly. Chapter four will focus on establishing the framework regarding human rights components in PKOs within which the UN has attempted to set norms and policies. This will help demonstrate the uniqueness of MINURSO and the relevance in using this case in highlighting the fragility of the UN peacekeeping system. Chapter five will analyse the evolution of the human rights language in documents related to MINURSO and the conflict in Western Sahara. The aim is to put into perspective, through qualitative document analysis, the human rights approach in the UN system and its practice in peacekeeping deployment regarding this particular conflict. Finally, based on data collected from interviews, chapter six aims at establishing a perceived connection between the absence of human rights monitoring and the wider conflict resolution process from stakeholders involved (or previously involved). As far as the legal/doctrinal analysis is concerned, chapter seven will evaluate the now-arguable existence of a norm of customary international law whereby human rights components should automatically be integrated into UN PKOs mandates. The recent practice by the UNSC in deploying operations with built-in human rights monitoring and protection mechanisms and the belief that such practice is necessary through their institutionalisation at the UN level (as seen in chapter four) will pave the way for this analysis of a legal nature.

Part I - Literature review

The role of human rights monitoring and protection mechanisms in conflict resolution in general and UN peacekeeping missions in particular has been addressed in the academic literature at different levels. Following the major failures in the mid-1990's of the UN missions in the Former Yugoslavia, Somalia and Rwanda not only to protect the rights of innocent civilians but worse still, to prevent the perpetration of genocides, much commentary has been made on the assessment of the UN's capacity to equip its personnel and mandates with the necessary tools in order to fulfil their missions, and beyond, to limit the repercussions of armed conflicts and widespread violations on civilians. The effort to situate the study of peacekeeping in broader international relations theory started with the emergence of a new generation of PKOs (Barnett 1995; Debrix 1999, Kertcher 2016) and so does the apparent commitment of the UN to formalise the role of human rights in conflict resolution and peacekeeping beyond the broad conceptual approach established in the UN Charter. The aim of this first part of reviewing the literature will be to identify the key concepts on which this PhD research will be based on and to establish the state of play in the current academic literature around them. UN interventionism in conflict resolution, the operational framing of the conceptual notion of "robust mandates" and the effect(s) of human rights promotion and protection in UN peacekeeping operations (PKOs) are all part of a wider debate between human rights activists who tend to promote justice, and conflict resolution practitioners, leaning towards seeking peace.

This research project explores the extent to which MINURSO constitutes an anomaly in modern peacekeeping, the assessment made by scholars on the successfulness of modern PKOs with regards to human rights issues, as well as the weaknesses of the UN conflict resolution system in pursuing its goals. The literature review will therefore provide the scholarly background required in order to assess the current state of play and pave the way for an informed analysis of the impact of human rights components of PKOs, or their absence thereof, on the resolution of conflicts, with a particular focus on those related to self-determination.

The territory of Western Sahara was the latest addition to the UN list of non-self-governing territories in 1963 in order for Spain to ensure its decolonisation and

remains to this day the only one without an acknowledged administering power and with a PKO still in operation. MINURSO was established by UNSC resolution 390 of 21 April 1991 with both a military and political component (to monitor the cease-fire between the belligerents and to organise a referendum on the future of the territory respectively). It is, nonetheless, currently deprived of the ability to formally monitor and report human rights violations in neither the Western Sahara territory controlled by Morocco, nor the Sahrawi refugee camps in Algeria (Zunes & Mundy 2010, 149; Capella-Soler 2011, 8; Khakee 2014; 457; Torrejon Rodriguez 2020, 52), and is the only post-Cold War UN multi-dimensional peacekeeping mission in this situation (Soroeta Liceras 2009, 853; Torrejon Rodriguez 2020, 52) as will be demonstrated in chapter four of this thesis.

This literature review will therefore be divided into two chapters. Chapter one will look into the literature on human rights and UN peacekeeping in the context of the classical debate between human rights advocates and conflict resolvers - serving as a background for this thesis - and identifying the gaps that this research will intend to fill. Chapter two will focus on the case of Western Sahara and the limitations of research conducted on this specific question of human rights.

Chapter 1. Human rights in UN peacekeeping and conflict resolution: A lack of shared consensus

A number of questions arise from the literature review of the human rights issue in conflict resolution. For instance, what is the role of human rights provisions in peace agreements? Or, does more attention to human rights matters make it more likely for a peace agreement to be successfully implemented and sustained? Answers to these questions may nourish the wider debate at the centre of this thesis: is maintaining "international peace and security" always compatible with "promoting and protecting human rights" in situation of armed conflicts?

The concept of peacekeeping, referred to by the UN as one among a range of activities undertaken in order to maintain international peace and security throughout the world, emerged with the adoption of the UN Charter, but paradoxically, does not explicitly appear in such document. It has mostly evolved through practice over time and so did the relevant literature on this topic. The end of the Cold War and the ideological confrontation between the two superpowers opened the door to a so-called 'new world order' based on the ideals of solidarity among members of an organised international community and the respect for human rights (Berdal 1995, 228; O'Flaherty 2004, 2; Fortna & Howard 2008, 284; Parlevliet 2017, 334). Human rights have therefore figured prominently in the debates around conflict management and resolution instruments post 1990. On the other hand, there is consensus among observers that the UN has failed to prevent human rights violations and the perpetration of genocides, war crimes and crimes against humanity in the mid-1990s, and a review of its peacekeeping mechanism has been much required since then (Hannum 2006, 28; Berdal & Economides 2007, 17; Nsia-Pepra 2014, 8). This inability to protect civilians at all levels while on the ground has put into question the effectiveness of the operational doctrine of UN contemporary peacekeeping with regards to human rights (Hannum 2006; Nsia-Pepra 2011, 2014; Popovski 2015). This has caused the literature to become more methodologically rigorous in its assessment of peacekeeping, while the recommendations as to how its shortcomings should be remedied have gone in various directions. The growing recourse to PKOs after the end of the Cold War has also allowed for an increase in the generation of data

concerning peace missions' deployment and therefore more accurate assessments of their "effectiveness" (Sandler 2017, 1876). Simultaneously, the conceptual framework in which the study of peacekeeping has evolved has progressively taken into consideration theories of international relations with a more constructivist outlook such as sociological institutionalism. These theories have allowed for analyses that go beyond the mere evaluation of outcomes, highlighting the risk of losing the potential strength of a much broader sociological understanding of peacekeeping (Fetherston 2000, 193).

This chapter will lay out the relevant academic contributions that address the question of human rights in their scholarly analysis of the UN peacekeeping system. It will firstly seek to establish the conceptual framework of UN peace operations by putting forward a definition of the notion of peacekeeping for the purpose of this research, distinguishing this term from those of peace-making, peace enforcement and peacebuilding (1.1) before addressing recent debates around peacekeeping and international relations (thereinafter, IR) theory (1.2). This will be followed by an examination of the wider human rights/conflict resolution debate (1.3), before looking specifically into UN peacekeeping in practice and the notion of robustness of mandates (2.1). Finally, the role of the specific UN bodies dedicated to the protection and promotion of human rights (the Office of the High Commissioner for Human Rights, hereinafter OHCHR) and the deployment of PKOs (by the UNSC) will be weighed in light of the relevant discussions (2.2).

Section 1 The concept and context of peacekeeping

Section 1.1 Peacekeeping, peace-making, peace enforcement and peace building

In the absence of reference to the notions of peacekeeping, peace-making, peace enforcement and peacebuilding in the UN Charter, definitions and conceptualisations can abundantly be found in the academic and policy literature. Some authors have even identified as many as seven (Demurenko & Nikitin 1997) or twelve (Diehl, Druckman & Wall 1998, 38-40) different types of peace operations including the four mentioned above. The UN's Capstone Doctrine, issued in 2008, added the concept of 'conflict prevention' as one of the peace

and security activities alongside which peacekeeping was characterised and defined (Bellamy & Williams 2010, 15). These concepts have evolved over the years to accommodate for the reality on the ground and reflect the emergence of different generations of UN PKOs.

Attempts were made at different levels to remedy the absence of definition of peacekeeping in the UN Charter at an early stage. The second Secretary General (hereinafter, UNSG) in the history of the UN, Dag Hammarskjold, famously described peacekeeping as "chapter six and a half" in reference to the improvised operational practice of chapters VI (pacific settlements of disputes) and VII (actions with respect to threats to the peace, breaches of the peace and acts of aggression). Around three decades later in 1984, the International Peace Academy provided, in its "Peacekeepers' Handbook", a broad conceptual definition, which had already considered the use of PKOs in intrastate conflicts ahead of their expansion following the end of the Cold War. The Academy described peacekeeping as "the prevention, containment, moderation and termination of hostilities between or within States, through the medium of a peaceful third-party intervention organised and directed internally, using multilateral forces of soldiers, police and civilians to restore and maintain peace" (Diehl 1988, 487). The definition of peacekeeping has clearly changed over time, adapting to its practice. For instance, the 1990 edition of the Blue Helmets (UN's review of operations) refers to "international" peace and security (not foreseeing at the time the possibility to intervene in intrastate conflicts) and observes that peacekeeping personnel are deployed "without enforcement powers" (United Nations 1990, 4).

A decade after the attempt by the International Peace Academy, Goulding provided a more detailed definition in the academic literature and referred to peacekeeping as a set of "field operations established by the United Nations, with the consent of the parties concerned, to help control and resolve conflicts between them, under United Nations command and control, at the expense collectively of the member States and with military and other personnel and equipment provided voluntarily by them, acting impartially between the parties and using force to a minimum extent necessary" (Goulding 1993, 455). It is to note that his definition would exclude any peacekeeping operations by non-UN

actors. Continuing in the academic literature, for Diehl, peacekeeping is “the imposition of neutral and lightly armed interposition forces following a cessation of armed hostilities, and with the permission of the state on whose territories those forces are deployed, in order to discourage a renewal of military conflict and promote an environment under which the underlying dispute can be resolved (Diehl 1994, 13). On the policy level, former UNSG Boutros-Ghali’s *Agenda for Peace* also made an attempt to formalise the notion of peacekeeping operations alongside ‘preventive diplomacy’, ‘peace-making’ and ‘peacebuilding’ as one of several ways third parties can contribute to peacefully settle disputes. He defined peacekeeping as “the deployment of a UN presence in the field, hitherto with the consent of all the parties concerned, normally involving UN military and/or police personnel and frequently civilians as well. Peacekeeping is an activity that expands the possibilities for both the prevention of conflict and the making of peace” (Boutros-Ghali 1992, §20). In 2010, Williams emphasised on the protection of civilians as one of the main tasks of peacekeepers (Williams 2010, 12). More recently, Salvatore and Ruggeri have defined peacekeeping more simply as “one of the main conflict management tools used by the international community to restore or safeguard peace and security”, although this definition does not provide distinctive characteristics (di Salvatore & Ruggeri 2017).

As far as peace-making, peace enforcement and peace building are concerned, each concept has also even been defined in the literature and distinguished from that of peacekeeping. Peace-making and peace enforcement operations can be identified as the only operations automatically involving the use of military force (Sandler 2017, 1879) and generally “concerns the use of limited force until the noncooperative party is defeated or agrees to a peace agreement” (Fortna & Howard 2008, 291). Peace building operations are also believed to be generally more complex as they entail a long-term commitment to nation and institution building post-conflict (Dorussen & Gizelis 2013, 693; Di Salvatore & Ruggeri 2017, 4). Remmert provides a definition for “peace missions” in an attempt to encompass the typical attributes given in the literature and include all four definitions into one. He therefore refers to an “organisation that is established by an international organisation with the purpose to maintain or enforce peace in an area of active, imminent or prior armed conflict and that establishes a physical presence in that area for a limited amount of time” (Remmert 2019, 74). The

Department of PKOs (hereinafter, DPKO) was only created in March 1992 and made responsible for the planning, management and direction of PKOs on the ground. Interestingly, since the 1 January 2019, this UN Secretariat branch is now called Department of Peace Operations (hereinafter, DPO) therefore accommodating for these evolutions and considering the overarching notion of peace operations, which would include the making, enforcing, keeping and building of peace, encompassing all types of peace operations. The UN does not consider these to automatically occur in a sequential way and that they should be mutually reinforcing as will be discussed in chapter four.

For the purpose of this study, a definition of peacekeeping based on its most recurrent features will be retained in order to better understand and argue meaningfully about the issue in question: peacekeeping refers to the deployment by the UN (i) of multinational or single state of military, police and civil personnel (ii) onto a territory where peace and security are under threat or breached (iii), with the consent of the parties (iv) and entitled to resort to the use of force for self-defence purposes or any other situations permitted under the mission's constitutive mandate (v) aimed at implementing a cease-fire or a peace agreement (vi). Over time, peacekeeping has moved from "traditional" tasks that include cease fire, troops withdrawals and disarmament monitoring to providing humanitarian assistance, human rights and elections monitoring and assisting more generally with the rebuilding of judicial institutions (Fortna 2004, 270; Fortna & Howard 2008, 285; Doyle & Sambanis 2006, 14). The inclusion of these new features of peacekeeping that go beyond the mere military intervention to stop violence between the belligerents has raised more ideological and theoretical questions in the broader conflict resolution field of study, which will be addressed in the next section.

Section 1.2 UN peacekeeping and international relations theory

While this PhD thesis does not aim to contribute to IR and IR theory from a disciplinary perspective, it is helpful to examine how this field has approached (UN) peacekeeping in order to better situate the general and case study analysis provided below'. The latest and most comprehensive contribution to the scholarly analysis of UN peacekeeping within the wider spectrum of international relations

theories was released in 2020 ("United Nations peace operations and International Relations theory" edited by Oksamytna and Karlsrud). In their publication, the contributors make clear that there has been a tendency to orient the study of peacekeeping towards evolution of outcomes rather than connecting it with the broader IR scholarship, which partly explains why it is under-theorised (Maertens 2020, 150). This has recently changed however, as a result of two trends: political scientists' increasing interest in using peacekeeping as a fertile ground for testing and developing IR theories and peacekeeping scholars paying more attention to the connection between their work and the broader IR literature (Oksamytna & Karlsrud 2020, 2). Summarily put, the book examines a series of theories that have either been applied to the study of peacekeeping (realism, social institutionalism, constructivism and practice theories) or should be further developed in order to shed more light on peacekeeping practice (liberal institutionalism, rational choice institutionalism and critical security studies). Realist theories have principally attracted the most interest from scholars. There is indeed a fairly extensive literature on case studies of peacekeeping instrumentalised by major powers. These cases have drawn attention to fundamental realist elements such as power, interest and power politics (Stuenkel 2014; Kenkel & Cunliffe 2016). Although, all the theories developed in the publication could be applied, to an extent or another, to the study of MINURSO, one stands out as being particularly relevant: social institutionalism - or "organised hypocrisy" (Krasner 1999, 65; Lipson 2007, 6).

An attempt to insert the study of UN peacekeeping within the IR theory of social institutionalism had been made earlier. It was first conceptualised by Krasner in 1999 and later refined by Lipson in 2007. Lipson explained the inconsistencies between principles and practice in UN peacekeeping with the idea that organisations respond to conflicting pressures in external environments through contradictory actions and statements (Lipson 2007, 18). It is therefore a response to conflicting material and ideational pressures. Lipson believes that the conditions for organised hypocrisy's development are present in UN peacekeeping practice. Therefore, reform efforts such as the issuance of the Brahimi report can be put into question from the perspective of this theory, which suggests that actors "must honor, perhaps only in talk, certain norms but at the same time act in ways that violate these norms" (Krasner 1999, 65-66).

Social institutionalism can indeed provide some useful insight in order to understand and/or explain the apparent contradictory and inefficient behaviour that is being observed in MINURSO. Because it emphasises the powerful influence of social context on political actors (von Billerbeck 2020, 93), it justifies looking from the inside in order to identify and understand the institutional characteristics that allowed the contradictory behaviour, inefficiency and failures (the fact that the UNSC remains the ultimate decision-maker in dealing with human rights protection in the context of peacekeeping is a prime example of how the institutional environment gives rise to contradictory behaviour in practice). A sociological institutionalist framework can be applied to understand the UNSC's persistent refusal to explicitly incorporate human rights monitoring mechanisms into MINURSO's mandate, despite the importance given at the normative level. One can therefore ask whether the addition of human rights monitoring components should be based on a cost-effective achievement of objectives stated in the mandate (even only perceived), or, as sociological institutionalists would argue, on the necessary alignment of UN peacekeeping practice with the norms, principles and self-image of the UN as an institution. Human rights principles are embedded in the UN Charter and serve as boundaries of the organisation's institutional environment. Their presence in PKOs as full components is not simply one amongst various possible approaches to PKO but has been elevated to the status of a principle of peacekeeping in the UN (as explained in chapter four), and, going further, fall within the remit of customary international law (as argued in chapter seven).

MINURSO has never been the subject of a doctoral case study analysis, even less so to provide insight into the broader analysis of PKOs as a conflict resolution tool using any kind of IR theory. The application of IR theories to the study of UN peacekeeping appears to be attracting more interest. Scholars from both fields – political science and peacekeeping studies - are sharing knowledge and practice and the focus on MINURSO can help grow the literature even further.

Section 1.3 Human rights and conflict resolution: complementarity or disjuncture

The question of incorporating new tasks focusing on human rights into peacekeeping mandates falls within the underlying debate between human rights practitioners and conflict resolvers. This debate quickly revealed, for the most part, contrasting methods and perspectives. Indeed, when both fields have been considered in conjunction with one another, this has generally been done to demonstrate "how imperatives of peace and justice are – or can be – in conflict with one another" (Parlevliet 2002, 1). Challenges and dilemmas often arise from situations in the field for organisations and individual practitioners (Lutz, Babbitt & Hannum 2003, 173). Nevertheless, Lederach argues that, capturing stakeholders' choices in "rigid either/or terms" between protecting human rights and resolving conflicts can have serious limitations (Lederach 2003, 52).

There seems to be however an emerging consensus in the literature as to the importance of adding human rights provisions into conflict resolution processes (Parlevliet 2002, Lutz, Babbit & Hannum 2003, O'Flaherty 2004; Mansson 2005, Hannum 2006, Maus 2010; Alizadeh 2011), even a 'responsibility' to do so (Babbitt 2009, 9). Most of the debate rests on the ways with which human rights have to be incorporated at an operational level. Lutz et al have explored the synergies and tensions between human rights and conflict resolution at the practitioners' level. They have outlined the shared dilemma of balancing short term and long-term goals (Lutz, Babbit & Hannum 2003, 184) but recalled the various approaches and methods used in conflict resolution before violence breaks out, during the violent conflict and after a settlement is in place (Lutz, Babbit & Hannum 2003, 185-191). Babbit expresses this disjunction in the theory and practice of human rights and conflict resolution recalling that both share similar norms (participation, empowerment, equity and security), which translates variously into practice (Babbitt 2009, 4). Alizadeh proposes a "three-pillar strategy" on how to realise human rights protection and promotion at national and regional level in the context of OHCHR field presence with some perspective on conflict situations (Alizadeh 2011, 835).

For her part, Parlevliet has written extensively on the relationship between human rights and conflict resolution, with her approach to the latter shifting from conflict "management" to conflict "transformation". According to her, the notion of conflict transformation "addresses the wider social, political and cultural sources of

conflict and hence does not only focus on addressing the behavioural and attitudinal manifestations" (Parlevliet 2015, 379)- thus accommodating the analysis of protracted conflicts, relevant to this research (Parlevliet; 2002, 2011, 2015 & 2017). She has outlined the interdependence between the two fields, arguing that "without a proper understanding of the human rights dimension in conflicts, conflict management is bound to be unsustainable" (Parlevliet 2002, 1). Her work has also suggested that both concepts of human rights and conflict resolution embrace concurrent realities and create challenges in practice for organisations and individual practitioners such as "addressing the symptoms or causes of rights abuses and violent conflict or referring to rights violations in conflict resolution processes" (Parlevliet 2015, 214). Overall, her analysis has provided significant insight into the relationship between human rights and conflict resolution. It notably pointed out to the dilemma of balancing short term and long-term imperatives by arguing that "it is possible to contribute to immediate relief and long-term change at the same time" (Parlevliet 2015, 216). This is made possible by incorporating elements of human rights protection (such as creating safe spaces for dialogue) into conflict resolution strategies and vice versa (for example encouraging mediators to discuss the root causes of violations despite the immediate risk of jeopardising parties' willingness to engage). However, Parlevliet's work does not specifically refer to PKOs – one of the means to achieve a peaceful settlement of a conflict. It mostly covers the implication of human rights related issues on conflict transformation as a phenomenon, rather than on peacekeeping as a mechanism.

Parlevliet's substantial research outlines the role of state, no-state and inter-state (such as the UN) actors without providing further details on the roles, obstacles, strength/weaknesses or approaches that each can develop, face or overcome. Therefore, although extremely relevant in order to understand the current debate around the inter-connection between both fields, her analysis does not take into consideration the fragile normative framework nor the political impediments that UN peacekeeping mechanisms face at the UNSC. Nevertheless, some of her findings do point towards the role of peacekeeping, humanitarian relief and human rights monitoring when classifying "interventions in conflict situations according to the types of human rights abuses that they target and the objectives they seek to achieve" (Parlevliet 2011, 388).

In line with Parlevliet's views on integrating human rights and conflict resolution, Babbitt recalls Galtung's early evocation of the notion of "positive peace" and the necessity for conflict resolution processes to go beyond the mere cessation of violence. She observes that "the integration of human rights principles into conflict resolution processes is a critical way to build pathways toward such positive peace" (Babbitt 2009, 2). More relevant to this research, she also suggests that the promotion of human rights norms can "provide a source of leverage to identity groups who feel oppressed or victimised by discrimination" and therefore fuel grievances which can turn into potentially violent conflicts in a weak or fragile state.

Within the policy-oriented literature, a series of publications by the Aspen Institute has specifically focused on the operational challenges confronting UN PKOs in protecting and promoting human rights (Henkin 1995, 1998, 2003). The latest edition follows the publication of the 2000 "Brahimi" report on the review of the UN peacekeeping system and builds up on the experiences in Bosnia, Kosovo and East Timor to provide concrete policy recommendations, translating the theories of human rights and conflict resolution into a multidimensional practice. The Institute advocates in this regard "a less ad hoc and more institutionalised approach to human rights field work in peace operations" (Henkin 2003, 17). Going further, the issues of applicability and enforcement of international human rights law to PKOs has also been addressed in the literature, including the idea that a rigid compartmentalisation of UN efforts in conflict resolution "will render the search for human rights solutions […] limited" (White & Klaasen 2005, 246). The cross-cutting research conducted on the connections between human rights and conflict resolution have provided necessary elements of the doctrinal framework within which one can discuss the benefits of incorporating human rights language/components into peacekeeping mission mandates. This aspect has featured sporadically in the literature and is the object of the following section.

Section 2 The practice of peacekeeping

Section 2.1 Human rights and UN peacekeeping operations: towards more robust mandates?

The literature on peacekeeping operations generally is abundant. Despite their multiple tasks, this literature has not particularly focused on the question of human rights in these operations. It is nevertheless essential to restore the state of the literature on the issue. The theorical importance of human rights in specific mechanisms of peacebuilding, peacekeeping and peace enforcement does appear in primary sources such as UN resolutions, reports, guidelines and UNSGs' discourses. However, the reality on the ground as well as the complexity and politicization of the UN system have turned the theory into a convoluted practice. This has also nourished a large part of the literature addressing the relationship between peacekeeping missions and human rights issues towards, either, the human rights violations and abuses performed by UN personnel in operations (Verdirame, 2011; Uddin 2014; Hirschmann, 2017), or the applicability of international human rights law (hereinafter, IHRL) to them (Shraga, 2000; McInnis, 2007; Gicela Bolanos, 2015; Whittle, 2015). This section will present the work and findings from the lead authors on the question of human rights and peacekeeping. It highlights the reasons behind their recent emergence, the complexity of the relationship between the two notions and the creation of a new generation of PKOs and the notion of "robust" mandates. It also provides an evaluation of the concept of "effectiveness" of PKOs and international territorial administration (hereinafter, ITA) present in the literature and required in order to understand the wider debate of this thesis.

It is only after the end of the Cold War that the literature has witnessed an enlargement in research dealing with human rights protection within UN PKO. As pointed out by Parlevliet, "it has taken so long for human rights issues to be explicitly accepted on the agenda in peace process" (Parlevliet 2002, 14). This has been mainly the consequence of two phenomena: the use of force in PKO mandates in cases other than self-defence and the multi-dimensional nature of these operations, as well as the publication in 1996 by an Anonymous author in the *Human Rights Quarterly* journal accusing the international human rights movement of prolonging the war in Bosnia by refusing to support deals that could have ended violence but were deemed inadequate by them (Anonymous; 1996, 259). Mansson adds that "only as the international climate of the post-Cold War era made the insertion of human rights provisions in UN peacekeeping mandates

politically acceptable, did academic as well as political communities seriously initiate a discussion about human rights functions-as well as malfunctions-of UN peacekeeping" (Mansson 2005, 396). Since then, the idea that the normative nature of human rights standards may complicate the practical demands of peacekeeping has been a recurring theme in discussions on the relationship between human rights and conflict resolution and PKOs.

Many authors have recalled the importance of the existence of human rights protection among the various tasks of peacekeeping operations (Boutros Ghali 1992, 120; Mubalia 1997, 169; Petit 2000, 216; Katayanagi 2002, 7; O'Flaherty 2004, 58; Williams 2010, 10) and parallelly, a lack of proper acknowledgment in practice of this importance (Maus 2010, 81). Some have identified a paradigm shift in the philosophy of UN peacekeeping following the end of the Cold War and an adapted approach to peace extending beyond mere military concerns. On the ground, this materialised in the shift from "interpositional missions" between States to multidimensional missions tasked with institution building, economic development and a host of other political or social functions (Tardy, 2010; Koops, MacQueen & Williams 2017). It thus appears that human rights occupy a central place in the maintenance of peace. In sum, the literature highlights the role of human rights in peacekeeping operations as both a catalyst and a brake. Catalyst because human rights violations are often at the origin of the establishment of peacekeeping operations; and a brake because the sensitive issue of human rights violations can cause difficulties in peace negotiation processes (as is the case in Western Sahara).

To this end, thorough research conducted by Bell (2000), Putman (2002) and O'Flaherty (2004) has shown that human rights issues and conflict resolution interact in multiple ways and that the positive impact from one to the other is not systematic. All their work has revealed that the simple invocation or addition of human rights components to peacekeeping operations is not likely to automatically impact the peace negotiations in a positive way or help achieve a sustainable agreement. Katayanagi adds that for these human rights monitoring functions to be effective in multifunctional PKOs, strong legal documentation should constitute the base of the mandate and investigation and monitoring of human rights violations should be supplemented with institution-building

prerogatives (Katayanagi 2002, 224; 259). Therefore, over time, human rights have come to be considered as important in the generation, manifestation, resolution and prevention of violent conflict (Parlevliet 2009) but remain an object of debate among scholars. O'Flaherty has given particular attention to this specific question of integrating human rights components into PKOs in his research. As a practitioner, he has provided valuable insight into the existing shortcomings in the normative as well as operational frameworks, including in peace operations settings, as evidenced by a 2007 publication under his direction on the law, theory and practice of human rights field operations. He has confirmed the lack of shared doctrine (O'Flaherty 2004, 50) and examined how human rights components have developed as a tool in conflict resolution (O'Flaherty & Davitti 2014) and how a human rights field sector has emerged over time (O'Flaherty 2004, 54; O'Flaherty & Ulrich 2010, 5; O'Flaherty & Davitti 2014, 6).

Grey areas have been identified concerning the implementation of PKOs on the ground, including the applicability of human right law and the efficacity of human rights protection in PKOs (Howe, Kondoch & Spijkers 2015, 18). Only a handful of authors have addressed in depth the specific question of human rights components in UN PKOs, their lack of operational coherence and the necessity to create a clear and articulate strategy. In light of O'Flaherty's work described earlier, Maus highlights both the importance of human rights components in PKOs as well as the shortcomings when these are actually included (mainly the lack of funding and resources, rare priority over other goals of the mission, absence of guidelines). She insists on the ad hoc treatments currently being given to these components and the risks it entails on the overall benefits of a mission. As a remedy, she proposes the establishment of a new legal regime of human rights *post bellum* (Maus 2010, 77). However, this attempt to rectify the fragmentary institutionalisation of human rights in PKO does not provide a solution for missions that are deprived of human rights language in their mandate. This is particularly relevant for the case study of MINURSO/Western Sahara and will be addressed in chapter four of this thesis. For her part, Mansson reveals that human rights protection mechanisms in PKOs already existed in some ways during the Cold War in the form of the "protection of civilians, delivery of humanitarian assistance and the maintenance of law and order" (Mansson 2005, 379). She therefore suggests that implicit human rights prerogatives in UN peace

operations exist and emerged long before the end of the Cold War. Her analysis allows the establishment of an in-depth examination of the question of the necessary existence of explicit mechanisms for the protection of human rights in the UN PKOs at a normative and operational level. Both authors fall short of addressing the question of whether their absence impact the resolution of a conflict.

In parallel, and following the mid 1990's disasters, the relevance of "traditional" peacekeeping has been questioned (Griffin 2001, 150). The idea of making the UN peacekeeping more "robust", principally through the use of force, emerged in the 2000 Brahimi report issued at the demand of the then UNSG Kofi Annan in order to assess the UN's role in ensuring international peace and security, and has since generated much commentary among observers (Tardy; 2010, Sloan; 2011, Nsia-Pepra; 2011, 2014; Tardy & Wyss 2013; Engell & Jacobsen 2019). While arguing that simply adding a mandate to use force to make a PKO "robust" and protect human rights more effectively has been described as politically and operationally problematic (Popovski 2015, 35), very few have commented on the potential necessity of systematically including human rights monitoring mechanisms in PKOs in order to successfully achieve the tasks they were created to carry out (White & Klaasen 2005; Mansson 2005, Maus 2010, Howe, Kondoch & Spijkers 2015).

This understanding of "effectiveness" of PKOs has been discussed extensively in the literature as well. Firstly, it has been noted that each type of operations can be the subject of a different type of assessment (Bertram 1995, 387). Sandler identifies three key sub-debates about the assessment of successfulness of PKOs: number of criteria, selection bias and temporal scale and concluded that "most of the effectiveness literature relies on a single criterion" (Sandler 2017, 1891). Consequently, most authors have based their determination of the effectiveness of PKOs on a single criterion: achieving or maintaining peace for a set period of time (Diehl, Reifschneider, & Hensel 1996; Doyle and Sambanis 2000, 2006). Some have used the limitation or prevention of the number of casualties (Nsia-Prepa 2011; Salverda 2013; Hultman, Kathman, & Shannon 2013; Bove & Ruggeri 2019) differentiating battle-filed from civilian casualties (Valentino et al 2004; Eck and Hultman 2007; Nsia-Prepa 2011). Their analyses

have been made possible, as the dependant variable (civilian killing) can be easily quantified/numbered, and all the studies mentioned did not use the "mere" violations of human rights - symptoms of violent conflict and unresolved disputes - as a variable.

Moving from ending violence to bettering the conditions of peace has only recently emerged in the empirical literature on peacekeeping (Di Salvatore & Ruggeri 2019, 8). The most relevant piece of research regarding the impact of peacekeeping on interaction between conflicting parties regarding human rights dates back to 2013 (Dorussen & Gizelis 2013). Nevertheless, some have argued that multiple criteria can be necessary in order to perform a thorough evaluation on the successfulness of contemporary peace operations, especially in the post-conflict and capacity/institutions building phases (Diehl & Druckman 2010, 2013, 2006). The same authors have used the very goals of PKOs as criteria for assessment: maintain peace, organise free elections, achieve disarmament, monitor cease-fire etc, and one has specifically identified the mandated aims of the mission as the main criterion (Brown 1993). In line with Brown's approach, the UNSC has recently declared that "the Security Council expects full delivery of the mandates it authorises".[17] As an example, Mansson describes the UN mission in the Congo as one of the most successful peacekeeping operations undertaken by the UN on the basis "that it fulfilled the tasks it had been entrusted with in Resolution 169 of 1961" (Mansson 2005, 385).

Despite that, as Sandler outlines, using these as criteria raises the problem of hierarchy among them and a sound multiple-criteria measure of PKO effectiveness remains to be developed, this very assessment of effectiveness will be retained for the purpose of this research. In the case of MINURSO, this translates into asserting that the mission failed in fulfilling its "essential aim" in organising the referendum on self-determination, despite keeping the cease-fire intact for nearly 30 years. Further pieces of research support the validity of this assessment of failure based on the analysis that peacekeeping decreases the chances of settlement when such processes are already under way (Greig & Diehl 2005), the importance of local populations' expectations of the mission

[17] UN Security Council resolution S/RES/2406, on the situation in South Sudan, (15 March 2018), §11, available from https://digitallibrary.un.org/record/1477529?ln=en

(Diehl & Druckman 2010) and, if the belligerents were to take up arms again, peacekeeping success depends on the capacity to prevent conflict renewal (Diehl 1988). These aspects are all relevant when it comes to Western Sahara and come as “supporting criteria” in the assessment of the (un)successfulness of MINURSO.

The connection between the successfulness of a PKO in a given conflict and its category/composition has not been empirically researched in depth at the time of this research. In order to fill a normative void in the absence of such an institutionalised mechanism of checks and balances at the PKO level, the literature has revealed however, the concept of administration of territories by international organisations as an alternative to peacekeeping. It has increasingly been considered as an emerging legal regime post-Cold War and a credible attempt to identify an enforceable human rights protection mechanism (de Wet 2004; White and Klaasen 2005; Tzouvala 2019). The role that international organisations, such as the UN, can play in human rights protection and promotion within the framework of international territorial administration (ITA) has been documented in the past two decades, particularly following the war in the Former Yugoslavia and the cases of Kosovo or that of East Timor (Wilde 2001, 599; Ratner 2005, 697; Wilde 2010, 78; Tzouvala 2019, 3). This question is especially interesting in the case of Non-Self-Governing Territories like that of Western Sahara, which is currently under no lawful territorial administration.

Section 2.2 The coordination between the UNSC and the OHCHR

Several publications have addressed political, legal or institutional issues linked to the integration of human rights components into different phases of UN peace operations (White & Klaasen 2005, Murphy & Mansson 2013). However, few have focused their analysis on the overall impact of their incorporation on the achievement of a PKO’s mandate (Henkin 1995, 1998, 2003). Out of all the UN offices and departments, it is argued that the OHCHR should play a primary role on the ground, within (O’Flaherty 2004, 49; Hannum 2006, 4) or outside the framework of peacekeeping missions through pre-deployment training and field offices (Horowitz 2010, 30). This relationship has been pencilled in the 1999 Memorandum of Understanding between OHCHR and Department of

Peacekeeping Operations (DPO), updated in 2002 but, as suggested in the same document, further collaboration – particularly with the Department of Political Affairs (DPA) – is required (Oswald, Durham & Bates 2010, 181-184). In this regard, some writers have rightly outlined the inconsistent manner in which the UN establishes its human rights presence in conflict situations: special human rights advisors or rapporteurs, OHCHR field offices or human rights observers and officers within PKOs (Moeckli & Nowak 2007, 86; Horowitz 2010, 37).

Hannum (2006) outlines the importance of exploring options within the UN system as a whole, in order to remedy the potential lack of human rights protection in peacekeeping. Hannum was looking particularly at the role of OHCHR in UN peacekeeping, peace-making and peacebuilding. Having interviewed staff members of OHCHR and the DPA, he was able to show how human rights were perceived as a threat to diplomatic flexibility. He notes that "human rights *per se*, have rarely been considered by conflict resolution analysts as relevant to reaching/implementing viable peace agreements" (Hannum 2006, 46). Yet, in the case of peacekeeping, Guidotti argues that a lack of compliance with a set of basic principles - outlined by OHCHR - by human rights officers on the ground may run the risk for the mission of losing its credibility (Guidotti 2016). This however applies to UN missions which contain human rights components in their mandates. No research has been done on the credibility of UN missions which lack a human rights monitoring section. Hurst Hannum's research on the role of OHCHR in PKOs outlines the importance for the Office to "draft a set of guidelines or model provisions for insertion into peace agreements that will define the mandate of post settlement human rights monitoring" (Hannum, 2006, 127). He however insists that specific circumstances may dictate different approaches.

The theoretical and operational balance between a sound and reliable human rights monitoring component and an effective peacekeeping operation is of utter importance given the variety of observations being made in the literature. The underlying question that prevents the establishment of a solid doctrine on human rights monitoring in peacekeeping is simple: should the responsibility of promoting and protecting human rights fall under the UNSC? The answer to this question would come from a careful evaluation of the relevant balance given between the mandate of a peacekeeping operation under the UNSC and that of

a field operation under OHCHR. The rising focus on human rights in the conflict in Western Sahara, especially in POLISARIO's negotiation strategy, can be perceived as an illustration of the overall debate on human rights components implementation in PKOs. MINURSO being currently deprived of such entitlements, the request by Sahrawi representatives, civil society and international organisations in general to modify the mandate, raises pertinent questions on the relationship between human rights and conflict resolution. The Western Sahara case will consequently serve as a base for evaluation of the current debate's questions and draw proposals for concrete answers. It is therefore essential to look next into the literature on this specific conflict, with a focus on the issue of human rights.

Chapter 2. The Western Sahara conflict, MINURSO and the emerging human rights issue

In spite of its longevity (over four decades) and complexity, the conflict in Western Sahara has not been the subject of extensive academic interest, and not always unbiased. Its scholarly analysis paradoxically offers a wide range of perspectives (from law to politics, anthropology, journalism, geography, forced migration studies etc) and relatively scarce academic sources. This multi-disciplinary aspect of the topic has yet offered very little cross-field and inter-disciplinary research (San Martin 2010) such as this thesis. Nearly 20 years passed between two publications in English of comprehensive reports of events on the conflict between 1983 and 2004 (Hodges 1983 and Shelley 2004). Therefore, the conflict not only lacks media coverage, but it also lacks academic and scientific publications as mentioned previously (Errazzouki 2013). The uniqueness of the case and the apparent ease of politicization (often partial) rather contributed to isolating its analysis from the wider literature in various fields of study, encouraging a disciplinary concentration in the areas of international law (Kingsbury 2018; Pinto Leite 2007; Ponce de Leon 2012; Ruiz Miguel 2013, 2018; Smith 2015, 2019; Soroeta Liceras 2014; Torrejon Rodriguez 2020), international relations (Durch 1993; Fernandez-Molina 2015, 2016, 2017, 2019; Khakee 2014; Mundy 2006, 2010; Ojeda-Garcia 2015, 2016; Zoubir 1996, 2010, 2018; Zunes & Mundy 2010, 2022) and, to some extent, anthropology (Drury 2018; Isidoros 2018; Wilson 2010, 2012, 2014). In addition, the historical attachment of territory to Spain and involvement of Morocco limit most of the research studies to the Spanish and French language (Ojeda-Garcia, Fernandez-Molina & Veguilla 2017, 4). Additionally, the first comprehensive publication solely addressing MINURSO, its functioning, composition, legal and geopolitical background, relationship with the African Union, the EU, the USA, China or France, as well as the human rights question within its mandate was only published in December 2022 (Besenyo, Huddleston & Zoubir, 2022). Consequently, an up-to-date review of the relevant literature on the conflict with a focus on human rights issues is needed in order to situate the case of Western Sahara in the broader conflict resolution literature, which, more often than not, tend to neglect the “last colony in Africa”.

The inter-disciplinary approach and multi-level analysis only came to light in recent publications. In *Global, Regional and Local Dimensions of Western Sahara's Protracted Decolonization: When a Conflict Gets Old* (Ojeda-Garcia, Fernandez-Molina & Veguilla 2017), the 22 contributors offer for instance, indispensable elements for a thorough examination of the dynamics of the conflict. The case's historical process has widely been discussed, but gathering interrelated views of its 'global, regional and local dimensions' was an original and needed endeavour. The conflict has been described as "frozen" (Fernandez-Molina 2019; Zoubir 2010) and the reasons behind this protractedness have been researched in academic (Durch 1993; Seddon 1994, 1999; Ziai 1996; Sola Martin 2006; Chapaux 2010; San Martin 2010; Zoubir 2010; Boukhars & Roussellier 2014) and non-academic publications (Shelley 2004; Theofilopoulou 2010). More specifically, very few publications have dedicated their entirety to the issue of human rights in the MINURSO mandate and its potential impact on the peace process. The most comprehensive ones comprise a think tank paper (Capella-Soler 2011) and two academic articles in the field of politics (Khakee 2014) and law (Torrejon Rodriguez 2020). This human rights aspect of the conflict and the UN mission in Western Sahara has not been extensively researched nor analysed other than the reports issued by national and international organisations specialised in reporting human rights violations globally. It seems that it has emerged as an issue that POLISARIO, Sahrawi civil society and international human rights organisations have pushed as a result of the stalemate in the referendum process. The fact remains that, questions over the successfulness (as discussed in the previous chapter) of MINURSO were raised early in the literature (section 1), while the anomaly regarding human rights in MINURSO has been acknowledged more widely (section 2).

Section 1 The failure of MINURSO and scholarship on the conflict in Western Sahara

MINURSO was established by resolution 690 adopted on 29 April 1991 by the UNSC in accordance with the settlement proposals (the so-called Settlement Plan) accepted on 30 August 1988 by the two parties to the conflict, i.e. Morocco and POLISARIO. This plan, the content of which is detailed in the UNSG report

of 18 June 1990[18], had arranged for the appointment of a Special Representative by the UNSC, the declaration of a cease-fire and the organisation of a referendum. In fact, the introduction of the document clearly specifies that "the essential aim of the proposals […] is to enable the people of the Territory of Western Sahara to exercise their right to self-determination and independence" in accordance with the relevant UN resolutions and as detailed in the proposals. To assist in this "essential aim" of organising a referendum on self-determination, a cease-fire was to be declared and a Special Representative appointed. The referendum would be organised in cooperation with the Organisation of African Unity (hereinafter, OAU) and would allow for the people of the territory to choose between independence and integration into Morocco. The plan also envisaged the creation of an Identification Commission "responsible for carefully and scrupulously reviewing the 1974 census and updating it".[19]

Interestingly, in *Understanding Peacekeeping*, the authors described MINURSO's sole purpose as being in charge of organising a "referendum on independence from Morocco" (Bellamy & Williams 2010, 98) or to "supervise referendum" (Bellamy & Williams 2010, 144). Therefore, as no referendum has been organised, while MINURSO is still in place, it can be considered that it has failed to fulfil its "essential aim". Deep concerns regarding the lack success of MINURSO in organising the referendum on the future of the territory were expressed as early as in 1996 by the UNSC (S/RES/1042) and the UNSG (S/1996/343) when the latter advocated the withdrawal of the voter identification team of MINURSO. International NGOs had already sent out alarm signals that very same year on the failure to protect human rights during the process. In April of that year, Amnesty International noted that "MINURSO has been a silent witness to the blatant human rights violations in Western Sahara and has failed to ensure the protection of the most basic human rights".[20]

However, few academic and media observers had anticipated MINURSO's moving towards a deadlock already at the time of the conflict. Those who did, mostly used the terms "delay" and, to a lesser extent, "failure" to describe the

[18] UN Secretary General report S/21360 on "The Situation Concerning Western Sahara", (18 June 1990) available from https://digitallibrary.un.org/record/94688?ln=en
[19] Ibid., note 4.
[20] Amnesty International, Human Rights Violations in Western Sahara, 18 April 1996, MDE/29/04/96, available from https://www.refworld.org/docid/3ae6a99313.html

situation in Western Sahara (Durch 1993, 154; Seddon 1994; Rucz 1994; Ziai 1996; Hughes 1996; Zoubir 1996). As a pioneer, William Durch, in an article written back in 1993 had recommended for the mission to be terminated only two years after its official deployment given the unlikelihood of a referendum being organised. He outlined that the unwillingness on both parts to compromise was striking and that in the case of MINURSO, "compromising and loss are seen to produce similar political outcomes" (Durch 1993, 169). It is not until the late 1990's and early 2000's that the perception of "failure" started to become widespread and accepted in the literature on the conflict as proper evaluations of the achievements of the mission started to be conducted (Seddon 1999; Sola-Marin 2005, 2006). The "winner-take-all" nature of the referendum offering either independence or integration to Morocco is often put forward as one of the reasons why the mission has failed to fulfil its essential aim (Zunes & Mundy 2010, 170; Theophilopoulou 2006, 15; Jensen 2005, 45). The geopolitical and operational aspect of the reasons behind the failure to organise a referendum on self-determination has been widely prioritised in all the publications already mentioned. The case of MINURSO has increasingly been used as an example of UN incompetence through the media (New York Times 1995, 2016; The Guardian 2001; Washington Times 2013), Human Rights Watch reports and among MINURSO representatives themselves. Frank Ruddy, former Deputy Chairman of the MINURSO Identification Commission testified in 1995 before the United States Congress on this incompetence.[21]

The reasons behind this failure may by multiple, but most of the researchers, observers and experts on the topic have privileged the power politics surrounding the resolution of this particular conflict (Zoubir, 1993; Ziai, 1996; Zunes & Mundy, 2010; Sola-Martin, 2015). For instance, Sola-Martin's research focuses on two main reasons for the failure of MINURSO to organise the referendum: power politics on one hand and bias on the other. He argues, based on Galtung's concept of negative peace, that the only successful aspect of the mission is the promotion of negative peace or the absence of physical violence (Galtung, 1976), which arguably is the reason PKOs were created in the first place. For him, due to the multi-dimensional aspect of peacekeeping missions after the Cold War

[21] "Review of United Nations Operations and Peacekeeping", (25 January 1995) available from http://www.arso.org/06-3-1.htm

increasingly impacting the political environment of a given territory, the influence of third parties and their interest in the outcome of the conflict played a major role in sustaining the uneven balance of power between Morocco and POLISARIO. The ease with which the successive UNSGs have accommodated to Morocco's demands are the reflection of this shift in MINURSO's transformative role and the cause for its failure (Sola-Martin 2006). He mainly evokes UNSG's decisions to postpone the holding of the referendum due to Morocco's reluctance to accept the list of voters updated by the UN on the basis of the 1974 Spanish census (Sola Martin 2006, 50), the UNSG's inaction against the unilateral decision by the Moroccan authorities to transfer non-indigenous population to the territory in violation of the Settlement Plan (Sola Martin 2006, 59) or Boutros Ghali's appointment as former Foreign Minister of Egypt with a strong pro-Moroccan stance casting doubts on his impartiality when criticising only POLISARIO's positions (Sola Martin 2006, 65; Zunes & Mundy 2010, 197).

Debates on MINURSO's failure have also been encouraged by comparisons with similar cases of conflict and UN involvement. On the one hand, the review of publications on Western Sahara indeed shows that a substantial number of academics, diplomats and practitioners who showed interest in this conflict had already been involved in some capacity in researching and resolving the conflict in East Timor (Pinto Leite, Secretary of the International Platform of Jurists for East Timor and Hurst Hannum, Legal Consultant to the UN on East Timor or Special Representatives Colin Stewart and Wolfgang Weisbrod-Weber for instance). The similarities between both conflicts had encouraged some to think that the success (through the expression of the right to self-determination) in one (East Timor) could be duplicated on the other (Western Sahara). When East Timor declared its independence in 1999 following the proclamation of the referendum results led by the UN, some academics and practitioners have turned their interest toward the conflict in Western Sahara. According to Whitfield, "the terms of the relationship between the UN and the East Timor and Western Sahara cases were rather clear unlike that of Abkhazia for instance" (Whitfield 2007, 188-189). Additionally, the case of Western Sahara has often been used as an example in publications on self-determination alongside that of East Timor (Castellino 2000; O'Leary et al 2001; Walter et al. 2014). Indeed, both cases involved a territorial dispute nested in a troubled decolonisation process by former

European colonial powers (Portugal and Spain respectively), which involved annexation by third countries (Indonesia for East Timor and Morocco for Western Sahara). In both instances, the UN deployed a mission to supervise a referendum on self-determination (UNAMET and MINURSO).

Further comparisons have been made in the literature between the case of Western Sahara and that of Namibia. Nonetheless, however similar the case of Western Sahara may be to that of Namibia, Durch notes, that analogy does not hold as MINURSO in Western Sahara was designed to intervene at an earlier stage of the political process (Durch 1993, 169). Despite acknowledging the common framework of postponed decolonisation processes, Durch does not mention MINURSO's lack of human rights components once, nor does Siekman in his piece on *The Development of the UN Law concerning Peacekeeping Operations* (Siekman 1992), which illustrates the little importance given to such an issue at the time when referring to the UN mission in Western Sahara. Other parallels can be drawn in that Morocco's annexation of the territory – like that of South Africa or partly, Indonesia - was not recognised by the organised international community (Smith 2015, 16) until former US president Trump's proclamation of December 10, 2020. The possible comparison made between both cases and that of Western Sahara has become more relevant in light of the discussion around the exploitation of natural resources (Smith 2015, 2) and many have used the evidence from the cases of Namibia and East Timor in their argumentations regarding the situation in Western Sahara (Smith 2015, 14, 16; Wrange 2020, 11, 23, Smith 2019, 511). This particular issue of natural resources has actually recently revived the literature on the conflict in Western Sahara in light of the recent major decisions by the Court of Justice of the European Union (CJEU) of December 2016, February 2018 and September 2021.[22]

Section 2 The controversy over MINURSO's mandate and human rights monitoring

[22] Front Polisario v Council of the European Union, CJEU Case C-104/16 P (21 December 2016) available from http://curia.europa.eu/juris/document/document.jsf?text=&docid=186489&doclang=EN ; WSCUK v Commissioners for HMRC, Secretary of State for Environment, Food and Rural Affairs, CJEU Case C-266/16 (28 February 2018), available from and Cases T-344/19 and T-356/19, *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) contre Conseil,* [2021].
http://curia.europa.eu/juris/document/document.jsf;jsessionid=12651D5C50A963F787523EC C0EEBD2CA?text=&docid=199683&pageIndex=0&doclang=EN&mode=lst&dir=&occ=fir st&part=1&cid=7698162

In resolution S/RES/2654 of 27 October 2022, the UNSC unanimously extended the mandate of MINURSO for the 59th time since its creation in April 1991 without any human rights monitoring and/or reporting components and no support from the OHCHR.[23] The absence of human rights in the mandate of MINURSO is a prime example of this lack of consistency between the theory and practice of human rights monitoring in peacekeeping. However, this case is rarely mentioned in the literature on human rights and PKOs reviewed above in chapter one. Worst still, some have mistakenly stated that new generations of PKOs – deployed right after the end of the Cold War - now all include human rights monitoring mechanisms (Ntsama Balla 2013). Also, the case of MINURSO appears to be an exception to the general trends whereby, in Africa, "government authorities are less likely to contest UN multidimensional peacekeeping, while rebel authorities are more likely to contest peacekeeping", and "governments as well as rebels are more likely to contest efforts to address human rights" (Dorussen & GIzelis 2013, 692). This is in fact proven not to be the case for MINURSO as Moroccan authorities are more reluctant towards the addition of human rights protection mechanisms to the mission than POLISARIO (as chapter five reveals). Needless to say, that the anomaly in MINURSO's mandate occasionally outlined by researchers (Soroeta Liceras 2009, 853; Capella Soler 2011, 8; Torrejon Rodriguez 2020, 52), combined with the poor media coverage of the conflict can explain the lack of scholarly analysis in the broader field of research. None actually intend to identify whether any link exists between the current status quo and the initial absence of human rights components in MINURSO. *Au contraire*, it seems that the issue of human rights has mostly emerged in the last two decades or so, which coincides with several events: the rejection by Morocco of the Baker Plan II and complete suspension of referendum activities in 2003, Morocco's proposal for autonomy in 2007 (thus crystallising the stalemate) and the 2010 events in Gdeim Izik and associated human rights violations. These explain why explicit demands for MINURSO's activities to include monitoring of human rights only surfaced recently.

Therefore, the absence of human rights monitoring in the MINURSO mandate as a factor favouring or hindering conflict resolution has consequently only started

[23] Ibid., note 11

to emerge scarcely as an issue during the 2010's. As an example of the lack of attentiveness to the issues of human rights in this conflict, Durch's early paper discussing MINURSO's political origins and operative mechanisms and how it was failing to do its job as planned only mentions the term "human rights" once in the footnotes (Durch 1993, 152). Thereupon, the specific issue of human rights in the Western Sahara conflict has been addressed sporadically in the context of certain aspects of the conflict: Sahrawi nationalism (Darbouche & Zoubir 2008, 102; Zunes & Mundy 2010, 150), resistance (Fernandez-Molina 2015, 245) or denunciation of Morocco's presence in the territory under international law (Smith 2020, 44), diplomatic management of the conflict (Fernandez-Molina 2013, 2015) or its international trade dimension (Soroeta-Liceras 2009; Ruiz Miguel 2018). While some publications have focused on Sahrawi non-violent resistance (Stephan & Mundy 2006; Zunes & Mundy 2010; Dann 2014), Fernandez-Molina has highlighted the fact that this domestic non-violent activism has revived the international community's interest in human rights questions in Western Sahara (Fernandez-Molina 2015, 237) and therefore strengthened the demand by Sahrawi activists to "extend the mandate of MINURSO to monitor human rights" (Fernandez-Molina 2015, 243).

Only one author has put forward the idea that human rights monitoring or protection mechanisms were indeed originally foreseen by the Settlement Plan, causing the existence of a human rights component to be "incidental" (Torrejon Rodriguez 2020, 47). According to him, the multi-steps process through which the conflict was to be resolved never went beyond the first one: establishing a cease-fire, and had the voters' identification been completed, the monitoring of human rights in order to organise a "free and fair referendum" would have been implemented (Torrejon Rodriguez 2020, 52). His sequential analysis, however, does not provide for a broader interpretation of the law in order to understand to what extent human rights monitoring components are or should be implemented in order to move the process forward, regardless of which stage it is at, which is one of the aims of this thesis.

This uniqueness of the situation in Western Sahara related to the absence of a human rights monitoring component in the UN mission created to resolve the conflict also increases the pressure for an institutionalisation or unification of a

monitoring compliance system for all UN human rights Conventions. This debate has risen in the academic circles in the last twenty years (Clapham 2000, 175; O'Flaherty 2004; O'Brien 2007). The legal obstacles to the creation of such a unified standing treaty body (assembling all the relevant documents under one umbrella) are multiple: legal relationship between all treaties, hierarchy, enforcement authority etc. The UN's Commissioner for Human Rights, in an attempt to conceptualise this project, had listed several options to be envisaged: amendments to each treaty, overarching amending procedural protocol, umbrella convention or transfer of competencies to one of the existing human rights treaty bodies (Hannum 2006). But this goes far beyond the issue of human rights monitoring mechanisms in PKOs like MINURSO.

The apparent increasingly remote prospect for resolving the conflict in Western Sahara coupled, in the last five years, with the emergence of a jurisprudence regarding the principle of permanent sovereignty over natural resources of a non-self-governed people, have certainly fuelled the literature on the conflict and incorporated new turns of events to be taken into account regarding its underlying dynamics. This is reflected quite logically in the literature.

The purpose of this research is not to established why MINURSO has failed to fulfil its original mission or even to establish which party to the Western Sahara conflict has violated human rights the most and if and how they should be sanctioned, but rather to determine whether a relationship exists – or is perceived to be existing - between the absence of a human rights monitoring component within its mandate and the evolution of such conflict. Therefore, this research will help to fill in the gaps identified.

Conclusion

It might be difficult to apprehend it at first glance: human rights norms do not prohibit wars and violence; and wars do not necessarily violate international human rights norms *per se*. The absence of human rights monitoring in PKOs certainly challenges several of the United Nations relevant resolutions on the importance of human rights promotion and protection in conflict resolution processes. The most relevant example in that respect is the 2008 Human Rights

Council's Resolution 9/9 on the protection of the human rights of civilians in armed conflicts, and which includes 'people under foreign occupation'. The question of implementation of human rights in UN PKOs has also been highlighted in recent years with the increasing number of human rights abuses by UN personnel mandated with peacekeeping duties to the extent that the UNSC adopted on March 11, 2016 its first resolution on sexual abuse and exploitation aimed at preventing sexual violence by UN peacekeepers.[24] As pointed out by former UNSG Kofi Annan in June 2004, "it is in times of fear and anger, even more than in times of peace and tranquillity, that you need universal human rights and a spirit of mutual respect".[25] This thesis will therefore follow the words of the late UNSG and the work of Parlevliet and O'Flaherty (and others) in bringing together the fields of human rights and conflict resolution by providing evidence of the atypical nature of MINURSO as human rights monitoring mechanisms can play a part in reaching long-lasting peace agreements and resolve protracted conflicts.

Given the current state of play, the gaps identified in the literature and the patent lack of empirical analyses on the conflict in Western Sahara regarding human rights compared to other conflicts, it is appropriate to look at the interface between human rights and the UN peacekeeping in more detail. Spelling out some of the implications that a lack of shared doctrine and a differentiated understanding could have for scholars, practitioners and populations on the ground is also a necessary endeavour. As far as the implementation of human rights law is concerned, the principles of self-determination and permanent sovereignty over natural resources have grown the recent literature on the conflict in Western Sahara. In this regard, "a reorientation towards securing human rights in the region, democratisation and distribution of resource wealth, rather than ownership of the resource *per se*, is perhaps the direction in which debates and research should orientate" (White 2015, 356). Ultimately, the intended contribution of this research project is to enhance the current peacekeeping mechanisms where weaknesses have been identified and ensure that conflicts

[24] UN Security Council resolution S/RES/2272 (11 March 2016) available from https://digitallibrary.un.org/record/822976?ln=fr

[25] Press Release, Kofi Annan, (10 June 2004), Three Crises-Collective Security, Global Solidarity, Intolerance- Test UN System, US Leadership, Says Secretary-General at Harvard Commencement available from https://www.un.org/press/en/2004/sgsm9357.doc.htm

are constructively addressed in ways that uphold human rights. The findings would therefore have both theoretical and policy implications in the field.

Part II: Empirical analysis

CHAPTER 3 The conflict in Western Sahara and the genesis of MINURSO: The lessons of an outlier case?

The sovereignty over the territory of Western Sahara has been and remains the primary issue of this protracted conflict for which the international system has failed to provide a solution since the early 1960's. The UN, which was dealing at the time with a large decolonisation process throughout the world, was seized early with the "question of Spanish Sahara", with the UNGA issuing resolutions on the matter from December 1965 as will be analysed in chapter five of this thesis. However, the context in which MINURSO was created 26 years later, as well as the dynamics of the conflict and the international legal issues at stake, contributed to the singularly unique nature of this peacekeeping mission. This case is, indeed, one of particular interest in the examination of the normative framework of PKOs on the one hand, and the superposition of various sets of laws on the other hand: the law on decolonisation, international humanitarian law and international criminal law. In the case of Western Sahara, peacekeeping is a relevant example to the UN's assumption of 'exclusive' conduct of a self-determination/referendum process despite a stated willingness to integrate the OAU in the process. Reconstructing this context and highlighting the flaws in the decolonisation process prior to the 1991 deployment of MINURSO will allow for a better understanding of the UNSC's shortcomings in providing human rights protection prerogatives to the mission post-deployment.

To fulfil such objective, this chapter presents the history of the Western Sahara conflict, particularly its emergence as an object/subject of international law with respect to decolonisation, self-determination, and the United Nations' management of non-self-governing territories. It will address relevant colonial and post-colonial developments, as well as the major UN resolutions and legal opinions (from the ICJ, UN Under-Secretary Hans Corell, the CJEU and the AU). The adoption and/or issuance of such analytical works by high-ranking legal professionals contributed, in some part, to establish Western Sahara's status as an outlier – despite some contextual similarities with cases such as East Timor.

Because these decisions and opinions identify new elements in the development of international law as well as international relations, they have shaped a unique conflict prototype, which appear to be deprived of any immediate solution. The components of the conflict for which judges had to make decisions or give opinion are conducive to either the challenging of existing theories, or the generation of new hypotheses as far as conflict resolution is concerned. Indeed, some elements of what the UN calls the "question" of Western Sahara are, indeed, unprecedented and/or unmatched in the history of the UN in general, and that of peacekeeping in particular. They highlight the discrepancies between the theory and practice regarding decolonisation, self-determination, human rights protection, and peacekeeping. They also shed light on the actionable nature of certain rights and their relevant processes. These elements, which will be detailed and analysed in this chapter, lay out the reasons as to how a case like Western Sahara appears to be a radical outlier.

With this in mind, this chapter begins by describing the statutory framework and set forth the necessary elements to understand the singularity of the decolonisation process of Western Sahara by the UN (section 1). It will then provide some insight into the peculiarities surrounding the creation of MINURSO, tasked with monitoring the cease-fire and ensuring the right to self-determination is exercised but not to monitor human rights on the ground (section 2). Finally, the chapter will recount the most serious attempt to have the UNSC amend the mandate of MINURSO and incorporate a HRMC, which was ventured by US Ambassador Susan Rice in April 2013 (section 3). This initiative caused a series of retaliations on the political level by Morocco and caused the parties' already distant positions to grow further apart, emphasising, in the meantime, the highly contentious nature of the human rights issue in this conflict.

Section 1 The conflict in Western Sahara and its emergence as an object of international law

In order to highlight the specificity of the decolonisation process in Western Sahara, it is paramount to first establish the background against which it is being analysed. International law for decolonisation has unfolded as the UNGA – the principal UN organ dealing with the matter since 1946 – adopted a number of

resolutions aimed at shaping a process based on the principles acknowledged in the UN Charter through article 2 - political independence of States - and article 73 - self-determination of non-self-governing peoples. This section details the general issues at stake with regard to the notion of decolonisation and self-determination (section 1.1), before analysing the various legal elements characterizing the conflict in Western Sahara as an object of international law at the dawn of the conflict (section 1.2). It will finally highlight the role of the international organisations involved before, during and after the war, and their contribution to the emergence of an outlier case (section 1.3).

Section 1.1 Decolonisation, self-determination, and the UN's management of NSGTs

Before pointing out the particular features of the question of Western Sahara, this sub-section recalls the commonalities between this case and others, as it has been – and continues to be - dealt with as a decolonisation matter. There is no treatment of the question of Western Sahara as a matter of occupation and annexation at the UNSC level (Smith 2020, 492). The process through which it has gone through includes its inscription onto the list of NSGTs in 1963, discussions at the UNGA Special Political and Decolonization Committee (Fourth Committee) from 1972 and a request by the UNGA to the ICJ (resolution 3292 [XXIX]) to give an advisory opinion on the legal aspects of the question. The relevant UNGA resolutions regarding decolonisation – examined in this sub-section - are continuously being repeated throughout the issuance of documents related to Western Sahara. They all recall the "inalienable right to self-determination and independence" of the people of Western Sahara. The erga omnes nature of this right has very recently been restated by the ICJ in 2019 "Chagos Islands" opinion[26] and in a landmark decision rendered by the African Court on Human and Peoples' Rights (hereinafter, ACHPR) on September 22, 2022.[27]

[26] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ GL No 169, ICGJ 534 (ICJ 2019), 25th February 2019, United Nations [UN]; International Court of Justice [ICJ]
[27] African Court on Human and Peoples' Rights, Mornah vs Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania & Tunisia, 22 September 2022, §298, available from https://www.african-court.org/cpmt/storage/app/uploads/public/632/e0f/3ad/632e0f3ad580e748464681.pdf

The founding resolutions on which the law on decolonisation is based are UNGA resolutions 1514 (XV) of 14 December 1960 ("Declaration on the Granting of Independence to Colonial Countries and Peoples")[28] and 1541 (XV) of 15 December 1960 ("Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under Article 73e of the Charter").[29] Other resolutions have further defined the principles already contained in these landmark documents. For instance, UNGA resolution 2625 of 24 October 1970, clarifies that "the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the state administrating it". The Court of Justice of the European Union would later use the same terminology when ruling on economic cooperation agreements between the Union and Morocco, which cover economic activities taking place in, and products originating from, the territory of Western Sahara. With regards to the permanent sovereignty over natural resources, the UNGA, in its resolution 1803 of 14 December 1965, linked the access and exploitation to natural resources by a people to its right to self-determination.[30] It is to note that the UNGA was driven to issue this resolution partly on the basis of the situation at the time of South West Africa (later Namibia). UNGA resolution 1803 on permanent sovereignty over natural resources for NSGTs came to add more details on the law of decolonisation following the adoption of landmark resolutions 1514, 1541 and 2625. Sovereignty therefore extends to resources (Schrijver 1997, 143). The nexus between 1514/1541 and 1803 can be seen in common article 1 of the ICCPR and ICESCR.

As far as the implementation of the right to self-determination of the people of Western Sahara is concerned, a Visiting Mission to the territory was requested by the Fourth Committee in 1974 in order to gauge the aspirations of the people. The mission was conducted during the first week of May 1975 by three Committee Members. The report of the Visiting Mission was annexed to Chapter XIII of the report of the Special Committee of December 1975 (A/10023/Add.5).[31] In the

[28] UN General Assembly resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, available from https://digitallibrary.un.org/record/206145?ln=fr
[29] UN General Assembly resolution 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under Article 73e of the Charter, available from https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/153/15/PDF/NR015315.pdf?OpenElement
[30] https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf
[31] UN General Assembly Thirtieth Session, Supplement No. 23, Report of the special committee on the situation with regard to the implementation of the declaration on the granting of independence to colonial countries and peoples, Volume III, available from https://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/A_10023_Rev1_SO_en.pdf

report, the role of Spain was emphasized as that of Administering Power, responsible to ensure the decolonisation process of the territory in accordance with the relevant resolutions and the UN Charter.

The existence of these provisions regarding the right to self-determination – though not binding – establishes a clear framework, which gives the states involved in the decolonisation of a NSGT a compelling obligation to decolonize, accompanied by a clear modus operandi, regardless of the presence of a PKO. Theoretically, this would mean that States are to support non-self-governing peoples to attain self-determination no matter how the relevant peacekeeping operation is performing (when one is deployed). This obligation has indeed been qualified as *erga omnes* in the Chagos Island opinion as well as the latest decision by the ACHPR of September 2022 as mentioned above. Yet, as detailed in previous chapters, the UN and later, the UNSC, through MINURSO, have failed to provide a solution to the Western Sahara case. One of the consequences of the failure of MINURSO is the unprecedented redefinition of a basic principle of international human rights law such as the right to self-determination. Not only does the protection of human rights seem to have an impact on the resolution of a conflict, but the dynamics of the dispute seem to be influencing the reformulation of this basic principle of human rights law as suggested previously. This thesis outlines the paradox of safeguarding human rights in agreed cases of self-determination, where the parties accept the possibility of a chosen political independence for a people, but where mechanisms aimed at ensuring the protection of that people on the ground in order to reach this outcome are non-existent.

The following sub-sections will highlight the particular features of the case under study and foreground the reasons why it can be considered as an anomaly in the UN history of decolonisation.

Section 1.2 The 1975 ICJ advisory opinion and the Madrid Accords

The year 1975 was a turning point in the conflict over Western Sahara. That October 16, the ICJ rendered its advisory opinion requested by the UNGA, under the initiative of the Kingdom of Morocco, joined by Mauritania (with Spain as a

participating State by a memorial and in the hearing of the case). The Court was requested to assess whether the territory of Western Sahara was considered *terra nullius* prior to Spanish colonisation in 1884, i.e., whether the territory was in some way deprived of any population at the time of colonial acquisition. The Court unanimously concluded that, at the time of colonisation by Spain, the territory was not *terra nullius.* On the second question referred to it, the court found that 'the materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara…'(para.162). However, the ICJ concluded "that the materials and information presented to it did not establish any tie of territorial sovereignty" (para.162) or "any legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory" (para. 162).[32] Consequently, Spain – with the support of the UN - was required under international law to proceed with the decolonisation process of the Spanish Sahara.

The advisory opinion did not, however, prevent the Kingdom of Morocco from launching its "Green March" the following month (6 November), which reportedly saw between 100,000 (Hodges 1982, 222) and 350,000 (Zunes & Mundy 2010, xxviii) Moroccan subjects to the King invaded the territory in order to "regain its southern provinces". This event was precipitated by the worsening health of Spain's head of state, Francisco Franco, with the result that a few days later, Spain agreed to transfer administrative (as opposed to administering) prerogatives to Morocco and Mauritania. On 14 November 1975, the Madrid Accords – formally the Declaration of Principles on Western Sahara - were signed between Spain, Morocco, and Mauritania setting the conditions under which Spain would withdraw from the territory and divide its administration between the two African states. Its paragraph two reads that "Spain shall immediately proceed to establish a temporary administration in the territory, in which Morocco and Mauritania shall participate in collaboration with the Jemâa[33], and to which the responsibilities and powers referred to in the preceding paragraph shall be

[32] Ibid., note 7, p.12 §129, §162
[33] The tribal assembly established by Spain in May 1967 was to serve as a local consultative link with the colonial administration (Hultman 1977, 27).

transferred […] in respect of the principles of the UN Charter".[34] Although it was never published on the *Boletin Oficial del Estado* – Spain's official State journal where decrees and orders are published on a weekly basis - the accord was executed and Mauritania and Morocco subsequently partitioned the territory in April 1976. The Accords have not been considered by the UNGA as they had not been prepared under its auspices, and "even in some respects, without taking into account first and foremost the principles of the UN".[35] Protocols to the Madrid Accords allowed for transfer of the Bou Craa phosphate mine and its infrastructure to Morocco and for Spain to continue its involvement in the coastal fisheries (Thompson 1980, 175). The protocols were only made known, or came to light, many years later, although the fisheries arrangements were clear enough. Spain held a 35% ownership share in Phosboucraa until 2002, when the Moroccan Office Chérifien des Phosphates (now OCP SA) acquired the entirety of shares.[36]

Akin to the request for an advisory opinion sent to the ICJ in late 1974, it seems that the initial purpose of the Madrid Accords was to clarify the situation over the status of the territory. However, the administrative arrangements for the NSGT of Western Sahara were discussed without consultation or consent of any representatives of the Sahrawi people.[37] Furthermore, as will be discussed below, a legal opinion by Hans Corell, UN Under-Secretary General for Legal Affairs, concluded that the agreement 'did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred'.[38] On 26 February 1976, Spain formalised its withdrawal from Western Sahara in a letter addressed to the UNSG. The next day, the Saharawi liberation movement, POLISARIO, and an assembly of Sahrawi people unilaterally proclaimed the creation of an independent State, the Sahrawi Arab Democratic Republic (SADR). Over an ensuing three-year period, the armed

[34] Declaration of principles on Western Sahara between Morocco, Mauritania and Spain, dated 14 November 1975, available from https://peacemaker.un.org/sites/peacemaker.un.org/files/MA-MR-ES_751114_DeclarationPrinciplesOnWesternSahara%28fr%29.pdf
[35] UN General Assembly, Fourth Committee document A/C.4/SR.2178 (§38), dated 2 December 1975, available from file:///Users/meriemnaili/Downloads/A_C-4_SR-2178-EN.pdf
[36] OCP Group no longer has a corporate style or name. The company discontinued its former government agency name, Office Chérifien des Phosphates (which was later incorporated as OCP, SA) to signal a clear break from being a state agency. However, it is still a parastatal corporation.
[37] Spain also legislated the end of its responsibilities in the Cortes on November 19th, 1975. See the *Law on Decolonization of the Sahara*, Ley 40/1975 de 19 de noviembre sobre descolonizacion del Sahara, available from https://www.boe.es/boe/dias/1975/11/20/pdfs/A24234-24234.pdf
[38] UN Security Council resolution S/2002/161 of 12 February 2002, §6

conflict between Morocco, Mauritania and POLISARIO intensified in the territory of Western Sahara. In 1979 however, Mauritania signed an armistice agreement with POLISARIO and formally renounced all claims on the territory of Western Sahara. This decision caused the immediate take-over by Morocco of the portion of the territory previously under Mauritania's control, expanding its control as an occupying power.

The withdrawal and ongoing absence of an administering power listed by the UN and the simultaneous situation of occupation is another particular feature of the case in Western Sahara. This case is by and large a compelling example of the difference between an administering and an occupying power. Spain was originally designated as administering power when the territory was first placed in the UN list of NSGTs in 1963. Morocco has been recognised as the occupying one (notably within the framework of the AU[39] but also the High Court in South Africa[40] and the CJEU through their press release services[41]), or at the very least, a condition of occupation has been asserted[42] despite the UN avoiding that language. In its 2022 decision, the ACHPR recalled that "both the UN and the AU recognise the situation of SADR as one of occupation and consider its territory as one of those territories whose decolonisation process is not yet fully complete" (§301). Both statuses entail different obligations - particularly regarding human rights - which derive from different sources of the law. It is also relevant to note that Morocco has not claimed to have taken over the role of administering power to date and has not been recognised by anyone to have done so (Wrange 2020, 169). The Kingdom holds to merely having recovered sovereignty over its territory. IHL limits the authority of an occupying power, which, according to Article 43 of the 1907 Hague Regulations, should respect the laws of the occupied territory[43] alongside other provisions of IHL regarding human rights and the transfer of population (1949 Fourth Geneva Convention, art.49). This is all the

[39] Ibid., note 39.
[40] Order issued in the High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) on Friday, 23rd February 2018 in the Case No. 1487/2017 and available from https://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf
[41] CJEU Press Release No , Luxembourg, 27 February 2018, Judgment in case C-266/16, WSCUK v Commissioners for HMRC, Secretary of State for Environment, Food and Rural Affairs, available from http://curia.europa.eu/juris/document/document.jsf;jsessionid=12651D5C50A963F787523ECC0EEBD2CA?text=&docid=199683&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7698162
[42] UN General Assembly resolutions A/RES/34/37 (21 November 1979), available from https://digitallibrary.un.org/record/10608?ln=fr and A/RES/35/19 (11 November 1980), available from https://digitallibrary.un.org/record/17222
[43] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available from: https://ihl-databases.icrc.org/ihl/INTRO/195

more true as POLISARIO, as a national liberation movement, has signed and acceded to the Geneva Conventions in June 2015.[44] As a NSGT, these laws suffer from an ambiguous status. Spain's responsibility under IHRL and IHL arguably continues in and throughout the territory of Western Sahara, and even extend through its criminal jurisdiction (Smith 2020, 492).

Section 1.3 The war and the role of international organisations

Even though hostilities were ongoing in the territory, there was not much of a peace process *per* se between 1975 and 1986. There were indeed some efforts through the UNGA in the early years following the withdrawal from Spain to try and prevent the conflict from escalating further. In the meantime, to strengthen its colonization of the territory, Morocco had begun building what it later called "le mur de défense" (the defence wall). In August 1980, following the withdrawal of Mauritanian troops the previous year, Morocco sought to "secure" a part of the territory that Mauritania had occupied. Construction of the wall - or "berm" - was completed in 1987 with an eventual overall length of just under 2,500km (Zunes & Mundy 2010, 21). It singularly brought to an end the armed conflict on Saharawi wide-ranging raids with significant freedom of action through much of Western Sahara.

The aim of any process or initiative by the organised international community at the time was firstly to put an end to hostilities on the ground. The hostilities attracted the interest of UN member States in a late Cold War context. As many battlegrounds around the world, each of the parties was supported diplomatically, financially, and militarily by competing powers and superpowers. Morocco was the West and the USA's *protégé*, while POLISARIO remained very much under the guardianship of Algeria, on the other side of the international political spectrum, though the Soviet Union as such did not directly support it (Hodges, 1983; Zoubir, 1987). Not only did States individually attempt to affirm their spheres of influence, the organised international community through international and regional organisations, offered the parties the space to pursue their conflict

[44] Swiss Federal Department for Foreign Affairs, Notification aux Gouvernements des Etats parties aux Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre, 26 June 2015.

in diplomatic terms. The UN, the OAU and EU institutions have all been, one way or another, actors of that process.

The OAU was the international organisation that took the lead in peace-making efforts and provided good offices during the first stage of the war and the period prior to the deployment of MINURSO (Hodges 1983, 320). The admission of the SADR as a full member of the OAU in 1984 resulted in Morocco's decision to withdraw the same year in protest. Morocco would only join the now called African Union in January 2017. However, when the SADR joined the organisation in 1984, movement toward a ceasefire and discussions around how to ensure an act of self-determination started to be sensed. Indeed, a "coordination mission" was established in 1985 by the UN and the OAU with representatives dispatched to find a solution to the conflict between the two parties.[45] After consultations, the joint OAU-UN working group drew up a proposal for settlement, which was accepted – although separately - by the two parties on 30 August 1988 and would later be detailed in the UNSG report S/21360 of 18 June 1990 and the UNSC resolution establishing MINURSO.[46] The admission of the SADR in 1984 also consolidated its international recognition, with already 56 UN member States officially recognising the SADR.[47] The fact that the OAU – founded in 1963 - was part of the peace process and negotiations leading up to the Settlement Plan being agreed remains almost singular. The UN has, indeed, succeeded in bringing cases of decolonisation to an end with little to no intervention from the regional organisation as the continent was facing similar decolonisation challenges at a time the war in Western Sahara was ongoing. For instance, Namibia – formerly known as South West Africa – was also a case of decolonisation preceded or interrupted by an episode of occupation by a neighbouring state, i.e. *apartheid* South Africa. In contrast to Western Sahara, the UN, alone, laid the groundwork on human rights protection and conflict resolution long before the popular consultations organised in 1989 leading to its independence, notably through the creation of the UN Council for South West

[45] Organization of African Unity, Resolution on Western Sahara, AHG/Res.104(XIX), 6-12 June 1983, available from https://www.peaceau.org/uploads/ahg-res-104-xix-e.pdf
[46] Ibid., note 4
[47] Ruiz Miguel., C., Una Documentacion Esencial Para Conocer El Sahara Occidental, available from https://www.umdraiga.com/documentos/RASD/RECONOCIMIENTOS_DE_LA_RASD.htm

Africa in 1967[48] (renamed Namibia in 1968).[49] The case of MINURSO differs in various ways from that of Namibia and others in Africa and the world, for which, once the UN was on the ground, they came to be resolved without much delay or involvement of regional organisations such as the OAU or AU. Further anomalies can be pointed out regarding the establishment and deployment of the UN mission tasked with supporting the decolonisation process in Western Sahara, something considered in the following section.

Section 2 The origins of MINURSO: the genesis of an anomaly

The exceptionality of MINURSO is not only the result of a comparative analysis in respect of other UN PKOs and their institutional framework. It also stems from an extensive analysis of how MINURSO came to become a mission and create a situation that the parties involved in its establishment – and the UN particularly - never intended. It bears mentioning that MINURSO was originally empowered by the UNSC to institute a ceasefire, repatriate Saharawi refugees and organize a referendum within a year of being constituted. The aim of this section is to convey the fact that MINURSO was never conceived of as a long-term peacekeeping operation, where typically there is a prior agreement between the parties on the implementation of a political solution to a conflict.

Section 2.1 The absence of an agreement between the parties

Firstly, the process with which the parties came to "agree in principle" on the Settlement Plan - and the difficulty to conform with OAU resolution 104 (XIX) of June 1983 requesting the parties to undertake direct negotiations – ought to be questioned. Although open-ended and relatively ambiguous peace agreements are not an anomaly in themselves (see for example the Oslo agreement between Israel and Palestine[50] or the Good Friday Agreement in Northern Ireland[51]), the case of Western Sahara seems to constitute a

[48] UN General Assembly resolution A/RES/2248 of 19 May 1967, Question of South West Africa, available at https://www.refworld.org/docid/3b00f048c.html
[49] UN General Assembly resolution A/RES/2372(XXII) of 12 June 1968, Question of South West Africa, available at https://digitallibrary.un.org/record/203084/usage?ln=fr
[50] Dumper, M. (2010). Constructive Ambiguities? Jerusalem, International Law and the Peace Process. In International Law and the Israeli-Palestinian Conflict. Routledge. ISBN 9780203834657
[51] Dingley, J. (2005) Constructive Ambiguity and the Peace Process in Northern Ireland, Low Intensity Conflict & Law Enforcement, 13:1, 1-23, DOI: 10.1080/09662840500223531

rather peculiar situation. Indeed, the OAU resolution called on both parties to negotiate directly[52] but the document which was later referred to as the Settlement Plan was presented to each of them separately. Marrack Goulding, UN Under-Secretary General for Special Political Affairs between 1986 and 1993, noted that there were no signatures on the settlement proposals and that there were times during the negotiations when he "even wondered whether the two sides had been shown the same document" (Goulding 2002, 201). Morocco and POLISARIO had never previously held formal direct talks (although there were informal, secret talks in 1978 and in the presence of Hassan II in 1989), and therefore substantial issues – particularly regarding the list of voters and options to be put forward at the referendum - were not addressed in the settlement proposals and implementation plan. This was confirmed by Kathlyn Thomas, former Legal Representative of the Identification Commission between 1994 and 1996, interviewed as part of this research.[53] Worse still, the parties' comments to the proposals were kept secret from the task force in charge of drafting the implementation plan by UNSG Perez de Cuellar and advisor Issa Diallo (Theofilopoulou 2006, 3).

Section 2.2 A mission unfit for purpose

Secondly, as MINURSO's primary focus was to organise the referendum while carrying out the tasks of a typical peacekeeping mission (or first-generation mission) such as monitoring a cease-fire, it had to be equipped with adequate resources. Data shows that it was not necessarily the case. Indeed, MINURSO has, in most recent years, been described as unfit for its purpose, with an inadequate mandate, repartition of resources and even unsuitable question to be asked at the prospective referendum (Sola-Martin, 2006; Theophilopoulou, 2006; Rousselier, 2019). This can be perceived as being the result of uncoordinated efforts from the three main UN organs. For instance, the political component of the mission was deemed disproportionately small – not sufficiently resourced - given the purpose of the mission *vis à vis* the military element (Sola-Martin 2006). As far as the Mission's cost is concerned, it was originally budgeted at $260 million in 1991 for an initial 36-week operation aimed at organising a referendum

[52] OAU resolution AHG/Res. 104 (XIX) on Western Sahara, §2, available at https://www.peaceau.org/uploads/ahg-res-104-xix-e.pdf
[53] Interview 17

with an initial census of just under 75,000 voters. With an average cost of around §50 million per year, the mission has now cost the United Nations over §1.5 billion. As a comparison, the total planned cost for organising the referendum in Namibia fell just under US$370 million for over 700,000 registered voters[54], or nearly ten times as many voters as for a referendum in Western Sahara.[55]

At the time of its deployment, MINURSO was originally supposed to comprise a civilian component of up to 1,000 personnel and, at full strength, a military component which would consist of approximately 1,700 personnel, and a security unit of about 300 police officers.[56] In comparison, in East Timor, UNTAET consisted, between October 1999 and May 2002, of a governance, public administration and civilian police component of 1,640 individuals – while a separate peacekeeping force (INTERFET) comprised all 12,000 armed personnel in charge of monitoring the ceasefire from September 1999 to February 2000 (Dickens 2001, 217; Horner 2021, 239). Following the apparent abandonment of the referendum route for Western Sahara since at least 2007, the role of the MINURSO civilian component has been limited to supporting the military unit in logistic and administrative activities, something confirmed by one of the senior UN officials in the interviews discussed in chapter six.[57] The number of civilian staff was reduced in 2016 after Morocco expelled 84 of them, as a response to the use of the term "occupation" by the then UNSG when describing the Kingdom's presence in the territory during a visit to the region.[58] This resulted in a critical staff shortage as noted by the subsequent UNSG report and weakening MINURSO's capacity for some months. As of June 2022, the mission's webpage notes the number of deployed personnel for MINURSO is down to 709, including 464 civilians, the remainder being military personnel. This situation regarding the staff composition of MINURSO contrasts with other missions in terms of mandated activities, for which a separate section is usually dedicated, for instance, to the monitoring of human rights violations. This was the case for example with the UN Integrated Mission in Timor-Leste (UNMIT) – although a post-independence UN mission - which was comprised of a Human

[54] UNTAG facts and figures webpage available from https://peacekeeping.un.org/sites/default/files/past/untagF.htm
[55] Although Namibia never had a referendum as such. The elected constituent assembly simply moved to independence.
[56] UN Secretary General Report S/22464 (19 April 1991) available from https://digitallibrary.un.org/record/112220?ln=en
[57] Interview 7
[58] UN Security Council, Report of the Secretary-General on the situation concerning Western Sahara, S/2016/355, 19 April 2016, available from: https://digitallibrary.un.org/record/826961?ln=fr, §4

Rights and Transitional Justice Section (HRTJS) responsible for strengthening the mission's capacity to monitor, protect and promote human rights. For East Timor, UNTAET's Human Rights Unit (HRU) reported directly to the Special Representative of the Secretary General and was responsible for a wide range of human rights monitoring activities prior to accessing independence.[59]

Section 2.3 An incapacitated voters identification process

Lastly, the lack of adequate staffing and resources has certainly contributed to aggravate a process of identifying voters which was already subjected to the conflicting interests and desires of the parties due to the "winner-take-all" nature of the referendum. As revealed in the literature, this "winner-take-all" nature of the referendum is often put forward as one of the reasons why the mission has failed to fulfil its essential aim (Zunes & Mundy 2010, 170; Theophilopoulou 2006, 15; Jensen 2005, 45). The following sub-section describes this voter identification process, highlighting in the meantime how it contributes to the mission being an anomaly in modern peacekeeping.

It was the mandate of MINURSO which provided for the creation of an Identification Commission to resolve the issue of the eligibility of Sahrawi voters for the referendum. A Technical Commission was created in mid-1989 to implement the Settlement Plan, with a schedule based on several phases and a deployment of UN observers following the proclamation of a ceasefire (Jensen 2005, 132). Talks quickly began to draw up a voters list amid great differences between the parties. POLISARIO maintained that the Spanish census of 1974 was the only valid basis, with 66,925 eligible adult electors (Díaz Hernández et al 2014, 5), while Morocco demanded inclusion of three contested tribes in the identification process, which – for POLISARIO - potentially meant inhabitants who, as settlers, continued to populate the occupied part of the territory as well as people from southern Morocco (Jensen 2012, 52-53). It was decided that the 1974 Spanish census would serve as a basis, and the parties were to propose voters for inclusion on the grounds that they were omitted from the 1974 census (Zunes & Mundy 2010, 186). In 1991, the first list was published with around

[59] UNTAET Press Office, UNTAET Fact Sheet 12: Human Rights, (28 February 2002), available from https://reliefweb.int/report/timor-leste/untaet-fact-sheet-12-human-rights

86,000 voters (Zunes & Mundy 2010, 192-193). However, the process of identifying voters would be obstructed in later years, mainly by Morocco which attempted to include as many Moroccan settlers as possible. The criteria for eligibility had sometimes been modified to accommodate Morocco's demands and concerns (Zoubir & Pazzanita 1995). Up to 180,000 applications had been filed on the part of the Kingdom, the majority of which had been rejected by the UN Commission as they did not satisfy the criteria for eligibility (Zunes & Mundy 2010, 214). A total of 195,589 individuals were interviewed as part of this lengthy process and the final voters' list communicated at the end of 1999 comprised a total of 86,412 people (Zunes & Mundy 2010, 192-193; Jensen 2012, 90; Fernandez-Molina 2016, 49).

Consequently, as the voter identification process was circumvented and derailed at an early stage, the whole process has generated a great deal of tension between the two parties. There was no prior agreement on the referendum's electorate and the UN, indeed, arguably made the mistake of allowing the parties to put forward the candidates they wished to see take part in the referendum. This margin of manoeuvre granted to the parties with regards to the identification of voters can be seen as "constructive ambiguity", where ambiguous language is used as a negotiation tactic in order to advance some political purpose. All of the names that came to the Identification Commission had to be processed through the two parties. More disturbingly, the procedure allowed an occupying Morocco to bring forward candidates to file petitions to be accepted as voters in a referendum,[60] something which did not occur in the case of East Timor for instance.

All these factors contributed to shaping a unique – abnormal - situation in the history of UN decolonisation and peacekeeping. Not only was the agreement setting up the main principles in the conflict resolution not signed or formally agreed upon jointly by the two parties, but Spain has disappeared from the process of decolonisation as the Administering Power for the first time in the history of the UN. The absence of HRMC in the mandate appears to be yet another divergent element in a mission which seems to be deprived of necessary resources. The following section will recall the parties' positions on this matter as

[60] Interview 17

well as the failed attempt by the US to remedy this anomaly. This episode has caused the parties to embed themselves even further in their respective positions, exposing even more brightly the role of human rights monitoring in conflict resolution.

Section 3 The absence of HRMC and the 2013 failed effort to include human rights in the mandate

The issue of human rights in the Western Sahara conflict started to emerge – as will be discussed later in this thesis – long after MINURSO was first deployed. MINURSO's lack of monitoring prerogatives has certainly been pointed out as an anomaly to be accounted for and has increasingly been used as a negotiation tool by one of the parties (POLISARIO). The politicisation of human rights is not limited to the case of Western Sahara. The propensity for actors in international relations to utilize the issues of human rights in order to realize certain political interests did not appear with MINURSO and the Saharan conflict. Human rights questions have been treated in selective rather than universal ways in other cases (Hannum 2006, 47). However, never has this question been the subject of heated debates regarding the content of a PKO.

As a first step in this process, demonstrations in favour of self-determination and independence in Laayoune in May 2005 triggered the first visit on the field by the OHCHR in May and June 2006, following which a report was drafted, but never officially published. It was leaked and made available the same year.[61] The report lists the various human rights violations witnessed during the visit (right to life, liberty and security of person, right to a fair trial, prohibition of torture, freedom of expression, assembly and association and freedom of movement). The report concluded that the human rights situation was "of serious concern" and linked the question of the right to self-determination to the consideration of the overall human rights situation. The main limit of the current OHCHR involvement in human rights monitoring is that the absence of a Memorandum of Understanding with Morocco is preventing the establishment of an OHCHR office on the ground. Yet, successive UNSGs have included a "human rights" section in annual reports

[61] Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf, 15/23 May and 19 June 2006, available form https://www.arso.org/OHCHRrep2006en.pdf [PREVIOUSLY NOTE 100]

to the UNSC since October 2006. These reports have been based on information provided by the OHCHR's Western Sahara desk officer based in Geneva (and who has been interviewed as part of this research and which findings are detailed in chapter six).

The parties to the conflict have taken radically opposed positions regarding the incorporation of a HRMC in the mandate of MINURSO. Whilst POLISARIO has made the issue of HRMC a key element in their negotiation towards the resolution of the conflict, Morocco has opposed any attempt to amend the mandate in this regard. Officials, civil society and the media have clearly carried these stances (section 3.1). Although some actors' positions have been made more or less explicit, the attempt by US Ambassador Susan Rice to add a monitoring mechanism in April 2013 exposed the real significance and importance to some of them (section 3.2). This section aims at clarifying the various positions and related implications regarding HRMC prerogatives for MINURSO in order to understand the underlying dynamics of this conflict and why it is outstanding in modern peacekeeping.

Section 3.1 The parties and other actors' positions regarding the absence of HRMC in MINURSO's mandate

POLISARIO's insistence and Morocco's reluctance to add a HRMC to the mandate of MINURSO have shaped the ways in which both parties have built their strategy towards achieving their goals. From the UNSC (as principal PKO mandating authority) to other UN organs and special procedures, the debate around the absence of HRMC has become the dominant reason for discord over the past two decades. POLISARIO have made use of several platforms within the UN system to voice its concerns and defend their patch before several organs, including the Human Rights Council or the Fourth Committee of the UNGA.

Several initiatives to remedy the absence of HRMC in the mandate of MINURSO can be attributed to various member States, including within the UNSC, in line with POLISARIO's demands. Letters by members of the UNSC to request that a human rights-related question be addressed or investigated only started being issued in 1992, when the US requested for the first time that the UNSC invite the

then Commission on Human Rights' Special Rapporteur on Iraq to address the Council.[62] In the case of Western Sahara, several non-permanent members have expressed concerned over the absence of HRMC in the mandate of MINURSO and have tended to offer POLISARIO the most sympathy such as Ireland, Norway or Sweden (Zunes & Mundy 2010, 124) while others have continuously condemned this anomaly and demanded strengthened human rights language (South Africa).[63] The UNSC would be the place in 2013 of the most serious attempt – to date – to add such a mechanism as detailed in the following sub-section.

As far as the UNGA is concerned, the latest resolution on the question of Western Sahara by the Fourth Committee dated 10 October 2022 does not mention the term human rights once.[64] Yet, concerns had been raised by various petitioners during the hearings.[65] The petitioners comprise a range of officials, academics, activists, lawyers and NGOs. The responsibility of collecting information about the circumstances of a non-self-governed people arguably falls within the remit of Article 73 (e) of the UN Charter and the Administering Power. No provision in Chapter XI of the UN Charter prevents the rest of the UN member States from assuming the responsibility of seeking information regarding a NSGT, including on the human rights situation. In the case of Western Sahara, the hearing of petitioners before the Fourth Committee and the international community is all the more crucial as Spain has stopped transferring the relevant information. Although the territory had been placed on the UN's list of NSGT almost a decade earlier: petitioners have started to mention concerns over human rights in Western Sahara as early as 1975.[66] It has been a recurring topic since then, and petitioners have selectively highlighted human rights violations either in occupied Western Sahara or the refugee camps near Tindouf.

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[62] Security Council resolution S/24396 (10 August 1992), available from http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_24396.pdf. Security Council Report, an independent organisation based in New York, keeps track of a chronology of events related to human rights at the UNSC level (https://www.securitycouncilreport.org/chronology/human-rights.php) and holds an inventory of all its documentation related to human rights issues on a separate webpage (https://www.securitycouncilreport.org/un-documents/human-rights/). These are indexed by category (resolutions, reports, letters, meeting records) in a chronological order, alongside other UNGA and HRC documents.

[63] Security Council Report, 28 October 2020, *Un mission for the Referendum in Western Sahara (MINURSO) Mandate Renewal*, available from https://www.securitycouncilreport.org/whatsinblue/2020/10/un-mission-for-the-referendum-in-western-sahara-minurso-mandate-renewal.php

[64] UN General Assembly, Seventy-Seventh Session, Question of Western Sahara, 10 October 2022, available from https://digitallibrary.un.org/record/3990160?ln=fr

[65] https://press.un.org/en/2022/gaspd752.doc.htm

[66] UN General Assembly document A/C.4/SR.2178, Official records of the General Assembly, 30th session, Fourth Committee, Trusteeship (including non-self-governing territories), summary record of 2178th meeting, 2 December 1975, §67-68, available from https://digitallibrary.un.org/record/795485?ln=fr

At the Human Rights Council in Geneva, the human rights issue was first brought up by member States during Morocco's Universal Periodic Review in September 2012. One of the Human Rights Council's five recommendations was to establish a human rights mechanism for MINURSO. In the third cycle in 2017, Uruguay recommended that Morocco "accept the establishment of a permanent rights component in the United Nations Mission for the Referendum in Western Sahara, given the continuing need for independent and impartial monitoring of the human rights situation in the place". Namibia made a similar recommendation.[67] In the 2022 cycle, an even higher focus has been placed on human rights following the violations suffered by Sultana Khaya and her family, prominent Saharawi rights defenders.[68] As far as special procedures are concerned, in a report to the UN Human Rights Council dated 30 April 2013, UN Special Rapporteur on Torture Juan Mendez pointed out the use of excessive violence against protesters and in detention centres.[69] He stated that a HRMC was urgently needed to improve human rights observance (page 91 of the report). Several other Special rapporteurs have highlighted, in recent years, the violations witnessed in this conflict, and these can be considered as an *ad hoc* monitoring mechanism.

The idea that HRMC should be added has been firmly relayed by leading international human rights organisations (RFK Centre, Human Rights Watch, Amnesty international). A 2008 Human Rights Watch (hereinafter, HRW) report was one of the first documents that advocated establishing "a mechanism for regular observing and reporting on human rights conditions both in Western Sahara and in the Tindouf refugee camps".[70] On April13, 2010, Human Rights Watch and the Robert F. Kennedy Center for Justice and Human Rights (hereinafter, RFK Center), demanded to the then UNSG, in a joint letter, that a HRMC be added to the mandate of MINURSO.[71] They deem such addition to be a logical continuation of the mission's presence on the ground as per the general principles of the DPKO and MINURSO's own mission to maintain "law and order".

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[67] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review : Morocco*, 13 July 2017, A/HRC/36/6, §144.24 & 144.28, available at: https://www.refworld.org/docid/59b928434.html
[68] amnesty.org/fr/documents/mde29/5058/2021/en/
[69] A/HRC/22/53/Add.2
[70] Human Rights Watch report dated 19 December 2008, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps', available from https://www.hrw.org/report/2008/12/19/human-rights-western-sahara-and-tindouf-refugee-camps
[71] Human Rights Watch & RFK Center letter to Secretary-General Ban Ki-moon dated April 13, 2010, available from https://www.hrw.org/news/2010/04/13/letter-secretary-general-ban-ki-moon

In September 2012, the RFK Center issued a report following a visit to Western Sahara and the refugee camps in Tindouf in which it noted how the absence of a permanent solution to the conflict has had a direct impact on the denial of human rights for the Sahrawi people.[72] In January 2013, the Center further investigated the consequences of the failure to monitor human rights violations in the conflict over Western Sahara.[73] The Center's visit and subsequent reports are deemed by its leadership to have influenced the US mission's decision to propose adding a HRMC to the mandate of MINURSO in April 2013 (discussed in the next sub-section). Amnesty International has, for its part, demanded that such amendment be made in April 2014, emphasising that such mechanism would "help ensure an independent investigation is carried out" in the aftermath of the Gdeim Izik events of November 2010.[74]

At the member States level, some Nordic states – Sweden and Norway - have discouraged companies to invest in Western Sahara due to the human rights situation on the ground. Many phosphate exporters have consequently stopped their involvement due to divestment by their shareholders. This was the case, for example, with Wesfarmers, Ltd and The Mosaic Company whose last shipments took place in 2011 and 2009 respectively. In the latter case, the main investor, Nordea, in its 2010 semi-annual report, acknowledged the human rights issues involved with importing phosphate from Western Sahara and decided to divest from the North American giant Mosaic (Naili 2021, 17).

Outside the UN system, the European Court of Human Rights is also a platform where human rights violations related to the conflict in Western Sahara have been brought up and 'monitored', however under two conditions. These conditions include exhaustion of domestic remedies and complaint against one of the 47 State parties to the 1953 European Convention on Human Rights as a result of a significant disadvantage suffered by the applicant, particularly Spain, arguably still legally responsible for the non-self-governed people of Western Sahara. The conditions set by the Court were met on three different occasions. The first

[72] RFK Center for Justice and Human Rights, 3 September 2012, *RFK International Delegation Visit to Morocco Occupied Western Sahara and the Refugee Camps in Algeria*, available from http://www.hlrn.org/img/documents/WS_Report-RFK_Center-09.2012.pdf

[73] RFK Center for Justice and Human Rights, 1 January 2013, *Nowhere to Turn: The Consequences of the Failure to Monitor Human Rights Violations in Western Sahara and Tindouf Refugee Camps*, available from https://rfkhr.imgix.net/asset/RFK-Center-Report-Nowhere-to-turn.pdf

[74] Amnesty International, "UN peacekeeping force in Western Sahara must monitor human rights", April 11, 2014, available from https://www.amnesty.org/en/latest/news/2014/04/western-sahara-un-security-council/

decision was rendered in May 2011 in a case related to the right to private and family life (Article 8). The Court found a lack of diligence on the part of the Spanish authorities with regards to the treatment of a girl awaiting to return to the refugee camps in Tindouf following a short stay in Spain. This weakened the relations between her and her mother, whose right to be reunited with her created a "positive obligation" for member States.[75] The second case saw a Moroccan national contesting his extradition to Morocco from France because of his support for the right to self-determination of the Sahrawi people. The Court did not consider it necessary to rule on the risks incurred by the applicant, in the context extradition, because of his support for the self-determination of Western Sahara given that the risks of torture and inhuman treatments had been alleged because of the applicant's involvement in other criminal activities.[76] In the last case, the Court found Spain guilty of violating the Convention by refusing to study asylum requests filed by 30 Sahrawis claiming to be persecuted by Moroccan authorities.[77] These open the door to any case involving acts of governments touching on Saharawi rights, at least for those physically present in member States of the Court.

Morocco's position and refusal to add a HMRC to the mandate of MINURSO has not always been explicit. However, in his report of April 2010, the UNSG noted that "POLISARIO called for a United Nations [human rights] monitoring mechanism, and Morocco expressed its opposition".[78] Four years later, in his annual speech commemorating the anniversary of the Green March, the King made his position on the issue publicly clear for the first time. He declared "no to any attempt to revise the negotiating principles and parameters, as well as any other attempt to reconsider or expand the mandate of MINURSO, including the issue of human rights monitoring".[79] The Kingdom's immediate response to the

[75] CEDH (24 May 2011), Saleck Bardi a/Spain, nb66167/09, available from https://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/STEDH_SALECK-BARDI-c-ESPAGNE_240511_fr.pdf

[76] CEDH (30 May 2013), Rafaa a/ France, nb25393/10 available from https://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/STEDH_RAFAA-v-FRANCE_300513_fr.pdf

[77] CEDH (22 April 2014), A.C. and others a/ Spain, nb6528/11 available from https://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/STEDH_AC-AND-OTHERS-v-SPAIN_fr.pdf

[78] UN Secretary General report S/2010/175 (6 April 2010), §12, available from https://digitallibrary.un.org/record/679910?ln=en

[79] "Speech by His Majesty King Mohammed VI on the occasion of the 39th anniversary of the Green March", dated 6 November 2014, available from http://www.sahara.gov.ma/blog/messages-royaux/discours-de-sa-majeste-le-roimohammed-vi-a-loccasion-du-39eme-anniversaire-de-la-marche-verte/

demands by POLISARIO and their supporters to incorporate such a HRMC is to simply disconnect the monitoring necessity from the aim to resolve the conflict. This idea was relayed by the representative of the Moroccan National Council for Human Rights (French acronym, CNDH) during the interview conducted as part of this research.[80]

Yet, the Kingdom's strategy goes beyond this disconnected approach between human rights protection and conflict resolution. It has, firstly, included denying self-determination related violations of human rights in the territory under its control as confirmed during the interview conducted with Mourad Erraghrib, Director of Cabinet of the President of the CNDH based in Rabat.[81] What is more, under an anonymous pseudonym, a man named Chris Coleman published on a Twitter account in 2015 a multitude of sensitive documents from the Moroccan Ministry of Foreign Affairs. These documents include numerous strategy notes and correspondence relating to the Western Sahara issue, one explicitly shedding light on the risks of adding a HRMC to the mandate of MINURSO in the Kingdom's approach to the resolution of the conflict.[82] In addition, Morocco has claimed that its own monitoring mechanisms are sufficient. The CNDH representative has argued, as part of this research, that the CNDH offers the necessary tools to protect human rights in Western Sahara.[83] It is believed that a UN monitoring mechanism would lower Morocco's authority over the territory as well as create a two-tier protection system as the leaked document "Pourquoi le monitoring" mentioned previously recalls. It is also considered any monitoring from the UN to be an outright external body to a territory under its sovereignty.[84]

Morocco has, then, made a point of emphasising on the violations allegedly reported in the refugee camps in Tindouf. Yet, a review of the report shows that none issued by the special rapporteurs or UNHRC working groups have highlighted serious infringements of human rights in the refugee camps. Sporadic examples of violations occurring in the refugee camps near Tindouf in Algeria

[80] Interview 26
[81] Interview 26
[82] Ministère des Affaires Étrangères et de la Coopération (undated), Pourquoi le monitoring prévu par le texte de la resolution du Conseil de Sécurité sur le Sahara est-il dangereux?, leaked document available from https://www.arso.org/Coleman/Pourquoi_le_monitoring.pdf
[83] Interview 26
[84] Morocco Worlds News, "Western Sahara: Why Christopher Ross is Wrong About Morocco", 26 October 2021, available from https://www.moroccoworldnews.com/2021/10/345186/why-christopher-ross-is-wrong-about-morocco-and-western-sahara

are, at times, brought to the attention of special rapporteurs and working groups such as that for Arbitrary Detention in June 2020.[85] The report of the UNHRC Working Group in the Universal Periodic Review (UPR) of Algeria dated July 2012 did not highlight human rights concerns in the refugee camps near Tindouf.[86]

Finally, Morocco has continuously been denouncing what is refers to as a biased standpoint of the international NGOs issuing reports on the human rights situation in the territory of Western Sahara. The national press has been an important relay point for the authorities in this regard, and on this national issue in general, often referred to as "la Question Nationale" (with capital letters). A piece from September 2022, again, named Amnesty International and Human Rights Watch as supposedly

"known for their systematic hostility against Morocco and their regular attacks on the supreme interests of [the] country, particularly with regard to the Sahara affair, the international human rights organisations Human Rights Watch and Amnesty International often serve up biased and unargued literature which is taken advantage of by certain national and international journalists to vilify Morocco".[87]

Despite the reports and the recommendations issued by various UN organs and member States, the UNSC remains the sole organ entitled to amend the mandate of a PKO and add any specific prerogatives. At this level, however, negotiations and decisions are often made behind closed doors. Yet, on one particular instance, an attempt to modify the mandate of MINURSO by the US permanent representative to the UN has come close to reaching the Council's table and is discussed next.

Section 3.2 The failed effort by the US as a penholder to include HRMC in the mandate

[85] UN document A/HRC/WGAD/2020/7, "Avis no 7/2020, concernant El Fadel Breica (Algérie)", 5 June 2020, available at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session87/A_HRC_WGAD_2020_7_Advance_Edited_Version.pdf?fbclid=IwAR2d_LDQOo4Ffyzrl7vvc7REsIsJfc1RVt4bCzucD5_4B9vtmRXWURZDZ9w

[86] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review : Algeria*, 5 July 2012, A/HRC/21/13, available at: https://www.refworld.org/docid/506d80942.html

[87] Amourag., A, "Amnesty International et Human Rights Watch: Une hostilités sans limite contre le Maroc", in *Maroc Hebdo",* 19 September 2022, available from https://www.maroc-hebdo.press.ma/hostilite-sans-limites-contre-maroc

When US Ambassador to the UN Susan Rice and US Secretary of State John Kerry were appointed, Moroccan news reported worryingly. Unlike Hilary Clinton, largely favourable to Moroccan positions, Susan Rice had not expressed significant interest in advancing neither Morocco's positions nor North African affairs more broadly. For its part, John Kerry was among six US Senators to write in June 2001 to the then Secretary of State Colin Powell, to express concern over the fact that the UN would "abandon the referendum and support a solution that proposes integrating the Western Sahara into Morocco against the will of the Sahrawi people" (Zoubir 2007, 164). Under the Clinton administration (1993-2001), Susan Rice had contributed to significant changes in the US-Africa policy (see e.g. the African Growth and Opportunity Act) and was appointed Assistant Secretary of State for African Affairs in 1997. She appeared to have sought to turn the issue of human rights into a robust pillar of American foreign policy.[88] After a short period conducting business and think tank activities, Rice was appointed US ambassador to the UN in January 2009.

Tensions began to emerge between Morocco and the US prior to the April 2013 attempt to incorporate human rights monitoring in the mandate renewal of MINURSO. The relations between the two States had started degrading the previous year over statements and comments made by Christopher Ross, a former senior US diplomat, appointed Personal Envoy to the UNSG in January 2009. In a leaked note to the Moroccan Prime Minister dated 2 October 2014, the Foreign Affairs cabinet recognised that the Kingdom's positions and interests have been undermined since the beginning of the year 2012.[89] The Moroccan authorities had considered that Mr. Ross, not having been able to make progress on the political level, had allowed himself to be involved in matters that are not part of the mandate entrusted to him by the UNSG, in other words, human rights issues. The note suggested then the possibility for Morocco to disavow the Personal Envoy in place, as Algeria had done with his predecessor, Peter Van Walsum.[90] The differences between Morocco and the US, and the UN, on this particular issue reached their peak with Washington's attempt - narrowly thwarted

[88] Remarks by National Security Advisor Susan E. Rice at the Human Rights First Annual Summit, Washington D.C, Wednesday, December 4 2013 available from https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-national-security-advisor-susan-e-rice-human-rights-advancing-am
[89] Royaume du Maroc, Ministère des Affaires Étrangères et de la Coopération, "Note à Monsieur le Ministre", dated 2 October 2014, available from https://www.arso.org/Coleman/Fiche_USA_Sahara.pdf
[90] Ibid.

by Morocco - to extend MINURSO's mandate to include human rights monitoring prerogatives in the first half of 2013 (Fernandez-Molina 2016, 70-71).

This attempt occurred during Obama's second term of office and followed the RFK Center's visit to Western Sahara in the summer of 2012 and subsequent reports in September 2012 and January 2013.[91] The organisation, based in New York, believes that its work played a key role in the attempt to change the mandate of MINURSO. In the "Our Story" section of their website, the RFK Center states:

"In April 2013, following an RFK Human Rights delegation to Western Sahara, as well as RFK Human Rights advocacy efforts, the U.S. mission to the U.N. proposed adding a human rights mechanism to MINURSO's peacekeeping mission. The actions put forth by the United States were an unprecedented breakthrough in the arduous struggle to protect human rights in the region. That same year, RFK Human Rights joined Sahrawi activist Aminatou Haidar in an aggressive lobbying push to further cement the rights of the Sahrawi people. Their efforts included meeting with the missions of several key countries at the U.N., as well as the U.S. Ambassador to the U.N. Susan Rice."[92]

As the penholder, the US is the UNSC member which role is to lead the negotiation and draft of resolutions on MINURSO. The practice of penholdership at the UNSC gradually and informally materialised to take root firmly by 2010. The term "penholder" was used publicly for the first time in November 2011 by the Indian ambassador during an open debate on the Council's working methods.[93] Susan Rice, as the US ambassador to the UN, had put forward a draft which included language pointing towards the setting up of a monitoring mechanism of human rights violations in Western Sahara and the refugee camps in Tindouf.[94] It has been reported – if only in the Moroccan press[95] - that she had done so without informing her superiors beforehand. As there is no official record

[91] Ibid., notes 84 & 85
[92] https://rfkhumanrights.org/our-story
[93] United Nations Security Council, *Research Report on the Penholder System*, (New York: United Nations, December 2018), p.2, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Penholders.pdf
[94] Foreign Policy, "Susan Rice gets the Morocco block", April 24, 2013, available from https://foreignpolicy.com/2013/04/24/susan-rice-gets-the-morocco-block/ & Your Middle East, "Why did the US change its mind about Western Sahara", May2, 2013, available from https://yourmiddleeast.com/2013/05/02/why-did-the-us-change-its-mind-about-western-sahara/
[95] http://www.slateafrique.com/169203/affaire-minurso-chuck-hagel-en-colere-contre-susan-rice

of this initiative, the information gathered originates primarily from secondary sources. The draft never reached, however, the Council members' table. It seems that the initiative was not even discussed with the other members of the Group of Friends of Western Sahara, namely France, Russia, the UK and Spain (Fernandez-Molina 2016, 71). At the time the draft was elaborated, Morocco was holding a rotating seat on the UNSC, therefore the need to reach a consensus would have grappled with the presence of its would-be main opponent.

While Rice's attempt to amend the mandate of MINURSO was also perceived to have been "against the interests of Morocco" by the Moroccan press,[96] it, however, had a twofold effect. Firstly, it revealed or confirmed Morocco's and other parties' position on the issue of human rights monitoring in the mandate of MINURSO in the aftermath of the Gdeim Izik events of November 2010. The speech by King Mohamed VI in November 2014, mentioned previously, was an unprecedented public affirmation of the refusal to provide any changes to the mandate regarding human rights. Secondly, it confirmed and catalysed the idea that human rights have become a negotiation tool in a peace process in which the parties were already at odds over everything. In the aftermath of the April 2013 'crisis' concerning a HRMC for MINURSO, US President Barack Obama agreed to ensure no such initiative would be pursued in exchange for an ending of military trials of civilians, allowing a visit to Western Sahara by the UN High Commissioner for Human Rights and legalising certain Saharawi human rights organisations such as that led by Aminatu Haidar, CODESA (Ruiz Miguel 2018, 125).[97] It is also after this episode that more international human rights organisations started to call for such a mechanism to be added as mentioned previously with Amnesty International's report of 2014.[98] Euromed Rights issued a statement on April 30, 2013 through which it "regrets the UN Security Council decision not to extend the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO) to human rights issues in the area".[99]

[96] https://www.moroccoworldnews.com/2013/06/93584/susan-rices-morocco-minurso-sahara
[97] Most of the information was leaked through "Chris Coleman's" Twitter accound mentioned above.
[98] Ibid., note 86
[99] Euromed Rights, "No Human Rights Mandate for MINURSO in Western Sahara!", April 30, 2013, available from https://euromedrights.org/publication/no-human-rights-mandate-for-minurso-in-western-sahara/

Susan Rice has been contacted for the purpose of this research with no avail. She makes no mention of Western Sahara in her memoir "Tough Love: My Story of the Things Worth Fighting For" published in 2019.[100] Nearly 10 years after this attempt was made, it seems that it was indeed the closest the UNSC have been to officially discuss the human rights monitoring aspect of the mission. This episode is reflective of the fairly recent centrality of the human rights questions in this conflict resolution process. This focus has been made possible precisely by the absence of HRMC, therefore emphasizing the abnormal nature of the PKO responsible in Western Sahara.

Conclusion

This chapter has addressed the unique nature of the case of MINURSO within the universe of UN PKOs. Western Sahara is a counterexample to the UN peacekeeping's declared progress to safeguard human rights following the approaches commended in the past two decades, first by Brahimi and later as a matter of the concept of the "responsibility to protect".[101] Western Sahara is a place where an entire pantheon of unrealized modern rights is present, and manifest in the failure of their protection, beginning with the inalienable right to self-determination. PKO mandates have been amended on several occasions in the past to respond to the ongoing violations during armed conflicts: Bosnia and Herzegovina (Resolution 824 of May 1993),[102] Burundi (statement by the UNSC president of August 1994),[103] Rwanda (Resolution 1029 of December 1995),[104] all as a result of UNSC visiting missions on the ground. Yet, MINURSO's mandate has remained unchanged as far as human rights monitoring is concerned. When, only two years after its deployment, UNSG Boutros Boutros-Ghali considered that "MINURSO, as a United Nations mission, could not be a silent witness to conduct that might infringe the human rights of the civilian population", he called for what social institutionalists refer to as an alignment or adjustment of the organisation's

[100] Rice, S., (2019), "Tough Love: My Story of the Things Worth Fighting For", Simon & Schuster Ed.
[101] World Summit Outcome document A/60/L.1, dated 24 October 2005, §138-139, available from https://www.globalr2p.org/resources/2005-world-summit-outcome-a-60-l-1/
[102] UN Security Council, Security Council resolution S/RES/824 [Bosnia and Herzegovina], (6 May 1993), available from: https://www.refworld.org/docid/3b00f16028.html
[103] UN Security Council document S/1994/1039, Report of the Security Council Mission to Burundi on 13 and 14 August 1994 : letter of transmittal : letter dated 7 September 1994 from the members of the Security Council Mission to Burundi addressed to the President of the Security Council, (9 September 1994), available from: https://www.refworld.org/docid/4c4d40f42.html
[104] UN Security Council, Security Council resolution S/RES/1029 [On extension and adjustment of the mandate of the UN Assistance Mission for Rwanda], (12 December 1995), available at: https://www.refworld.org/docid/3b00f15b18.html

principles and actions. [105] This has not materialised in the normative foundation of the mission, whose very existence is being questioned as this chapter reveals.

At various levels, the UN and the international community are dealing with a now *sui generis* case of decolonisation and conflict resolution process. The UNSC, and the UN as an organisation, bear responsibility for the protracted impasse in Western Sahara. According to the International Crisis Group,

"by defining the conflict in terms of self-determination, the UN has endorsed the POLISARIO's and Algeria's view of the question. By insisting that the resolution of the conflict must be consensual, however, it has awarded Morocco a veto on any outcome. The contradiction in these two aspects of the UN's behaviour is at the heart of the impasse".[106]

This contradiction is also at the heart of this research. In establishing the emergence of a norm of human rights monitoring in UN peacekeeping operations across the world, the discission in this chapter has sought to identify the highly irregular nature of MINURSO within the evolving order of such institutions. It aimed at providing a factual context regarding the genesis of the mission and understand how the issue of human rights has come to be a cornerstone in the (ir)resolution of the Western Sahara conflict. This chapter has, therefore, laid the groundwork for analysing the case of MINURSO as deviant. In constituting an anomaly with regards to guiding principles – analysed in the following chapters - on conflict resolution, peacekeeping and human rights protection, it will help develop a more in-depth understanding of conflict resolution dynamics. More generally, the establishment of this exceptionality for MINURSO not only questions the effectiveness of a system of international peace and security but goes to justify the single case study approach adopted in this thesis. Every case of conflict and of self-determination is, of course, *sui generis*. Therefore, any generalisation may be done carefully. As an empirical enquiry that investigates a contemporary phenomenon in depth and within its real-life context (Yin 2009, 14), the use of MINURSO as a case study is not aimed at developing theories based

[105] UN Security Council, Report by the Secretary General on the situation concerning Western Sahara, S/25170, (New York: United Nations 1993), available from https://digitallibrary.un.org/search?ln=en&p=S%2F25170&f=&c=Resource+Type&c=UN+Bodies&sf=&so=d&rg=50&fti=0
[106] International Crisis Group Middle East/North Africa Report Number 66, 11 June 2007, "Western Sahara: Out of the Impasse", available at https://www.crisisgroup.org/middle-east-north-africa/north-africa/western-sahara/western-sahara-out-impasse , p.20

on its deviant nature as previously mentioned. The purpose of this sampling strategy is mainly exploratory, and the deviant nature of this case is not predicted to deconstruct existing theories regarding human rights protection and conflict resolution or develop new ones, but rather to reveal their shortcomings and boundaries.

The following chapter will set the scene regarding the treatment of HRMC on the basis of assessing the UN documentary record and how the organisation is structuring the issue within its institutional framework.

Chapter 4: The fragmentary institutionalisation of human rights in UN PKOs

The UN has established a set of principles declaring that peace and security cannot be achieved without protecting human rights (Ife 2007, 160), but has not provided any specific *modus operandi*. For instance, UNGA Resolution dated 3 April 2006 establishing the Human Rights Council (HRC) stated that "peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being," and that "development, peace and security and human rights are interlinked and mutually reinforcing".[107] However, the role of human rights norms within UN peacekeeping doctrine has not been institutionalised in any streamlined or coherent way from the beginning. Not all missions established by the UNSC since the creation of the organisation have had a built-in human rights component in their mandates (Zunes & Mundy 2010, 149). While the relationship between human rights protection and conflict resolution is not straightforward, as the review of the literature has suggested (Parlevliet 2002; O'Flaherty 2004; Mansson 2005, Hannum 2006), the lack of consistency in UN practice is mainly due to the fact that peacekeeping, as it exists today, was not foreseen by the UN Charter. Therefore, the establishment of a normative-legal framework regarding human rights in PKOs has been deemed necessary in view of the shortcomings that their scattered mentions in UN documents have caused (Maus 2010, 80).

The focus of this study being on the concept of peacekeeping, it is appropriate to recall the definition established in Chapter one. Peacekeeping is "the deployment by the UN of multinational or single state of military, police and civil personnel onto a territory where peace and security are under threat or breached, with the consent of the hosting state, and entitled to resort to the use of force for self-defence purposes or any other situations permitted under the mission's constitutive mandate aimed at implementing a cease-fire or a peace agreement". Analysing the role of human rights functions in PKOs at the normative-legal and institutional level is essential to understand the significance of any human rights language included or excluded from peace operations mandates, and particularly

[107] UN General Assembly resolution A/RES/60/251 (3 April 2006) available from https://undocs.org/en/A/RES/60/251

the one at the heart of this research: the UN Mission for the Referendum in Western Sahara (MINURSO). Going further, identifying the gaps in the normative-legal framework can help explain the deficiencies in practice. For the purpose of this analysis, the term "normative-legal" framework will be understood as a set of norms, policies and guidelines aimed at structuring and standardising UN peacekeeping from a regulatory perspective.

The UN has attempted to remedy the absence of a streamlined approach by issuing guidelines, manuals or good practice documentation regarding the need for human rights monitoring, protection and promotion in situations of armed conflict. These documents, which will be discussed in this chapter, provide for general principles and operational directions based on the idea that the protection of human rights is necessary to conflict resolution and post-conflict reconciliation, which also coincides with the emerging concepts of protection of civilians and responsibility to protect. Human rights issues in the context of peacekeeping and conflict resolution support have mostly generated interest from the UNSC, the Department of Peacekeeping Operations (DPKO, newly DPO) as well as the Office of the High Commissioner for Human Rights (OHCHR). This growing attention from various entities has encouraged them to coordinate their work via, for instance, Memoranda of Understanding (MoU). Elements of standardization of publicly issued reports is also emerging in the context of an OHCHR effort to place information regarding its field operations on its website regularly.[108] It is therefore often placed at the heart of human rights protection by the UN peacekeeping doctrine and its role will be examined in this chapter.

This process of institutionalising human rights in peacekeeping doctrine beyond specific mandates constituting PKOs runs however into several obstacles. Firstly, it is confronted with the political reality of a divided UNSC and more generally, international community about the political end-state that PKOs are meant to achieve. Secondly, for as much as the promotion and protection of human rights represent one of the objectives of the 193-membered organisation, the emphasis of the Charter remains on the concept of security. Therefore, the inclusion of human rights within peacekeeping missions mandated by the UN is not perceived

[108] "OHCHR in the World: making human rights a reality on the ground" under the Where We Work section, available from https://www.ohchr.org/en/countries/pages/workinfield.aspx

as being required automatically and are treated on an *ad'hoc* basis. Thirdly, structural impediments such as the veto procedure, coupled with self-interested political considerations to the systemic utilisation of human rights norms and mechanisms can explain why there is no overarching *modus operandi* regarding human rights in UN PKOs and why certain conflicts are given more human rights focus than others. The aim of this chapter is to analyse the role given to human rights components in UN peacekeeping at the UN's normative-legal and institutional level as well as to highlight its shortcomings. This analysis will provide an overview of the background upon which MINURSO came into existence, permitting a later in-depth examination of the content and limits of this particular mission.

The chapter will analyse the UN's approach to human rights regarding the ending of armed conflicts from the establishment of "semi normative-legal" instruments to the relevant components in PKOs mandates, which has mostly emerged after the end of the Cold War and confirmed after the issuance of the Brahimi Report in 2000. For the purpose of this research, the term human rights components will be understood as per the 2011 UN Policy as "the component of a UN peace operation or political mission which has the primary responsibility for carrying out the peace operation or political mission's human rights mandate".[109] The chapter will therefore firstly draw up the baseline of human rights norms adopted at the inter-state level (section 1.1) as well as the UN level (section 1.2), which constitutes the basis on which the organisation relies on for setting up relevant human rights components in PKO mandates. The chapter will then set the scene of the institutional framework for implementation of human rights components in PKOs, where responsibilities amongst mandating and mandated organs and agencies are not clearly defined (section 2). Finally, the practice of incorporating human rights provisions the mandates of UN PKOs will be analysed in light of these foundational norms and institutional framework in order to outline further the relevance of using MINURSO as a case study (section 3).

Section 1: Normative-legal framework concerning human rights in UN conflict management and PKOs

[109] Ibid., note 2 p.26

Although the UN Charter does refer to human rights, it does so only in passing.[110] The implementation of its Art 55 on the respect for the principle of equal rights was a gradual process which started with the adoption of the Universal Declaration of Human Rights (hereinafter, UDHR) in 1948. The establishment of a constitutive framework for human rights protection through universal treaties within the UN system has started only long after the adoption of the UDHR. The set of universal human rights treaties that have emerged has formed the point of reference for any mention of human rights in UN documents. The approach adopted by the UNSC and other departments has evolved in this regard, presumably to meet the different circumstances and demands of different PKOs. It is therefore necessary to firstly detail the constitutive framework for human rights norms adopted at inter-state level and usable in the context of peacekeeping and analyse the significance of their ratification (1.1) before listing and contextualising the myriad attempts by the organisation to incorporate them into a *modus operandi* for PKOs (1.2).

Section 1.1 The foundational set of norms

It is firstly essential to lay out the core foundation of international human rights law which rests on a set of treaties and conventions broadly ratified and implemented by the UN member States in the decades following the Second World War. These were and are still necessary for the organisation to rely upon a set of widely ratified norms as the UN Charter alone could not assume such a function of providing a detailed source of protective norms. International human rights law is an integral part of the normative-legal framework for UN peace operations as recalled in the 2011 joint policy on the matter by the OHCHR, DPKO, Department of Political Affairs (DPA) and Department for Field Support (DFS) and which will be discussed further in this chapter.[111] According to the UN Human Rights Treaty Body database available on the organisation's website[112], these written norms include 12 texts. They have not been signed and ratified by the UN member States unanimously and indicating a ratification rate at the time of writing (differing from the treaty's signature) can prove beneficial in

[110] For instance, there is no distinct set of rights recognised to minority groups in the Charter.
[111] Ibid., note 23, p.4
[112] Database provided by the OHCHR, available from https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

understanding the extent to which human rights norms are upheld by the international community.

Table 1: UN Human Rights Treaty Ratification Rate

Signature date	Name	Ratification rate (ratifying States/UN member States)
21 December 1965	International Convention on the Elimination of All Forms of Racial Discrimination	94.5%
16 December 1966	International Covenant on Civil and Political Rights	89.6%
16 December 1966	International Covenant on Economic, Social and Cultural Rights	88.1%
19 December 1979	Convention on the Elimination of All Forms of Discrimination against Women	97.9%
4 February 1985	Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (and 2002 Optional Protocol of the Convention against Torture)*	87.6%
15 December 1989	Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty*	45.6%
30 November 1989	Convention on the Rights of the Child	99.4%
18 December 1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**	28.5%
25 May 2000	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	88.1%
25 May 2000	Optional Protocol to the Convention on the Rights of	91.1%

	the Child on the sale of children child prostitution and child pornography*	
30 March 2007	Convention on the Rights of Persons with Disabilities	93.8%
6 February 2007	Convention for the Protection of All Persons from Enforced Disappearance*	32.1%

** Refers to the texts that do not contain neither the words "peace" or "security",*
*** Refers to the text that does not contain the word "peace"*

The Declaration on the Rights of Indigenous Peoples adopted in 2007, absent from the Treaty Body Data base, is also to be mentioned. It is the most comprehensive international instrument on the rights of indigenous peoples and, as will be detailed in the following chapter, is relevant in contexts of armed conflict and that of the Western Sahara. It aims at establishing "a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".[113] It also seeks to elaborate on existing human rights standards set by the organisation as they apply to the specific situation of indigenous peoples. It remains a declaratory document and therefore non-legally-binding.

The sets of provisions listed, intended to cover the basic rights of all and at all times, constitute binding international law as part of the country's treaty obligations once ratified. They have been ratified by an average of 78% of the UN member States. With the exception of the Second Protocol to the ICCPR on Death Penalty, the Convention on Migrant Workers and that on the Protection from Enforced Disappearance, they have all been ratified by a resounding majority of the UN member States. The ratification rates reveal the extent to which the international community grant these norms a particular standing, despite the reservations and declarations made by some members on selected conventions. These norms constituting the core of IHRL have to be distinguished from that of International Humanitarian Law (IHL). IHL norms, governing the way in which warfare is conducted, are gathered principally in the 1949 Four Geneva Conventions – which have been ratified by all UN member States – and the three

[113] UN General Assembly Resolution A/RES/61/295 "*United Nations Declaration on the Rights of Indigenous Peoples*", (13 September 2007), available from https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

1977 Additional Protocols relating to the Protection of Victims of Armed Conflicts – ratified respectively by 174, 169 and 77 out of the 193 UN member States. The implementation of IHL and the UN's approach towards conflict resolution will however not be covered in this study. This would require the engagement of different entities outside the UN (mainly the International Committee of the Red Cross), a discussion around international criminal responsibility which applies to individuals and a complete reconsideration of the UN's role in its implementation.

Each of the IHRL conventions includes a reporting and protection mechanism comprised of one or all of the following procedures: reporting, individual complaints, inquiries (including country visits), inter-State complaints, notification to the UNGA, early warning actions, follow-up, recommendations, UNSG's study on specific issues, subcommittee visits and advisory services. None of them incorporates a sanction mechanism in the event of non-compliance and none refers to peacekeeping. In fact, five of them (therefore nearly half of the treaty body) do not contend the word "peace" and four do not contend the word "security". Interestingly, the OHCHR Handbook for Human Rights Treaty Body Members published in 2015 does not mention the words "peace" nor "peacekeeping" once either.[114] The reasons can be threefold. Firstly, at the time the texts were drafted, PKOs as a conflict management mechanism were being deployed on an *ad hoc* basis. In the space of 35 years (between 1965 and 2000), when the essential of the Human Rights Treaty Body was adopted, only 10 PKOs (out of the total of 71 past and present operations) have been deployed. After the end of the Cold War and the acceleration in peacekeeping activities, two conventions (on the Rights of Persons with disabilities and for the Protection of all Persons from Enforced Disappearance) and two protocols (on the Convention on the Rights of the Child) were signed in seven years (between May 2000 and March 2007) while the same number of PKOs (10) were deployed within these dates. The focus of the UN member States was clearly on setting the foundational set of human rights norms in the context of the Cold War and ideological confrontations which did not allow for extended interventions on the ground.

[114] Office of the High Commissioner for Human Rights, *Handbook for Human Rights Treaty Body Members* (2015), available from https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf

Secondly, not mentioning the applicability of the Human Rights Treaty Body to UN PKOs in the 2015 Handbook means they are not confined to a specific normative-legal framework. This can also arguably leave gaps in their interpretation if not referred to properly. Lastly, the implementation of these human rights norms in the particular context of peacekeeping may require a different set of expertise, resources, supervision and reporting mechanisms. Notwithstanding the reasons behind these absences, the fact that IHRL instruments do not expressly apply to PKOs create a disconnect between internal organs of the UN. Mansson argues that, these core human rights cannot be fulfilled if the fundamental right to peace, which UN PKOs intend to protect, is not realised (Mansson 2005, 397). This supports the idea of a *jus post bellum* regime (set of specific human rights norms applicable after a conflict has been resolved) put forward by Maus in her publication. It can also explain the total absence of mention of PKOs in general human rights protection instruments identified in this chapter. However, this statement should be considered carefully as it seems to suggest that human rights cannot be realised in the absence of peace.

It is important to point out that IHRL also includes norms deriving from customary international law. The latter's two constitutive elements are: a uniform and consistent practice by the States as well as the belief that such practice is obligatory (*opinio juris*).[115] Additionally, and more relevantly to this research, certain rules of customary international law are deemed so fundamental that they cannot be set aside by treaty and are binding on the UN, and thus on PKOs as internal organs of the UN directly. They are often connected with human rights standards and the principle of self-determination or the prohibition on slavery and genocide are relevant examples. These will be developed further in the normative-legal dimension of the analysis in chapter seven of this thesis.

Section 1.2 UN general operational guidelines

None of the human rights treaties listed in the first section addresses the applicability of human rights law to UN PKOs and the UN, as an organisation, is not party to any of these conventions. Even though human rights provisions are

[115] *Legality of the Threat or Use of Nuclear Weapons* (1996), Advisory Opinion, I.C.J, Reports 1996, p.226, §64 available from https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf

meant to be universal, the conditions regarding their implementation by or during a peacekeeping mission is not coherently established within the UN policy framework. Yet, the importance of incorporating the protection of human rights in peacekeeping missions through relevant components did appear in resolutions and statements by the UN itself, mostly the UNSC.[116] It in fact considers international human rights law to be "an integral part of the normative-legal framework for United Nations peacekeeping operations" as stated by the so-called Capstone doctrine of 2008, which will be detailed in this section. Consequently, given the silence of the conventions and the outcry by the international civil society caused by the disastrous experiences in the field in the Former Yugoslavia or Rwanda, the UN has attempted to fill in these gaps by issuing several reports and guidelines on the issue. Although the UN Peacekeeping Resource Hub gathers certain operational policies and guidelines in one website, no attempt has been made by either the organisation or, to a certain extent, the research community to assemble these various documents and place them under an overarching mechanism or guidelines for human rights implementation in PKOs.

Maus highlighted the lack of funding and resources, rare priority over other goals of the mission, as well as the absence of guidelines. She examined the shortcomings of the present system and considered how existing instruments may be applied. She insists on the ad hoc treatments currently being given to the human rights components and the risks it entails on the overall benefits of a mission. Her proposal for the establishment of a special regime regarding human rights in PKOs and requiring "an approach that goes beyond piecemeal solutions" or, as she names it, *jus post bellum,* form an insightful first step in this regard, but is mainly tailored to post-conflict situations (Maus 2010, 77) rather than a conceptual requirement to integrate human rights protection into conflict resolution mechanisms. Chapter five of the Leuven Manual on the International Law Applicable to Peace Operations also provides relevant elements of legal analysis regarding human rights law applicable to PKOs but fails to address the role of human rights components in this matter (Gill et al, 2017). By gathering the relevant sources, this section intends to lay the foundation for a streamlined and

[116] UN Security Council documents S/PRST/2001/5, Presidential Statement (20 February 2001) available from https://undocs.org/S/PRST/2001/5

standardised approach to the issue of human rights in PKOs at the UN policy level. This will then allow for an identification of the gaps and analysis of the corresponding deficiencies.

The methodology used to select these instruments includes a thorough search in the main UN databases (Official Document System, UN Digital Library and UN Resources), and a review of the relevant primary sources. They constitute the bases for this research on the links between human rights components in peacekeeping operations and conflict resolution. They were selected on the basis that they include either a review or recommendations on improving UN PKOs and mentioned the importance of human rights monitoring, protection and promotion. They also include documents dedicated specifically to the general functioning of human rights components, as these outline the importance given to them in the realm of conflict resolution. However, any specific policies on particular aspects of human rights monitoring for peacekeepers like the OHCHR/DPKO/DPA Policy on Public Reporting by Human Rights Components of UN Peace Operations, as well as any report or resolution adopted in the context of a particular conflict will not be considered for this exercise as they may refer to specific tasks or dynamics in a given (conflict) environment.

Table 2: UN Peacekeeping Guidelines and Instruments

Year	UN entity	Name	Nature and aim
1997	UNSG	Renewing the United Nations: A Programme for Reform (A/51/950)	General attempt to operationalise the notion of human rights across all areas of work of the UN
2000	Panel on United Nations Peace Operations	Report of the Panel on UN Peace Operations (Brahimi report)	Panel appointed by the UNSG to assess the shortcomings of the peace operations system to make recommendations for improvement
2001	OHCHR	Training Manual on Human Rights Monitoring	Training manual on the conduct of human rights monitoring in UN field operations, including coordination with PKOs. Out of 33 chapters, only 18 are available.[117]
2002	UNSG	Report on "Strengthening of the UN: An Agenda for Further Change"	The result of this report, "Action 2 Plan of Action", was adopted by Heads of 22 UN agencies, programmes and departments in

[117] https://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials.aspx

			September 2003, and laid out the main objectives for the period of 2004-2006
2002	OHCHR	Memorandum of Understanding between DPKO and OHCHR	Establishes a formal relationship between the two departments for the design and operation of PKOs
2003	DPKO	"Handbook on UN Multidimensional Peacekeeping Operations"	Introductory guidelines of the various components of multidimensional PKOs but "not intended to provide strategic or policy guidance"
2005	UNSG	UNSG's Policy Committee on Human Rights in Integrated Missions (decision No. 2005/24)	Highlights OHCHR's central role in providing expertise, guidance and support to human rights components (idea reinforced in the 2006 Guidance on Integrated Missions available here).
2008	DPKO & Department of Field Support	Capstone Doctrine	Attempt to fill the definitional gap in *Brahimi report*, differentiating between robust peacekeeping and peace enforcement. Robustness cannot be limited to peacekeepers and their ability to use force to secure their mandate, but must be part of a broader framework that includes operational and political parameters (Tardy; p.68) - Human rights law is "an integral part of the normative framework for UN PKOs' (p14) - "All UN entities have a responsibility to ensure that human rights are promoted and protected by and within their field operations" (p27)
2009	DPKO & Department of Field Support	"A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping"	Examines major policy shifts and strategy dilemmas. Progress report I (2010) and II (2011). Robust PK re-defined as "political and operational strategy to signal the intention of a UN mission mandate to deter threats to an existing peace process in the face of resistance from spoilers" (p.21).
2011	UN Secretariat	"Human Rights Due Diligence Policy on UN Support to non-UN Security Forces"	Requires UN entities (including UN PKOs) to display care, diligence and compliance to the Charter as well as IHRL and IHL when supporting non-UN security forces and partners.
2011	OHCHR, DPKO, DPA & DFS	Policy on Human Rights in UN Peace Operations and Political Missions	Provides guidance on how human rights should be integrated into the activities of UN peace operations and political missions. Includes provisions

			covering general principles also applicable in the absence of HRMC.
2012	UN Peace Operations Training Institute	Course on "Human Rights and Peacekeeping"	Course designed to provide understanding around the evolution of armed conflicts and the consequences on the protection of human rights as well as their importance in resolving conflicts.
2013	UNGA and UNSC	Human rights due diligence policy on United Nations support to non-United Nations security forces	https://undocs.org/S/2013/110
2015 (16 June) *	High Level Independent Panel on Peace Operations	(unadopted) Report	Panel established by the UNSG on 31 October 2014 to review UN peace operations and the emerging needs of the future.
2015 (30 June) *	Advisory Group of Experts on the 2015 Review of the UN Peacebuilding Architecture	Report on The Challenge of Sustaining Peace	Report prepared at the demand of both presidents of the UNGA and UNSC when two other panels were exploring critical dimensions of the peace and security pillar of the UN (HLIPPO and UN Women)
2015 (14 October) *	UN Women	High Level Advisory Group for the Global Study on the Implementation of SC Resolution 1325	Study requested by the UNSC to the UNSG to conduct a review on the implementation of resolution 1325 on women participation in all efforts for maintaining and promoting peace and security, to identify gaps and challenges.

** Consultations were held between all three groups (High Level Independent Panel, Advisory Group of Experts and UN women)*

It is clear that the UN's current approach is based on lessons learned and best practices. When it has failed in its duty or when it fulfilled its mission successfully, the various UN entities have either tried to reproduce what was deemed fruitful or eliminate repeat mistakes as encouraged by the UNSC itself.[118] The search for instruments covering the issue of human rights in peacekeeping shows that all (but one) attempts by the UN to institutionalise the human rights function into PKOs were carried out after the year 2000 and the issuance of the Brahimi Report. Out of seventeen documents, only four were drafted or co-drafted by the

[118] UN Security Council resolution S/RES/2436 (21 September 2018), available from https://undocs.org/S/RES/2436(2018)

DPKO (between 2002 and 2009), three by the OHCHR and one by the UNSC issued later in 2013. Most were the result of an initiative by the UNSG through direct reports (1997, 2002, 2005 and 2011) or via the appointment of a panel (2000 Brahimi Report and 2015 High Level Independent Panel on Peace Operations). Some instruments were also adopted by *ad hoc* entities such as the UN Peace Operations Training Institute or UN Women (although commissioned by the UNSG). Finally, the UNGA and UNSC were jointly at the origin of two reports (2013 and 2015). It is to note that the OHCHR and the UNSC have never released a joint report, policy document or guidelines, neither have the UNSC with the DPKO.

The first formalised attempt to tackle the issue of human rights in peace operations specifically and constitutes the corner stone of our analysis is the 2000 Brahimi Report.[119] The report was not designed to provide a *modus operandi* for the incorporation of human rights into PKOs mandates, but to make recommendations in order to remedy the existing gaps in the field of human rights in PKOs. It still acknowledged that human rights monitoring components (HRMC) in peace operation are "indeed critical to effective peace-building".[120] With the 2002 UNSG's Agenda for Further Change, "the process of human rights mainstreaming received further impetus" (O'Flaherty & Davitti 2014, 172). It acknowledges the "good progress" that has been achieved in integrating human rights throughout the United Nations system[121] and aims to build on this progress.

The *Capstone Doctrine* published in January 2008 as part of the UN DPKO Principles and Guidelines remains the most comprehensive of all documents mentioned in table 2. Jean-Marie Guéhenno, the then Under-Secretary General for Peacekeeping Operations described it as a simple "attempt […] to codify the major lessons learned from the past six decades of UN peacekeeping experience" in the Foreword of the Guidelines.[122] As such, it is a living document aimed at being reviewed and updated regularly, learning from the experience on

[119] The 1997 two-pager document briefly addressed the issue of human rights across all areas of work of the UN, without considering the specificities of PKOs.
[120] UN General Assembly document A/55/305 and Security Council document S/2000/809, *Report of the Panel on United Nations Peace Operations*, (21 August 2000), available from https://undocs.org/A/55/305, §41
[121] UN General Assembly document A/57/387, *Report of the Secretary General on Strengthening of the United Nations: an agenda for further change*, (2 September 2002), available from https://digitallibrary.un.org/record/474330 §48.
[122] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations Principles and Guidelines* (2008), p.7 available from https://www.un.org/ruleoflaw/blog/document/united-nations-peacekeeping-operations-principles-and-guidelines-the-capstone-doctrine/

the ground as described in its page 10, but the most recent version dates back to January 2008. Nevertheless, the document establishes a scope for application described as being specific, requiring judgement and varying according to the situation on the ground and claims that the UN has the "unique ability to mount a truly comprehensive response to complex crises" by developing the concept of "integrated missions".[123] It recognises that the achievement of sustainable peace requires progress in at least four critical areas including respect for human rights. To this end, it recognises that "all UN entities have a responsibility to ensure that human rights are protected and promoted by and within their field operations" and that "the integration of human rights […] should always be a key factor in the planning of multi-dimensional UNPKO".[124] Still concerning human rights, even though the doctrine clearly acknowledges that UN PKOs "should seek to advance human rights through the implementation of their mandates", they must do so "within the limits of their mandate and their competence".[125]

The practice of human rights PKO components not being systematically incorporated in peace operations is therefore explicitly acknowledged in the UN documentation. This lack of consistency in the theory and practice of human rights within the UN system is arguably what causes the international community to fail in protecting them, the civil society to be given motives to raise their voice and scholars to assess the efficiency of the UN system. The UN Human Rights Due Diligence Policy (HRDDP) issued by the UNSG in July 2011 (three years after the Capstone Doctrine), and the Policy on Human Rights in UN Peace Operations and Political Missions co-drafted by the OHCHR, DPKO, DPA and DFS (Joint Policy) the same year provide some answers. The former aims at preventing UN support – including through PKOs - to state and non-state actors alike when committing grave violations of international humanitarian law, human rights and refugee law as well as recalling the organisation's "responsibility to respect, promote and encourage respect for" these three sets of law.[126] The latter is designed to provide "guidance on how human rights shall be integrated into activities of UN peace operations and political missions".[127] When the HRDDP

[123] Ibid., p.25.
[124] Ibid., p.27.
[125] Ibid., p.14-15
[126] United Nations Secretariat, *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, (2011), p.38, available from http://hrbaportal.org/wp-content/files/Inter-Agency-HRDDP-Guidance-Note-2015.pdf
[127] Ibid., p3.

focuses on obligations the UN has in the context of working with third parties, the Joint Policy deals with direct internal obligations. UNMIK's Human Rights Section in Kosovo, for instance, operates explicitly within the framework of the Joint Policy. Some PKOs have established relevant task forces and working groups aimed at evaluating requests for support and making recommendations in accordance with the HRDDP's requirements.[128] The Joint Policy is of particular interest as its provisions "apply and should be incorporated into all current and future field peace operations and political missions, including those where integration of human rights was not originally a factor in operational planning and design".[129]

For its part, the HRDDP recalls that "it is important for UN entities not to send the wrong signals by, for example, implying that grave violations committed by recipients of some forms of UN support not strictly covered by the policy might be "acceptable"".[130] Given this statement, it is difficult to apprehend any UN-led peacekeeping operations without even a remote mechanism to ensure human rights violations are prevented, if not reported. One could argue that such requirements already lie within existing legal obligations of the UN under the law of international responsibility, which deals with the legal consequences of violations of human rights obligations. If human rights violations are monitored, they can be more easily accounted for. This assumption will be the basis of the normative-legal chapter in the last part of this thesis. If the alleged human rights violations occurring in the case of Western Sahara by both parties fall within the scope of the HRDDP for instance – ie, the support by UN entities to non-UN security forces – one could argue that the obligations under the policy would therefore be engaged.

It is clear from the analysis of the normative and operational framework regarding the incorporation of human rights components into PKOs that a sense of coherence is missing. This is reflected in the execution at the institutional level where mandating organs and mandated agencies have, collectively or individually, ventured in addressing the issue.

[128] Ibid., p.10.
[129] Ibid.,, p.3.
[130] Ibid.,, p.9.

Section 2: Political-institutional dynamics of human rights in UN conflict management and PKOs

Not only does the normative framework regarding human rights components in peacekeeping lack overarching guidelines, the resulting practice from the entities involved in peacekeeping suffers from a lack of coherence and coordination. There is not enough clarity – if at all – around the hierarchical responsibilities and roles that each of them (UNSC, DPKO, OHCHR mainly) should play. The UN lacks a peacekeeping doctrine beyond what is reflected in the list of documents provided in section 1.2 of this chapter. Additionally, the absence of systematic incorporation of human rights components in PKOs blur the whole picture even further in terms of the fundamentals of peace operations, on which a renewed multinational reflexion is required (Johnstone 2005, 11). As far as the UNSC is concerned and as presented in the previous section, it has never released any document regarding the handling of human rights issues in PKOs in collaboration with either the DPKO or the OHCHR. It has however, set up joint fact-finding missions with the OHCHR like the ones in the Congo in 2002[131] and 2003.[132] Therefore, the practice of human rights by the Council extends beyond the establishment of a normative framework as confirmed by the establishment of the first PKO including explicit human rights monitoring language in 1991, long before the Brahimi Report was released.

Despite that the UN Charter did not foresee the creation of peace operations in its provisions, the UNSC has taken on a leading role in creating PKOs and increasingly equip them with human rights components. However, it has not been the sole actor in this process and has relied on various entities to implement them. The division of labour amongst mandating organs and mandated agencies sometimes being unclear, there can be no consistent practice when it comes to incorporating and implementing human rights in UN PKOs. It is thus appropriate to provide an overview of the UN's – mostly the UNSC's – competence to establish PKOs and give them human rights mandates (2.1), before examining the role and practice of the relevant UN agencies involved with PKOs (2.1). The

[131] https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20S2002%20764.pdf
[132] https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20S2003%20216.pdf

last sub-section will finally highlight the consequent weaknesses of the mandates issued and operations deployed (2.3).

Section 2.1 Institutional responsibilities concerning human rights components in PKOs

The authority of the UNSC in terms of maintaining international peace and security derives principally from the Charter. Article 24 gives the UNSC "the primary responsibility for the maintenance of international peace and security" and that "in discharging these duties, the Security Council should act in accordance with the Purposes and Principles of the UN". This also confers to the UNSC "investigative powers" in order to get a sound factual basis for its action in peacekeeping.[133] Therefore, the UNSC can decide whether to condemn human rights violations, set up HRMC and even receive information on human rights situations form the HRC through its fact-finding missions.[134] These interactions with the HRC have actually increased at the end of the Cold War.[135]

In 2002, the then Secretary General Kofi Annan wrote that the UNSC "has learned from its difficulties in the past decade how to craft wiser and more effective solutions."[136] He also recognised that "good progress has been achieved to date in integrating human rights throughout the UN system. For example, human rights specialists are deployed as part of peacekeeping missions". Kofi Annan's statements can be explained by the rise in references to concerns about human rights violations and abuses in the mandates' recitals as well as an increasing inclusion of human rights components in PKOs. As will be detailed later in this chapter, out of the 54 operations deployed since the end of the Cold War (and the establishment of the UN Iraq-Kuwait Observation Mission in April 1991), 34 explicitly include the protection and promotion of human rights in their mandates. Since the adoption of the Brahimi Report, the 18 mandates adopted have systematically incorporated human rights components. Conversely, out of

[133] United Nations Security Council, *Research Report on Human rights and the Security Council: an evolving role*, (2016), p.4., available from https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_human_rights_january_2016.pdf
[134] Ibid., p.5
[135] Ibid.., p.8
[136] UN General Assembly document A/57/387, *Report of the Secretary General on Strengthening of the United Nations: an agenda for further change*, (2 September 2002), available from https://digitallibrary.un.org/record/474330, §9

the 18 operations mandated before November 1989 and the fall of the Berlin marking the end of the Cold War, none of them did.

In light of this, it can be asserted that UNSC members have even been taking a more proactive stance on issues of human rights. For instance, in a 2014 meeting at the UNSC on peacekeeping operations, the president of Argentina stated that "the responsibilities assigned to missions clearly entail various dimensions: the protection of human rights, assistance in rebuilding institutions and consolidating democracy and the rule of law. […] They also increasingly require more coordination and coherence".[137] However, this practice of discussing human rights at the Council level has also been recently met with resistance with, for example, a joint letter from Russia and China stating that the "Human Rights Council is a subsidiary organ of the General Assembly and as such is not authorised to interact with the Security Council". [138] This reveals a real sensitivity of the issue of human rights at Council level to this day. The political nature of this organ and the related controversies around its composition are not without effect on the absence or presence of human rights components and language in PKO mandates. The 2016 Research Report issued by an NGO, Security Council Report, provides relevant information and insight on the matter. It highlights that even though the HRC has been instrumental in providing information regarding human rights situations at the demand of UNSC's members, it has "stopped short of mandating that its investigators report regularly to the Security Council".[139]

The second main UN body involved in the deployment of operations on the ground is the UNGA. As a unique political and institutional forum where all 193 member States are represented, each PKO's budget and resources are subject to its approval. As such, its influence cannot be contested, including regarding human rights questions. The Fifth Committee of the UNGA (Administrative and Budgetary Committee) has indeed gone under intensified scrutiny from member States wanting to retain control over the matter. China and Russia, for instance, have pushed for deep cuts in PKOs, including to human rights and gender

[137] UN Security Council document S/PV.7275 (9 October 2014), available from https://undocs.org/pdf?symbol=en/S/PV.7275 p.26
[138] Security Council document S/2019/449 (30 May 2019), available from https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2019_449.pdf
[139] Ibid note 47., p.5.

components.[140] The issue of resources has been raised in addressing the successfulness of a mission and is a recurrent recommendation in all the policy documents mentioned in section 1.2.[141] Here again, practice has revealed the need for a coordination between the UNSC equipping the missions with tasks and the UNGA approving the corresponding resources. If budget cuts are initiated at UNGA level, the risk to see PKO's capacities diminishing – to the point of closure – rises.[142] Additionally, if mandates are expanded to new tasks without the necessary increase in financial and/or human resources, they will have to endure an internal re-shifting in order to "align budgetary resources", as was suggested by the UNSC when renewing the mandate of MINUSCA in 2018.[143] This disconnect creates a new forum for discussion and negotiation among members States, which increases the risk of downsizing resources. Beyond resources and financing issues, the UNGA has addressed general topics related to peacekeeping through the annual reports of its Special Committee on Peacekeeping Operations or the inclusion of specific agenda items on peacekeeping review during plenary sessions.

Finally, successive UNSGs have also formally contributed to the growth of textual bases related to human rights questions in peacekeeping. They have directly issued relevant documentation on many occasions (1997, 2002, 2005 and 2011) as seen in section 1.2, and have been at the origin of other initiatives such as the Brahimi Report, which would turn out to be critical. The UNSG's Human Rights Upfront Initiative launched by Ban Ki-Moon in 2013, can be regarded as a wish by the Secretariat, face of the organisation worldwide, to strengthen its role in governance and strategic leadership. It followed a 2012 internal review which concluded that there had been "systemic failure in meeting UN responsibilities to prevent and respond to serious violation of human rights and humanitarian law and to protect people at risk" in the realm of the war in Sri Lanka.[144] The initiative calls for a change in how the UN deals with human rights in all its activities. It is very critical of the mistakes that have been made and it is clear when reading

[140] As Jake Sherman recalls in an online article from The Global Observatory dated December 9, 2019, available from https://theglobalobservatory.org/2019/12/align-peacekeeping-mandates-resources-improve-link-security-council-fifth-committee/

[141] See also report by the Center for Civilians in Conflict, "Protection with less presence: How the peacekeeping operation on the Democratic Republic of Congo is attempting to deliver protection with fewer resources" of June2018.

[142] Ibid. p.3.

[143] Security Council Resolution S/RES/2448 (13 December 2018), §37, available from https://undocs.org/en/S/RES/2448(2018).

[144] UN Secretary General, Human Rights Upfront, an Overview, (2013), available from https://interagencystandingcommittee.org/system/files/overview_of_human_rights_up_front_july_2015.pdf

through the document that it is intended to be forward thinking with expressions such as “once-in-a-generation opportunity”.[145] This idea of prioritising human rights for all activities and staff engagement for the UN that the Secretariat tries to enforce as the organisation’s focal point is notwithstanding the necessary approval by political organs, such as the UNSC. White suggests that a formal recognition by the UN political organs of applicability of international human rights standards to all UN activities would constitute a step towards the right direction (White 2005, 463). However, the idea that the UN is more successful when it is acting under the authority of the parties to conflict and their will than when it is trying to impose its will from outside – based on the issuance of resolutions and policy documents - has also been put forward (Berdal & Economides 2007, 19).

In conclusion, as the main mandating authority, the UNSC has the power to decide whether or not and to what extent to incorporate human rights monitoring components in the PKOs it deploys, as well as to request the assistance of other UN bodies in their planning or implementation. However, this is subject to the UNGA’s final approval on budget and resources. Arguably, if an overarching principle or doctrine was adopted with regards to HRMC in PKOs, it should be generated by the UNSC itself. However, careful consideration to the role that the UN agencies mandated by the UNSC can play should be given.

Section 2.2 The role and practice of UN agencies involved with PKOs

This sub-section examines the ways in which the UNSC implement its mandating authority. While, mainly, the Council provides the legal foundation for PKOs, it often refers to other UN offices and entities in order to carry out certain tasks. The UN High Commissioner for Refugees (UNHCR), for instance, is mobilised to take care of refugees and internally displaced persons. For all the relevant human rights components, OHCHR is given a prime function and partners with the DPKO, DPA and DFS to ensure that the human rights related tasks are carried out with the proper resources and guidance when the mission is so mandated.[146]

[145] Ibid, p1.
[146] Ibid., note 2., p8

O'Flaherty notes that a number of UN agencies, such as UNHCR but also UNICEF and UNDP, had already taken a stance in integrating human rights approaches in their work (O'Flaherty 2004, 49). In a set of recommendations by the Policy Committee to the UNSG dated 26 October 2005[147], it was acknowledged that "human rights should be integrated into peace operations according to the following principles:

a) All UN entities have a responsibility to ensure that human rights are promoted and protected through and within their operations in the field;

b) A commitment to human rights and the ability to give the necessary prominence to human rights should be important factors in the selection of (Deputy) Special Representatives of the UNSG (SRSGs/DSRSGs), and in the monitoring of their performance, as well as that of the mission;

c) OHCHR, as "lead agency" on human rights issues, has a central role to play through the provision of expertise, guidance and support to human rights components. These components should discharge core human rights functions and help mainstream human rights across all mission activities; and,

d) Separate public reporting by the mission and/or the High Commissioner on issues of human rights concern should be routine."

The Policy Committee, chaired by the Deputy SG, however agreed that the decisions taken should apply to all the future missions and, regarding the current missions, that HRMC should be incorporated on a "case by case" basis.[148] The limits of a unified and streamlined approach lie precisely within the limited room for manoeuvre provided to the various organs of the UN in terms of assumption of responsibilities against that provided to the UNSC as described in section 2.1.

Nevertheless, the 2011 Joint Policy is an interesting example of cooperation between several relevant entities involved in both peace operations and human rights protection and promotion. The Policy sets out the conceptual, institutional and operational relations between OHCHR, DPKO, DPA and DFS in a fairly comprehensive manner. It also formally notes the difficulties of peace operations

[147] UN Secretary General Policy Committee, Decisions of the Secretary General - 26 October Policy Committee Meeting (2005), available from https://search.archives.un.org/uploads/r/united-nations-archives/a/e/4/ae4a75da2ff94014775a3a92f0fd79b9b242a86ff80500dce2c8ae960b3f964a/S-1091-0002-05-00010.pdf
[148] Ibid., (iii)

deprived of HRMC and the fact that they are still "expected to uphold human rights standards, ensure that they do not adversely affect human rights through their operations and advance human rights through the implementation of their mandates" to do so without the necessary resources.[149] This can be read as a criticism of the UNSC's failure to systematically equip PKOs in light of an agenda that the whole UN is seeking to pursue: the protection of human rights.

According to the same Policy, OHCHR is "the designated global lead entity in the areas of monitoring"[150], even though it does not imply an exclusive role in this matter. Attempts have been made by scholars to analyse and centralise the role of the OHCHR in the implementation of human rights protection during filed operations (O'Flaherty 2004, Hannum 2006, Alizadeh 2011) and the "need to assume a guiding role" has been given prime consideration (O'Flaherty & Davitti 2014, 170). Given the nature, aim and responsibility of the OHCHR to uphold human rights within as well as outside the UN system, it has "the status, authority and comprehensive mandate to articulate the vision and guide the action that will be required" to engage in any streamlining of processes regarding human rights in PKOs (O'Flaherty 2004, 55). The Brahimi Report itself highlights the need for the OHCHR to be more involved in "planning and executing the elements of peace operations that address human rights (§244). It goes on to acknowledge that "if United Nations operations are to have effective human rights components, OHCHR should be able to coordinate and institutionalise human rights field work in peace operations". In the 2002 Agenda for Further Change, the role of OHCHR in ensuring "that human rights are incorporated into country level analysis, planning and programme implementation" is also put forward (§51). In 2005, the Plan of Action for OHCHR, published in 2005 under the Former High Commissioner Louise Arbour, acknowledged its prime function in "designing, assisting in establishing, and recruiting for human rights components of peace operations".[151]

Nevertheless, shortcomings persist despite the apparent necessity for the OHCHR to take the lead on this matter. O'Flaherty notes that the 2001 Training

[149] Ibid., note 127, p.3
[150] Ibid., note 127, p.5
[151] OHCHR, *The OHCHR Plan of Action: Protection and Empowerment*, (2005), §58, available from https://www.ohchr.org/Documents/HRBodies/TB/TBS/planaction.pdf

Manual on Human Rights Monitoring produced by OHCHR "does not chart a route through many of the complex challenges that a mission will confront in practice" (O'Flaherty 2004, 50). The need for more notable participation by the OHCHR in the deliberations of the UNSC was also acknowledged in a landmark 2005 UNSG report.[152] This can be attributed to a late emergence of the entity as we know it today. Despite the fact that most human rights related conventions and treaties were signed and ratified between the late 1960's and early 1990's, the OHCHR was only created in 1994 by the UNGA.[153] Whether it be a logical extension of an UN-wide human rights mechanism or a rushed institutional set up for ensuring the coordination of human rights related issues within the organisation, it triggered some research and publications with regards to its role and responsibilities. According to the 2016 research report mentioned earlier, the UN Charter sees the Economic and Social Council (ECOSOC) as the body with key responsibilities for human rights and not the OHCHR, created later.[154] By creating the Commission on Human Rights (CHR), it intended to establish a body largely devoted to create its normative framework before starting to address human rights violations amid demands from the newly independent African States in the 1960's. In the UN organisational chart, the OHCHR is designated as one of the "five other UN entities". It sits under the direct authority of the UNGA but remains separate from the rest of the UN Secretariat. The Office still bears the main responsibilities in terms of human rights promotion and protection and its mission is to integrate human rights standards throughout the work of the organisation. However, the learning curve on which the OHCHR currently is can be evidenced by the work in progress of its Training Manual on Human Rights Monitoring as pointed by O'Flaherty. Out of 33 chapters listed in the manual, 15 are without content at the time of writing, including chapter six on "United Nations monitoring standards", chapter nine on "Strategic planning for human rights impact" or – more relevant in the case of Western Sahara – chapter 24 on "Monitoring human rights in the context of demonstrations and public meetings". This lack of institutional clarity and guidance amongst the UN agencies mandated by the UNSC further impacts the overall practice of discussing human rights

[152] UN Secretary General report A/59/2005/Add.1, *In Larger Freedom: Towards Development, Security and Human Rights for All*, (23 May 2005), available from https://digitallibrary.un.org/record/550204?ln=fr
[153] UN General Assembly resolution A/RES/48/141, "High Commissioner for the promotion and protection of all human rights", (7 January 1994), available from https://undocs.org/A/RES/48/141
[154] Ibid., note 134., p.3

issues and incorporating HRMC into PKOs, which has been highlighted by several evaluation reports addressed in the next sub-section.

Section 2.3 Implications for the mandates and peacekeeping practices

When the post of High Commissioner for Human Rights was created by UNGA Resolution 48/141, the relationship with the UNSC was not addressed, nor did the importance of human rights to the maintenance of international peace and security outlined.[155] In practice, when the first appointment of a Special Rapporteur on Human Rights for the Former Yugoslavia by the CHR in the summer of 1992 was made and his reports were made available to the UNSC, the UNSC began receiving human rights briefs on a regular basis regarding the conflict.[156] However, the regular provision of information on human rights situations regarding conflicts on the UNCS' agenda did not become common practice and the genocide in Rwanda is a strong reminder of this absence of connection. Indeed, the then CHR Special Rapporteur Bacre Waly Ndiaye had issued an alarming report on the human rights situation after a visit on the ground only days after an accord was signed in August 1992.[157] The UNSC did not take the report into account as the resolution establishing the UN mission in Rwanda did not mention human rights, nor did it provide for a human rights component at the time.[158] This consequently reinforces the idea that, ultimately, only the UNSC has the power to carry out a full implementation of human rights protection on the ground, regardless of how involved other entities can be or asked to be.

In an evaluation report issued in March 2019 by the UN Office of Internal Oversight Services (OIOS) on the effectiveness of human rights monitoring, reporting and follow up in the UN multi-dimensional peacekeeping operations, the mutual influence between the work on the ground by PKOs and the discussions by Council members is evidenced. Indeed, the publication of reports on human rights situations by HRMC clearly influenced the Council's work as it specifically referred to them, which led to increased mentions and consideration. The report

[155] Ibid., note 155
[156] Ibid note 134, p5.
[157] UN Document E/CN.4/1993/46, Report by the Special Rapporteur on Extrajudicial, summary or arbitrary executions, submitted pursuant to Commission on Human Rights resolution 1992/72, (23 December 1992), available from https://digitallibrary.un.org/record/158387?ln=fr
[158] UN Security Council resolution S/RES/872, (5 October 1993), available from https://digitallibrary.un.org/record/197341?ln=fr

points out the "spike in Security Council references to human rights issues in 2015 following the publication of five public reports in 2014 and 2015" in the case of South Sudan".[159] However, these public reports were largely published on an irregular basis for the time period considered by the OIOS (2014-2017), which "demonstrated the large gap between the intent of the Security Council and the Organization's policies versus its practice",[160] a gap ultimately reliant on the will of the UNSC.

In August 2009, UNHCR (together with the Policy Development and Evaluation Service and the Division of Operational Services) issued a report gathering the findings of a workshop on the lessons learned regarding its engagement with integrated UN missions.[161] The report highlights the tensions between mandates emerging from UNSC and based on political compromises, on the one hand, and humanitarian, human rights or refugee protection mandates whose legitimacy derives from overarching norms, on the other. The OIOS, in the 2019 Evaluation Report, recognised that "essential operational guidance was lacking with the OHCHR 2011 revised manual on human rights monitoring without content in 16 out of 33 chapters" as mentioned previously. [162] This lack of guidance reveals a clear operational deficiency by OHCHR and the UN as a whole in addressing critical issues regarding human rights monitoring in PKOs. Additionally, out of the nine recommendations made by the OIOS, seven where directly or jointly addressed to the OHCHR, including all four critical recommendations. Therefore, the shortcomings in dealing with human rights in peacekeeping by the OHCHR are as significant as the existing expectations to remedy them from the rest of the UN bodies and agencies.

In sum, there are two approaches to human rights protection in conflict situations within the UN system: as an objective of the organisation and as a function. Not incorporating HRMC in a PKO as a function does not mean that upholding human rights is not a final objective of the mission. In the case of MINURSO for instance,

[159] Office of Internal Oversight Services, *Evaluation of the Effectiveness of Human Rights Monitoring, Reporting and Follow-up in the UN Multi-Dimensional Peacekeeping Operations*, (8 March 2019), available at https://www.ohchr.org/Documents/AboutUs/Evaluation/Evaluation_human_rights_monitoring_reportomg_follow-up_peacekeeping.pdf, §110
[160] Ibid., §118
[161] UNHCR, PDES & DOS, *UNHCR Engagement with Integrated UN Missions: Report of a Lessons Learned Workshop*, August 2009, avialble from https://www.unhcr.org/en-ie/4a9e7ec99.pdf
[162] Ibid., note 161., p.2

ensuring that conditions for organising a “free and fair referendum” are met, fall rightly under this approach. However, not incorporating HRMC as a function is a political choice made by the UNSC that takes into account several considerations sometimes conflicting with the objective of upholding human rights. Ultimately, whether it be leading on a political (UNSC) or technical (OHCHR) basis, none of the entities can work unilaterally when it comes to human rights issues in conflict situations. A coordinated effort must be made in order to set up and implement a clear overarching policy on the matter. However, the UNSC ultimately appears to maintain control over any adoption or application of such a policy. Examining the practice of incorporating human rights provisions in PKOs depicts a more accurate state of affairs regarding the current institutionalisation of human rights in peacekeeping and its corresponding practice.

Section 3: Human rights provisions in PKO mandates

Pre- and post-Cold War operations pursue similar goals but not all of them incorporate, explicitly or not, functions related to human rights protection. As detailed in the previous sections, the UN has attempted over the years to fill in the gaps between the constitutive framework for human rights norms protection (made by the various treaties and conventions discussed in sub-section 1.1 of this chapter) and the reality of peacekeeping on the ground by incorporating sporadically human rights language into PKOs missions. As Mansson points out,

> “it is the change in the composition and mandates of contemporary peace operations, emphasising the role of civilian components and their tasks related to institution-building and the rule of law, rather than the inherent functions of the military peacekeepers *per se* that have modified as far as their potential human rights role is concerned” (Mansson 2005, 385).

Analysing all PKO mandates can help identify trends in how the UN has dealt with the question of human rights in conflict resolution in practice (section 3.1). Focusing on the missions still in place, however, helps understanding how singling out MINURSO is relevant to understanding these trends (section 3.2). Finally, section 3.3 will look into the context into which certain mandates came

into incorporating detailed human rights monitoring tasks and others where the mandates were provided with vague terminology.

Section 3.1 Content of human rights components in all PKO mandates

In this section, we are looking into the presence of human rights monitoring, protection and promotion mechanisms in all the mandates adopted since the creation of the UN. The analysis reveals the impact of two catalytic events in the evolution of human rights language in PKOs: the end of the Cold War in November 1989 and the adoption of the UN's Brahimi Report in November 2000. A decade after the end of the Cold War, the release of the Brahimi Report in 2000 followed by the events of 9/11 – perceived as a defining moment in thinking about international security and the nature of the international system – have already been identified as having helped grow the literature and nourish the debate on human rights and peace operations in the first chapter of this thesis. The incorporation of civilians' protection duties - so-called Protection of Civilian mandates - have also increased in the early 2000 after the first mission expressively authorising UN personnel to use force to protect civilians was established in 1999 in Sierra Leon (UNAMSIL). According to Mathias, this drive to introduce more robust Protection of Civilian mandates by the UNSC from 1999 onwards was mainly an attempt to respond to the difficult experiences in Bosnia Herzegovina and Rwanda in the mid-1990s (Mathias 2017, 4) rather than to compensate for a lack of human rights considerations.

The data analysis below is based on a review of all PKOs mandates adopted since the creation of the UN in 1945 in the search for either explicit HRMC or human rights related language (including in describing a situation threatening international peace and security in the mandates' recitals). Both references to human rights monitoring components and more general human rights related language have been coded. Only the UNSC resolutions related to the establishment of new PKOs or the ones expanding mandates to incorporate new responsibilities have been considered. Finally, no distinction has been made between Chapter VI and Chapter VII missions as the purpose of the analysis is to determine whether human rights were considered in the establishment of a PKO, regardless of their enforceable nature upon the State parties. The analysis

in fact reveals that explicit human rights components were found in both categories.

Table 3: PKO Mandates and HRMC since the Creation of the UN

Period	No HRMC	General human rights language	HRMC	Total
1945 to 1989	12	6	0	18
1989 to 2000	14	6	16	36
2000 to present	0	0	18	18
1945 to present	**26**	**12**	**33**	**72**

The figures show that all PKOs deployed after the issuance of the Brahimi Report in 2000 have systematically included an explicit HRMC or requested to end any human rights violations (like in the case of the UN Mission in Cote d'Ivoire and the UN Supervision Mission in Syria). This trend is a confirmation of the growing importance given to the protection and promotion of human rights since the end of the Cold War. Between 1989 and 2000, before the Brahimi Report was issued, 22 out of 36 missions already included human rights language or protection mechanisms. The distinction between traditional and modern PKOs identified in the literature (Fortna 2004, 270; Fortna & Howard 2008, 285; Doyle & Sambanis 2006, 14) can however be challenged to a certain extent, including when it comes to human rights issues. Indeed, the United Nations Operation in the Congo (ONUC)'s mandate (deployed on the country between July 1960 and June 1964) provides a lot of information regarding the institutionalisation of human rights in UN PKOs. Its success in the restoration and maintenance of law and order has provided insightful ground experience for establishing recommendations regarding civilian policing in peacekeeping that were later detailed in the Brahimi Report issued almost four decades later (Mansson 2005, 393). It set a precedent in several aspects of human rights functions (such as the protection of civilians).

The UN mission in El Salvador (ONUSAL) established in May 1991 remains the first to have explicitly incorporated human rights provisions within its mandate.

However, references to certain specific rights were arguably made in the mandates of UNTSO and UNMOGIP as early as 1948 and 1949. The former refers to religious freedoms and talks about the protection of the Holy Places and the City of Jerusalem "for the purpose of worship by those who have an established right to visit and worship at them"[163]. The latter mentions in the recitals the "full freedom to all subjects of the State, regardless of creed, caste or party, to express their views and to vote on the question of the accession of the State"[164]. According to the result of an analysis by Maus, after the deployment of ONUSAL, 22 out of 38 missions created have explicitly made reference to human rights in their mandate (Maus 2010, 59). However, the starting point of this examination (the creation of ONUSAL) does not allow for the inclusion of certain mandates establishing PKOs prior to the date of 20 May 1991 and after the end of the Cold War such as the one at the very heart of this thesis, MINURSO, established by a UNSC resolution three weeks earlier. At the time of her analysis, seven missions had not been deployed yet.[165] Additionally, based on the UN missions' catalogue, between the deployment of ONUSAL and the last mandate adopted at the time of her research in 2010, 43 missions were created. Therefore, four missions are missing from her conclusions. After having conducted the analysis for the purpose of this research, it can be ascertained that, since the creation of ONUSAL, the number of mandates that either include explicitly a human rights component, allows training in human rights law or coordination with relevant agencies and organisation regarding human rights issues, is in fact 34 (including ONUSAL) out of 51. Another seven of them have partial or implicit human rights related duties, which means 80 per cent of mandates adopted since the deployment of ONUSAL take a stance on human rights issues. This is higher than Maus' findings from 2010.

There is clear empirical evidence that HRMC have started to materialise as a standard practice at the UNSC level, which will be discussed further in this thesis when assessing the potential existence of human rights monitoring as a norm of customary international law. The next sub-section will set out the findings of an

[163] UN Security Council resolution S/RES/50, (29 May 1948), available from https://undocs.org/S/RES/50(1948) , §5
[164] UN Security Council resolution S/RES/47 (21 April 1948), available from https://undocs.org/S/RES/47(1948) §A.1(b)
[165] UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), UN Organization Interim Security Force for Abyei (UNISFA), UN Mission in the Republic of South Sudan (UNMISS), UN Supervision Mission in Syria (UNSMIS), UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and UN Mission for Justice Support in Haiti (MINUJUSTH)

analysis on the human rights related language in PKOs mandates still active. Analysing their content against the backdrop of all the analyses made thus far, as well as UNSC political considerations, will help setting the scene for the investigation of MINURSO, used here as a foundation for analysing human rights law in conflict resolution.

Section 3.2 Content of human rights components in currently deployed missions

Understanding the context within which the case of MINURSO is placed at the date of this research also requires a thorough examination of all currently deployed peace operations and the human rights related language contained in their constitutive mandates. This would also help situate MINURSO in the current human rights setting if it was to be provided with explicit HRMC. The official UN peacekeeping website (peacekeeping.un.org) lists 13 operations currently stationed across three continents:

Table 4: Human Rights Provisions in PKO Currently Deployed

Mission name	Creation date	Mandate	Human Rights components	Secondary reference to human rights
UNMOGIP, India and Pakistan	January & April 1948 S/RES/39 and S/RES/47 (1948)	- To bring about a cessation of the fighting - To create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan		*To make known to all concerned that the measures indicated in this and the following paragraphs provide full freedom to all subjects of the State, regardless of creed, caste, or party, to express their views and to vote on the question of the accession of the State, and that therefore they should co-operate in the maintenance of peace and order.(S/RES/47)*
UNTSO, Middle East	May 1948 (S/RES/50)	- To monitor ceasefires - To supervise armistice agreements - To prevent isolated incidents from escalating - To assist other UN peacekeeping operations in the region to fulfil their respective mandates.		*"Urges all Governments and authorities concerned to take every possible precaution for the protection of the Holy Places and of the City of Jerusalem, including access to all shrines and sanctuaries for the*

				purpose of worship by those who have an established right to visit and worship at them"
UNFICYP, Cyprus	March 1964 S/5575 and S/5603	- Prevent a recurrence of fighting; - Contribute to the maintenance and restoration of law and order and a return to normal conditions; - Supervision of ceasefire and maintaining a buffer zone between the lines of the Cyprus National Guard and of the Turkish and Turkish Cypriot forces.		
UNDOF, Golan	June 1974 S/RES/350	- Maintain the ceasefire; - Supervise the disengagement of all forces; - Supervise the areas of separation, as provided in the May 1974 Agreement on Disengagement.		
UNIFIL, Lebanon	March 1978 S/425 and S/426 with related UNSG report S/12611 (1978) and S/RES/1701 (2006)	1978: - Confirm the withdrawal of Israeli forces from Lebanon - Restore international peace and security - Assist the Lebanese Government in ensuring the return of its effective authority in the area 2006: - Monitor the cessation of hostilities. - Accompany and support the Lebanese Armed Forces (LAF) throughout the South - Extend its assistance to help ensure humanitarian access and the voluntary and safe return of displaced persons - Assist the LAF in taking steps towards the establishment of an area free of armed personnel, assets and weapons - Assist the Government of Lebanon, at its request, in securing its borders and other entry points		
MINURSO, Western Sahara	April 1991 S/RES/690	- Monitor the ceasefire; - Verify the reduction of Moroccan troops in the Territory; - Monitor the confinement of Moroccan and		

		POLISARIO troops to designated locations; - Take steps with the parties to ensure the release of all Western Saharan political prisoners or detainees; - Oversee the exchange of prisoners of war, to be implemented by ICRC; - Repatriate the refugees of Western Sahara, a task to be carried out by the UNHCR; - Identify and register qualified voters; - Organise and ensure a free and fair referendum and proclaim the results; - Reduce the threat of unexploded ordnances and mines		
UNMIK, Kosovo*	June 1999 S/RES1244	<u>International security presence in charge of</u>: - Maintaining and enforcing a ceasefire - Demilitarizing armed groups and establishing a secure environment for the return of refugees - Coordinating humanitarian aid - Supervising demining <u>International civil presence in charge of:</u> - Assuming administrative responsibilities and functions, facilitating a political process - Organising and overseeing the development of provisional institutions - Maintaining civil law and order - Protecting and promoting human rights	"*protecting and promoting human rights*"	
UNAMID, Darfur*	July 2007 S/RES/1769 (1007) and S/RES/2148 (2014) following the proclamation of independence	<u>2007:</u> - Protecting civilians - Facilitating humanitarian aid - Helping political process <u>2014:</u> - Mediate between the Government of Sudan and	*"requests the Secretary-General to ensure continued monitoring and reporting of the situation of children and continued dialogue with*	"*Reiterating in this regard its condemnation of all violations of human rights and international humanitarian law in Darfur*"

	of South Sudan in 2011	non-signatory armed movements on the basis of the Doha Document for Peace in Darfur; - Support the mediation of community conflict, including through measures to address its root causes.	*parties to the conflict towards the preparations of time-bound action plans to end recruitment and use of child soldiers and other violations against children"*	
MONUSCO, D.R of the Congo*	July 2010 S/RES/1925 and S/RES/2053 (2012)	- Protection of civilians, humanitarian personnel and human rights defenders under imminent threat of physical violence; - Support the Government of the DRC in its stabilization and peace consolidation efforts	"*Support the efforts of the Government of the DRC to ensure the protection of civilians from violations of international humanitarian law and human rights abuses, including all forms of sexual and gender-based violence, to promote and protect human rights and to fight impunity*"	
UNISFA, Abyei*	June 2011 S/RES/1990	- Monitor and verify the redeployment of any forces from the Abyei Area; - Participate in relevant Abyei Area bodies; - Provide de-mining assistance and technical advice; - Facilitate the delivery of humanitarian aid and the free movement of humanitarian personnel; - Strengthen the capacity of the Abyei Police Service (APS) by providing support, including the training of personnel, and coordinate with the APS on matters of law and order; - In cooperation with the APS, provide security for oil infrastructure in the Abyei Area	*Requests the Secretary-General to ensure that effective human rights monitoring is carried out, and the results included in his reports to the Council*	
UNMISS, South Sudan**	July 2011 S/RES/1996	- To consolidate peace and security, and to help establish the conditions for development in the Republic of South Sudan	*"Monitoring, investigating, verifying, and reporting regularly on human rights and potential threats against the civilian population as well as actual and potential*	

			violations of international humanitarian and human rights law, working as appropriate with the Office of the High Commissioner for Human Rights, bringing these to the attention of the authorities as necessary, and immediately reporting gross violations of human rights to the UNSC"	
MINUSMA, Mali*	April 2013 S/RES/2100	- Stabilization of key population centres and support for the reestablishment of State authority - Support for the implementation of the transitional road map, including the national political dialogue and the electoral process - Protection of civilians and UN personnel - Promotion and protection of human rights - Support for humanitarian assistance - Support for cultural preservation - Support for national and international justice	*"promotion and protection of human rights"*[166]	
MINUSCA, Central African Republic*	April 2014 S/RES/2149	- Protection of civilians - Support for the implementation of the transition process, including efforts in favour of the extension of State authority and preservation of territorial integrity	*"promotion and protection of human rights"*[167]	

[166] Include "*(i) To monitor, help investigate and report to the Council on any abuses or violations of human rights or violations of international humanitarian law committed throughout Mali and to contribute to efforts to prevent such violations and abuses; (ii) To support, in particular, the full deployment of MINUSMA human rights observers throughout the country; (iii) To monitor, help investigate and report to the Council specifically on violations and abuses committed against children as well as violations committed against women including all forms of sexual violence in armed conflict; (iv) To assist the transitional authorities of Mali in their efforts to promote and protect human rights;"*

[167] Include "*(i) To monitor, help investigate and report publicly and to the Security Council on violations of international humanitarian law and on abuses and violations of human rights committed throughout the CAR, in particular by different armed groups, including the former Seleka and the anti-Balaka, and to contribute to efforts to identify and prosecute perpetrators, and to prevent such violations and abuses, including through the deployment of human rights observers; (ii) To monitor, help investigate and report specifically on violations and abuses committed against children as well as violations committed against women, including all forms of sexual violence in armed conflict, and to contribute to efforts to identify and prosecute perpetrators, and to prevent such violations and abuses; (iii) To support the International Commission of Inquiry and the implementation of its recommendations; (iv) To assist the CAR authorities in the effort to protect and promote human rights;"*

		- Facilitate the immediate, full, safe and unhindered delivery of humanitarian assistance - Protection of the United Nations - Promotion and protection of human rights - Support for national and international justice and the rule of law - Disarmament, Demobilization, Reintegration (DDR) and Repatriation (DDRR)		

In the case of UNAMID and UNISFA, the UNSC requests the UNSG to ensure that human rights monitoring is carried out. The UNSG usually plays a role at the negotiations' level and not on the ground, but this language is a reflection of the Council's will to have human rights violations reported one way or another. This comparison reveals that, from all the mandates adopted after the end of the Cold War and still being regularly renewed and discussed by the UNSC, MINURSO is indeed the only one deprived of human rights related duties. While the five older missions (UNMOGIP in India and Pakistan, UNTSO in the Middle East, UNFICYP in Cyprus, UNDOF in the Golan, UNIFIL in Lebanon) that are still deployed at the time of this research also do not have a mandate related to human rights monitoring, MINURSO is the only one that belongs to the peacekeeping era described as "modern" or "multi-dimensional" by contrast to "traditional" (Torrejon Rodriguez 2020, 54). If ONUC's mandate represents an exception in traditional peacekeeping as discussed earlier, MINURSO remains an exception in modern peacekeeping.

This first level (quantitative) analysis therefore justifies the use of MINURSO as a case study for this research: why was it established without HRMC a few weeks only before the first ever mandate adopted with such mechanisms in an explicit manner? Were the two mandates drafted in parallel but without cross-communication between the respective teams? Why does it remain as such even after the issuance of the Brahimi Report and the confirmed focus given to human rights issues in PKOs? Do human rights violations reported by international NGOs in the case of the conflict in Western Sahara not suffice to trigger the reaction of UNSC members? Or does a case of decolonisation differ in all these respects? Human rights violations can sometimes constitute the basis for UN

intervention under Chapter VI or VII of the Charter in conjunction with OHCHR within a specific type of peace operations. But the UN as an organisation remains silent in the case of MINURSO despite all the tools in its possession that have been described in this chapter. Part of the answers to these questions were provided in chapter three above, when detailing the context within which MINURSO came to existing. Again, the role of the mandating authority (in this case, the UNSC) and the context in which it operates is to be addressed.

Section 3.3 Context of human rights components in PKO mandates

On the second level of (quantitative) analysis, it can be noted that differences exist in the human rights provisions in the mandates amongst currently deployed PKOs. Some of them refer only once (UNMIK in Kosovo) or twice (UNISFA in the Abyei region) to the terms "human rights", while the others have between 11 and 23 mentions (UNAMID in Darfur, MONUSCO in the Congo, MINUSMA in Mali, MINUSCA in Central African Republic and UNMISS in South Sudan). Even though the mandate requests "the Secretary-General to ensure that effective human rights monitoring is carried out, and the results included in his reports to the Council", UNISFA, in the disputed Abyei area (claimed by northern and southern Sudan), can be considered as not being thorough on the question of human rights. It is to note that, in the case of UNAMID, UNSC resolution 1769 of 31 July 2007 refers to paragraphs 54 and 55 of the report of the UNSG and the Chairperson of the African Union Commission of 5 June 2007 in order to detail the mandate of the mission, in which "human rights" is mentioned the most.[168] All these five mandates also include a "protection of civilians" mandate, and their duties under the human rights components are fairly well detailed, which reinforces the emphasise put on this matter. The chronological factor may be a potential explanation of these discrepancies, as UNMIK (1999) was deployed long before UNAMID (2007), MONUSCO (2010), UNMISS (2011), MINUSMA (2013) and MINUSCA (2014). However, UNISFA, for which the UNSC did not take an active stance on the question of human rights, was also created in the 2010's. In order to understand these differences, it is therefore appropriate to look into the political background on each of these missions.

[168] UN Security Council letter S/2007/307/Rev.1 from the Secretary General to the President of the Security Council, (5 June 2007) available from https://www.securitycouncilreport.org/un-documents/document/sudan-s2007-307-rev-1.php

As far as the UN mission in Kosovo is concerned, many factors can explain that the UNSC did not take the lead regarding the detailing of "human rights protection and promotion". Firstly, at the time of its creation, the International Criminal Tribunal for the former Yugoslavia had already been established for six years through UNSC resolution 827 adopted on 25 May 1993. It was set up in order to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia".[169] As such, although prosecuting serious violations of IHL is not identical with protecting human rights *per se*, a mechanism aimed at gathering information and evidence on violations was already in place. Additionally, the NATO mission in Kosovo (KFOR) was established at the same time as UNMIK (through UNSC Resolution 1244).[170] KFOR's mission included mostly security related tasks but was aimed at maintaining a safe and secure environment not only for the local population and returning refugees, but also for UNMIK personnel to be able to do their work. Finally, UNMIK is the only of the seven missions to have been established prior to the issuance of the Brahimi Report and the only one adopted not unanimously (China abstained). This can be symptomatic of a wish of the members at the time to try to reach a consensus, coupled with veto-avoiding practices that are common in the work of the Council.

In the case of UNISFA, it took several later mandate extensions to detail the extent to which human rights monitoring duties should be performed. The mandate has been extended 25 times at the time of writing (January 2022) since its creation in 2011 with each UNSC resolution "stressing the need for effective human rights monitoring" and requesting "the UNSG to ensure that effective monitoring is carried out". The fourth extension resolution dated 29 May 2013 added "any sexual and gender-based violence or violations and abuses committed against children" to the need for effective human rights monitoring.[171] In the ninth extension resolution dated 15 December 2015, the UNSC included "women" as recipients to the protection. In its 16th extension resolution dated 15 May 2018, the UNSC detailed further what it expects from the UNSG when

[169] UN Security Council resolution S/RES/827 (25 May 1993), available from https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf
[170] Security Council resolution R/RES/1244 (10 June 1999) available from https://undocs.org/S/RES/1244(1999)
[171] UN Security Council resolution S/RES/2104, (29 May 2013), available from https://digitallibrary.un.org/record/749656?ln=en

reporting on human rights monitoring, which should include "information, analysis, and data on violations and abuses of human rights".[172] Finally, the 20th included "and other violations and abuses committed against women and children" in the relevant paragraph.[173]

As discussed in section 2.1, the UNSC is the main decision-maker on the incorporation of human rights monitoring into PKO mandates. Chen Kertcher analysed the diplomatic discussions that take place around the adoption of UN PKOs mandates and argued that these tend to explain how mandates are executed (Kertcher 2016, 7), thus confirming the idea that peacekeeping is ultimately shaped by geopolitical considerations rather than legal imperatives, in line with IR realist theories. For instance, "due to Cambodia's dubious reputation in humanitarian issues, great importance was assigned to promoting the issue of human rights in diplomatic discussions." (Kertcher 2016, 104). Therefore, certain aspects of national dynamics can feed the human rights discussions in a particular conflict at the inter-state level.

Conclusion

This fragmentation in considering human rights protection in peacekeeping at the conceptual (norms and policies) as well as operational (mandates) level can be perceived as an impregnation of human rights standards into various levels of UN peacekeeping activities (Maus 2010, 63). However, the absence of a unified and clear statement regarding human rights components of UN PKOs, whichever they may be, can also reveal a lack of coherent strategy, or worse still, a lack of credibility of the UN system. In the case of Western Sahara, both human rights and conflict resolution agendas are currently suffering from a status quo which seems to subsist on the continuous struggle between international legality and political reality despite the existence of a so-called "Group of Friends", whose best interest is or should be the resolution of the conflict. The presence of human rights language in a PKO mandate seems to indicate the will to address violations as part of the conflict resolution process.

[172] UN Security Council resolution S/RES/2416, (15 May 2018), available from https://digitallibrary.un.org/record/1617169?ln=en
[173] UN Security Council resolution S/RES/2469, (14 May 2019), available from https://digitallibrary.un.org/record/3803207?ln=en

But does their absence signify a total lack of interest or protection? As Johnstone notes with regards to the use of force in PKOs, "a mandate without adequate capacity can generate expectations that will not be fulfilled. The qualifying words 'within the limits of the mission's capabilities' are aimed at lowering expectations, but is it reasonable to suppose that all concerned—including vulnerable populations—will read the fine print?" (Johnstone 2005, 7). This reflexion can be replicated in the case of HRMC, although can we assume that vulnerable populations should be expected to lower their expectations when it comes to protecting their basic human rights?

Another emerging question revolves around where do human rights components stand in relation to the emergence of the concepts of protection of civilians and responsibility to protect? In this regard, the 2008 Human Rights Council Resolution 9/9 on the "protection of the human rights of civilians in armed conflicts" also reiterated that "effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation".[174] Therefore, protection of civilian mandates arguably cannot be effectively achieved without appropriate and well-resourced HRMC.[175]

Ultimately, what is required in order to assess the value of any doctrine on human rights components in PKOs is a set of performance indicators (O'Flaherty 2004, 54). The establishment by the DPKO of a "Lessons Learned Unit" in 1995 followed by a guidance system and the deployment of Best Practice Officers to PKOs starting in 2004 indicate a will by the organisation to streamline policies, guidelines and standard operating procedures for PKOs. These do not necessarily focus on the human rights aspect of peace operations, and for such a doctrine to be formalised and operational, a strong involvement of the OHCHR in terms of expertise and resources is required. This participation has to be supported by an even stronger political will from the UNSC. This is precisely what seems to be failing the current resolution process in the conflict in Western Sahara. The following chapter will analyse MINURSO's narrative regarding

[174] United Nations Human Rights Council, *Resolution 9/9. Protection of the human rights of civilians in armed conflicts*, A/HRC/RES/9/9 (18 September 2008), available from https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_9.pdf
[175] Ibid., note 23, p5.

human rights since its deployment in April 1991 without any human rights monitoring prerogatives.

Chapter 5: The UN discourse on human rights in Western Sahara and the MINURSO mandate: a qualitative analysis

To put an end to hostilities on the ground, the UNSC intervened by adopting Resolution 690 of 1991, which established MINURSO. This resolution makes reference to, and is based on, the "Settlement Plan" to which both the Kingdom of Morocco and the POLISARIO Front had agreed in principle as described in chapter three of this thesis. Forasmuch as the content of the Settlement Plan had been discussed between the Secretary General and the parties (however separately), it is considered to have set somehow unrealistic deadlines and vaguely defined tasks, which allowed the stalemate to unfold (Sola Martin 2006, 375; Zunes & Mundy 2010, 182). Additionally, the question of Western Sahara is treated by the UNSC under Chapter VI of the UN Charter as per UNSC resolution 1495 of July 2003.[176] Therefore, no decision can be forced upon the parties. Plus, the Western Sahara question is subject to many political considerations given the nature of this organ as the veto mechanism allows permanent members to block any resolution that they do not deem satisfactory. Chapter four explained how MINURSO constitutes an anomaly in modern UN peacekeeping because it does not provide explicitly human rights monitoring prerogatives to its personnel unlike other post-Cold War missions. This chapter will analyse how human rights issues in the context of the conflict in Western Sahara have been dealt with by the UN in general, despite MINURSO's lack of an explicit monitoring component.

A review of the relevant UN documents on Western Sahara from the UN Security Council, Secretariat and General Assembly shows various time frames and levels of involvement for each body since the inclusion of the territory on the list of Non-Self-Governing Territories in 1963. While the UNSC passed no resolution on the subject between the years 1975 (S/RES 380) and 1988 (S/RES 621) and the UNSG did not issue any reports until June 1990 (S/21360), the UNGA adopted 16 resolutions between 1975 and the deployment of MINURSO. The Assembly also discussed the "question of Spanish Sahara" yearly from 1965. Given the ICJ's advisory opinion was rendered in 1975, the non-treatment of the Western

[176] Ibid., note 13

Sahara question by the UNSG and UNSC highlights the existing gap between the international legal and political mechanisms and the absence of complementarity between them. This chapter will analyse the human rights discourse from the three bodies, that is, to make out the meaning of a series of official texts and documents in relation to the wider conflict resolution process, beyond the use of human rights-related language. Rather than simply investigating the use of a specific language in the UN documents, an exploration of the discourse is necessary. It involves analysing the social and political effects that result from using a particular vocabulary on the one hand, and the productive effects of particular constructions of reality on the agency and identity of individuals and groups on the other hand (Holzscheiter 2014, 144).

Which references to human rights are made in the relevant UN documents addressing the conflict in Western Sahara? Is there an evolution in the use of human rights language? Is the presence or absence from resolutions and reports the result of particular circumstances on the ground? This chapter will answer these questions and aim at identifying whether a human rights discourse exists in the context of MINURSO and if there is a concordance between this discourse on human rights and the derailment of the political negotiation process intended to resolve the conflict. For that purpose, each relevant resolution and report has been scrutinised in the search for pertinent language. The analysis starts with the UNGA, which historically began to consider the Western Sahara question first and where discussions remain largely inconsequential. It will then inspect the UNSG reports before reviewing the resolutions adopted by the UNSC, which is spear-heading the decision-making process regarding PKOs in general and human rights components in the mandate of MINURSO in particular. The findings of this empirical analysis will be presented in three parts based on the sources. Section 1 will highlight the paradox that dominates UNGA resolutions. Section 2 will describe the pioneer role of the UNSG, and Personal Envoys appointed by the Secretariat. Finally, in the last section, the analysis will focus on the UNSC, which is provided with the authority to add human rights monitoring components and will evaluate its engagement in this matter despite the absence of such a mechanism.

Section 1 The UNGA resolutions

The UNGA has been involved in dealing with the question of Western Sahara at two different levels. As Western Sahara is listed as a NSGT, the issue has been discussed early on (from 1965) at the Fourth Committee of the UNGA on Decolonisation, which annual report forms the basis for the General Assembly resolution on "the question of Western Sahara". As far as the maintenance of international peace and security is concerned, the UNGA authorises budgets for individual missions such as MINURSO. When asked to approve the budget, the UNGA considers the reports of the Fifth Committee and adopts resolutions based on the report. The Assembly can therefore reject a budget allocated to a peacekeeping operation but never did in the case of MINURSO.

Based on the results of the analysis of these resolutions, a paradox can be identified. On the one hand, the UNGA has at times employed strongly worded language when referring to the situation in Western Sahara, namely the terms "occupation" and "responsibility" (section 1.1). On the other hand, it has never made any references to "human rights" and, worst still, it has adopted its resolutions every year with an almost unchanged content since 2008 (section 1.2). It did so even though major events took place, and which triggered both the UNSG and the UNSC in expressing their concerns over the human rights situations. Beyond constituting a space for international dialogue, the UNGA remains a forum where consensus-seeking behaviour prevails.

Section 1.1 The UNGA and international law

A review of all the UNGA resolutions regarding the question of Western Sahara reveals an early involvement by the Assembly in the conflict. The UNSC adopted only five resolutions before the creation of MINURSO in 1991 and the only report by the UNSG one year earlier is the one containing the Settlement Plan. In contrast, the UNGA adopted 25 resolutions between December 1965 and November 1990. This is explained by the fact that the question of Western Sahara was primarily a "matter of decolonisation". All resolutions adopted by the UNGA between December 1984 and November 1990 use this terminology.[177] It confirms

[177] UNGA resolutions A/RES/39/40 of 5 December 1984, A/RES/40/50 of 2 December 1985, A/RES/41/16 of 31 October 1986, A/RES/42/78 of 4 December 1987, A/RES/43/33 of 22 November 1988, A/RES/44/88 of 11 December 1989 and A/RES/45/21 of 20 November 1990.

the status of the territory of Western Sahara to be both colonised and illegally occupied as per two resolutions adopted in 1979 and 1980.[178] This has direct consequences on the type of protection that its people is entitled to demand from the UN, despite the absence of explicit human rights monitoring components in the MINURSO mandate. To this effect, all seven resolutions adopted between December 1984 and November 1990 contain a paragraph recalling that it is "a matter of decolonisation" until the peacekeeping mission was created and moved the conflict resolution approach from a decolonisation process *stricto sensu* to one of conflict management through peacekeeping. This early involvement was also coupled with a relatively strong position when describing several elements of the conflict. For instance, the first time the UNGA referred to the "responsibility of the United Nations towards the people of Western Sahara" was in December 1996 in resolution A/RES/51/143.[179] It has not been removed from any resolution ever since. This notion of responsibility commits the UN politically to deliver on the maintenance of peace as well as the expression of the right to self-determination for the people of Western Sahara. The latter has been reiterated in almost all UNGA resolutions with the exception of only three (in 1973, 1976 and 1983).

Out of the six principal organs of the United Nations (UNSC, UNSG, UNGA, ICJ, the Economic and Social Council and the Trusteeship Council), the UNGA is also the only one that has ever described Morocco's presence in the territory of Western Sahara as an "occupation". It is important to point out, however, that the ICJ's advisory opinion was rendered a couple of weeks before the Kingdom's entry into the territory so it could not have referred to the term as such. On two occasions in 1979 and 1980, the UNGA condemned the "occupation" of Western Sahara and demanded the withdrawal of Moroccan forces.[180] Neither the UNSC nor the UNSG ventured in employing such terminology in any of their documents, and the only Secretary General (Mr Ban Ki-moon) who used it publicly was confronted with such an outrage from Moroccan officials that he had to back pedal on his statement. To this day, the UNGA is the only UN organ to have described Morocco's presence in the territory as such, suggesting the applicability of IHL to

[178] UN General Assembly resolutions A/RES/34/37 (21 November 1979), available from https://digitallibrary.un.org/record/10608?ln=fr and A/RES/35/19 (11 November 1980), available from https://digitallibrary.un.org/record/17222
[179] UNGA resolution A/RES/51/143, (13 December 1996), available from https://undocs.org/en/A/RES/51/143
[180] Ibid., note 93

the case of Western Sahara. The reason that the UNGA remains the only one to have used this term, and, beyond, to have re-affirmed the organisation's responsibility towards the people of Western Sahara in every single resolution since 1996 can be explained by the fact that its resolutions are purely declaratory and deprived of any influence in the peace process jointly led by the UNSC and the Secretariat. The budgetary and administrative role of the Assembly regarding peacekeeping paradoxically allows greater laxity regarding its political assertions. It seems that because the Assembly does not have an active role in the decision-making process in relation to peacekeeping, it allows itself to use stronger terminology when describing the situation on the ground.

However, this firm position regarding the responsibility of the organisation towards a people considered to be occupied by one of its members never translated into any position taken regarding the absence of human rights monitoring in the corresponding PKO, nor the rise in alleged violations. In the case of the General Assembly, the reference to "the suffering of the people" made from December 2002 even stopped five years later.

Section 1.2 The UNGA and the political inertia

The last 14 resolutions adopted by the UNGA on the question of Western Sahara are characterised by both their extraordinary resemblance and corresponding inertia. Firstly, from resolution A/RES/62/116 of December 2007 onwards, all documents presented the same number of paragraphs (seven), when the average between 1965 and then was over nine paragraphs. Secondly, the references made to the "suffering of the people" as well as the Settlement Plan have completely disappeared. This pattern is repeated throughout the UNGA resolutions without exception until resolution 77/133 of 16 December 2022. Four years earlier, resolution A/RES/58/109 of December 2003 had also unveiled several tendencies which continue to appear up until now. Any mention of the "referendum on self-determination" has been removed. In a similar vein, "recalling the agreement in principle given on 30 August 1988" disappears from the recitals. Lastly, the "presence of neighbouring countries" in meetings and discussions also begins to be highlighted from 2003 onwards.

Not only does the UNGA not take into consideration the emerging concerns regarding human rights issues on the ground, it has also continually "welcome[d] the commitment of the parties to continue to show political will and work in an atmosphere propitious for dialogue" since resolution A/RES/63/105 of December 2008,[181] when UNSC resolutions and UNSG reports have pointed out a lack of proactive collaboration between the parties much earlier in the process. This detachment – accidental or deliberate – from the reality of the negotiation process can be perceived as a compromise formula that a majority of UNGA members will be ready to vote in favour of, a lack of knowledge or even a lack of interest from the Assembly. However, the fact that none of the recent resolutions from the UNGA mentions the rounds of negotiations that took place under the auspices of the Personal Envoy in February 2010, December 2018 and March 2019 can only be regarded as being a total lack of interest in the matter. If it was to be considered an absence of knowledge, previous similar meetings would have not been granted with satisfaction. Even though, in December 2018, it had been over 8 years since the parties met to discuss the situation in Western Sahara, the UNGA chose to dismiss these events in the last decade. One paragraph in the recitals is repeated in each resolution since December 2007:

"Expressing its satisfaction that the parties met on 18 and 19 June 2007, on 10 and 11 August 2007, from 7 to 9 January 2008 and from 16 to 18 March 2008 under the auspices of the Personal Envoy of the Secretary-General for Western Sahara and in the presence of the neighbouring countries and that they have agreed to continue the negotiations".

Finally, A/RES/62/116 of 17 December 2007 recognises for the first time that:

"all available options for self-determination of the Territories are valid as long as they are in accordance with the freely expressed wishes of the people concerned and in conformity with the clearly defined principles contained in General Assembly resolutions 1514 (XV) of 14 December 1960 and 1541 (XV) of 15 December 1960 and other resolutions of the General Assembly".[182]

[181] UN GA resolution A/RES/63/105, (5 December 2008), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/105 , §3
[182] UN General Assembly resolution A/RES/62/116, (17 December 2007), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/116

This move towards an expansion of the definition for self-determination is unprecedented and echoes the one made by the UNSG in October 2000 (which will be examined in the next section of this chapter). So far, the UN had already been dealing with acts of self-determination through either the holding of a referendum or popular consultations under its auspices (Namibia and East Timor), internally (South Sudan), unilateral declarations of independence (most post-colonial States) or bilateral statements with the former colonial power (Algeria, Morocco, Mauritania or Botswana to name but a few cases in Africa). This new rhetoric clearly intends to accommodate for the possibility of an autonomy plan with the prospect of a referendum following a transition period, which was proposed for the first time by Morocco in 2003.[183] However, since the prospected referendum in such scenario would not include an option for independence, the plan has not been deemed compliant with the inalienable right to self-determination that the Sahrawis are entitled to and was therefore rejected by POLISARIO and criticised by policy makers and scholars alike (Theofilopoulou 2006, 13; Zunes & Mundy 2010, 236-237; Ruiz Miguel 2006).

The connection between the right to self-determination and human rights in general is key to understanding why, despite the removal of the term "referendum" in UNGA (as well as UNSC) resolutions, the notion of "self-determination" is retained. The right to self-determination is established by the first article of both 1966 Covenants on human rights and discussed in chapter four. It is understood as the free determination of a people's political status, the free pursuit of their economic, social and cultural development and the free disposal of their natural wealth and resources. As a matter of fact, the 40th meeting of the UN 3rd Committee on self-determination recognised that, in the case of the protection of group rights, it is only through the realization of this very basic right of people to determine, with no compulsion or coercion, their own future, political status and independence that we can begin to address others such as dignity, justice, progress and equity.[184] In the context of colonised (i.e. non-self-governed) peoples, this right is binding on all States. In addition, in a 2006 report - which

[183] "Contribution du Royaume du Maroc à la négociation d'une solution politique mutuellement acceptable de la question du Sahara", (23 December 2003), available from https://www.arso.org/ProjetA2003.pdf
[184] UN General Assembly official records, (19 February 2009), available from https://digitallibrary.un.org/record/648400?ln=fr

was supposed to remain confidential - the OHCHR specifically recognised that "the question of the right to self-determination of the people of Western Sahara is paramount to the consideration of the overall human rights situation in the respective territories".[185]

The UNGA's approach - disconnected from the reality on the ground - as well as the calls from other parts of the UN goes beyond the definition of "organised hypocrisy" established by Lipson and evoked in chapter one of this thesis. While organised hypocrisy often arises from uncoordinated responses to conflicting pressures on the part of internal organisational elements (Lipson 2007, 9), the phenomenon observed through the analysis of UNGA resolution is characterised by a total absence of responses (whether it be in actions or talks). When the UNSC and UNSG responded to those pressures- including from outside the UN, the UNGA remained silent. This is particularly striking regarding human rights. In 2006, the OHCHR actually recommended the addition of human rights monitoring components in the mandate of MINURSO.[186] At the regional level, other assemblies responded to this recommendation by the OHCHR. In 2010, following the unrest and violence stemming from the shutdown of the peaceful Sahrawi protest camp in Gdeim Izik, near Laayoune, by Moroccan security forces, the European Parliament[187] and the African Union[188] called for addition of human rights prerogatives in the MINURSO mandate. Morocco created the Human Rights Council that same year, replacing the 'Consultative Council on Human Rights' established in 1990, which have been provided with more institutional powers and meant to be "accessible to Sahrawis" in response to the crisis. Both parties continuously accuse each other of human rights violations as repeatedly reported by the Security Council monthly forecast on Western Sahara.[189] As discussed in the following section, the UNSG insisted that both parties had to agree but no addition was made to the mandate.

[185] Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf, 15/23 May and 19 June 2006, available form https://www.arso.org/OHCHRrep2006en.pdf
[186] Ibid., p16.
[187] European Parliament, (25 November 2010), "Resolution of 25 November 2010 on the situation in Western Sahara", P7_TA(2010)0443, §6. available from http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2010-0443+0+DOC+PDF+V0//EN
[188] African Union Executive Council, 19-23 May 2013, "First Progress Report of the Chairperson of the Commission on the Situation in Western Sahara", EX.CL/788(XXIII)-Rev.1, §30, available from https://archives.au.int/bitstream/handle/123456789/4345/EX%20CL%20788%20%28XXIII%29%20_E.pdf?sequence=1&isAllowed=y
[189] Website link: https://www.securitycouncilreport.org/monthly-forecast/2010-04/lookup_c_glkwlemtisg_b_5888497.php

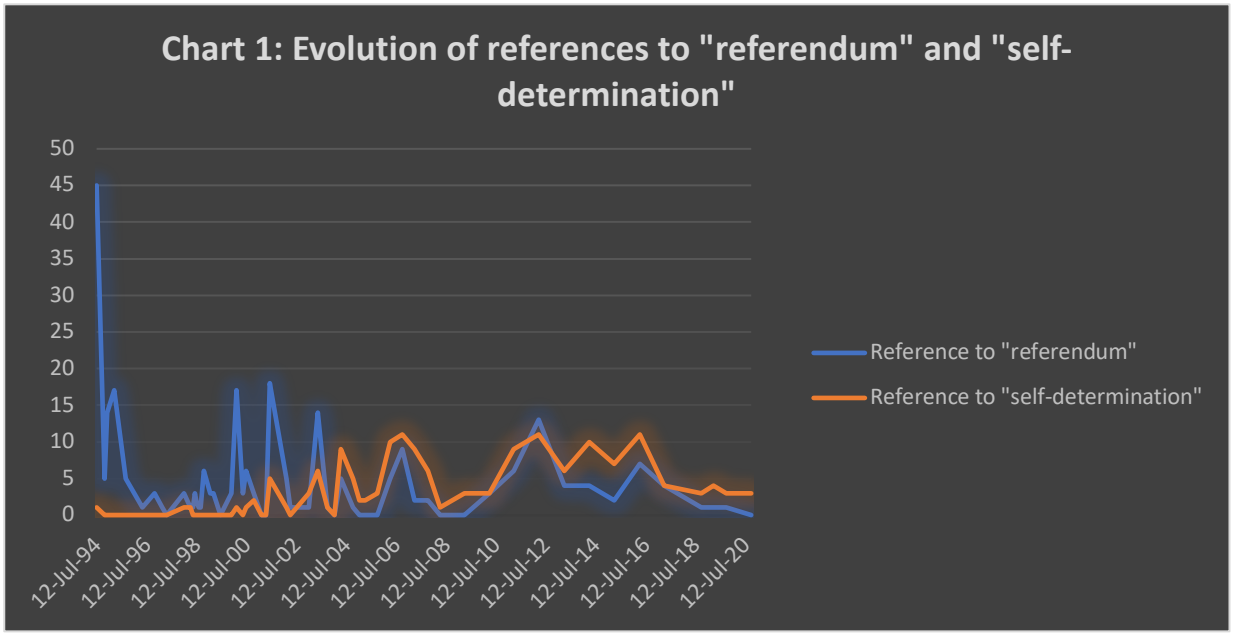
Section 2 The UNSG reports

The involvement of the Secretariat General only began with the agreeing to the Settlement Plan and creation of MINURSO in 1991. The UNSG, through his reports, provides an assessment of the situation to the UNSC before the end of each MINURSO mandate for the Council to make an informed decision on its renewal, extension or termination. The reports cover various aspects of the functioning of MINURSO (from military to administrative and financial) and provide recommendations as to how to proceed with the mission but are not of any decision-making value. In drafting these reports, the UNSG is assisted by the head of Mission or Special Representative of the Secretary General for Western Sahara (SRSG) and from 1997 onwards, by a Personal Envoy, mainly in charge of the political aspects of the conflict resolution process. This section investigates the human rights discourse in the UNSG reports since the creation of MINURSO, issued at the demand of the UNSC in order to provide relevant information regarding the evolution of the operation(s) on the ground. The method used to analyse the UNSG reports in order to examine the presence, nature and role of human rights issues in the dealing of the conflict in Western Sahara by the UN as an organisation is the same used for UNGA resolutions. In a context where a prospect for holding the referendum vanishes (section 2.1), the Secretariat's role remained limited to making observations and recommendations regarding human right issues (section 2.2). Yet, the UNSG highlighted the human rights issues much earlier than the UNSC through detailed accounts of events contained in the reports, and accentuated the stress placed on their relevance in resolving the conflict (section 2.3). Finally, the human rights violations at stake have been mainly of a civil and political nature and a pattern in their reporting seems to divulge an influence of the Personal Envoy in post (section 2.4).

Section 2.1 Emphasis on self-determination vs. decreasing prospects for a referendum

It emerges from the qualitative analysis of the UNSG reports that the notion of "self-determination" was only systematically employed from April 2004 onwards. This is partly the result of the introduction of the "Peace Plan for the Self-Determination of Western Sahara" (informally known as Baker Plan II) and

the discussions between the parties that unfolded in Houston, Texas, in late 2003 and early 2004. The Peace Plan – contained in Annex II of UNSG report S/2003/565 - proposed by the then Personal Envoy James Baker had envisioned a four or five-year transitional power-sharing between an autonomous Western Sahara Authority and the Moroccan State before the organisation of a self-determination referendum during which the entire population of the territory could vote for the status of the territory – including an option for independence. It was eventually rejected by Morocco (Zunes & Mundy 2010, 229; Theofilopoulou 2006, 11). The letter from the Kingdom of Morocco in response to Mr Baker's proposal is enclosed within the UNSG report S/2004/325.[190] This refusal is believed to have crystallised the conflict resolution's stalemate and explains why references to the holding of the referendum have been reduced to the point of no longer appearing in the report from the UNSG of October 2020 for the first time in ten years. The table below shows the frequency with which both "referendum" and "self-determination" have been used in the UNSG reports on Western Sahara:



Interestingly, since April 2004 and with the exception of reports S/2012/197 dated April 2012 and S/2021/843 of October 2021, all reports have mentioned the word "self-determination" more times than they have used "referendum". Kofi Annan

[190] UN Secretary General report S/2004/325, (23 April 2004), available from https://digitallibrary.un.org/record/520073?ln=fr

had even evoked for the first time in his report of October 2000 the idea of "alternative ways for self-determination" It is clear from both observations that the implementation of the right to self-determination remains the focus of the UNSG involvement in the conflict. As discussed in the previous section, the insistence on keeping the notion of self-determination central to the conflict resolution process can be explained by its connection to human rights protection. The OHCHR concluded in its 2006 report that "almost all human rights violations and concerns with regards to the people of Western Sahara, whether under the de facto authority of the Government of Morocco or of the Frente Polisario, stem from the non-implementation of this fundamental right".[191]

However, doors seem to be open for alternatives and the observed tendency paves the way for a reinforced assumption that the notion of self-determination can be reconsidered by the UN outside the framework of a popular consultation. In fact, these evolutions are illustrative of a shift in consideration by the Secretariat from the right of "external self-determination", ie to independence – in this case, through the holding of a referendum - to that of "internal self-determination" through which a given people can freely choose its own political, economic, and social system (Senese 1989, 19). The latter applies once they have achieved statehood and, therefore, does not apply to a people seeking relief from colonialism (New York Bar Association 2012, 40). This distinction has emerged in the doctrine following the findings published by the "Badinter Commission" on questions arising from the dissolution of Yugoslavia.[192] This was driven by the fear that a unilateral exercise of (external) self-determination would lead to excessive fragmentation of territories (Dickinson 2009, 552). Contemporary doctrine tends to base its construction of self-determination upon a clear pre-eminence of "internal self-determination" (Oeter 2015, 131) and there seems to be an agreed assumption amongst scholars that a people in a situation of oppression or colonisation is entitled to "external self-determination" (Senese 1989, 19; New York Bar Association 2012, 44; Oeter 2015, 127). The fact that the UNSG is less and less referring to the holding of a referendum as a way to solve this decolonisation issue raises the question of the nature of the right to self-determination at stake in the decolonisation process of Western Sahara.

[191] Ibid., note 187, p15.
[192] Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 2, July 4, 1992, 31 I.L.M. 1488, 1498 (1992)

The ambiguous formulations of many core international norms, such as the modalities of expression of the right to self-determination, enable the continued existence of different and often conflicting understandings of what the norm means. While ambiguity is often necessary for achieving compromise, it ultimately does not and cannot resolve debate about normative meaning, which is instead relegated to practices (Bode 2020, 139). In his report of October 2007, Ban Ki-moon accurately pointed out that "positions remained far apart on the definition of self-determination" from the parties (§6). However detailed or relevant the UNSG's recommendations can be, his role has remained one of messenger from the ground to the headquarters in New York. Ultimately, the decisions to extend or terminate the mandate of MINURSO is not for him to make and this has even been considered to be a reason for conflict irresolution in Western Sahara.

Section 2.2 A Secretariat deprived of capacity for effective implementation

Up until September 1995, the UNSG limited himself to making observations in his last paragraph. It is only when difficulties started to arise on the ground that he began to include some "recommendations". In report S/1995/779 of that year, Boutros Boutros Ghali even suggested the possibility of MINURSO's withdrawal if "the conditions necessary for the start of the transitional period are not in place" before the end of the proposed extension (§52).[193] In his report from May 22, 2000, Kofi Annan highlighted "the fact that no enforcement mechanism was envisaged in the settlement plan" and that "it would be essential that the parties now offer specific and concrete solutions to the multiple problems relating to the implementation of the plan that can be agreed to".[194] From having a highly central role in the Settlement Plan agreed by the parties in 1988, the Secretariat (via the Special Representative of the Secretary General) has slowly lost the authority it was initially meant to acquire.

Reykers reckons that there has been "little research into the role and influence of individual mission commanders or UN Special Representatives in the field. Since

[193] UN Secretary General report S/1995/779, (8 September 1995), available from https://digitallibrary.un.org/record/186203?ln=fr
[194] UN Secretary General report S/2000/461, 22 May 2000, available from https://digitallibrary.un.org/record/414738?ln=fr

they monitor missions on behalf of the UN Secretariat and regularly brief the UNSC, they hold a crucial position with room for filtering information from the missions to their principals in New York applying the principal-agent model" (Reykers 2020, 82). In the same vein, they are the first witnesses to the shortcomings and needs of the operation on the ground, which must be relayed to the Secretariat. As recommendations by the UNSG – based on the information provided by the head of mission as well as the OHCHR for human rights related issues - to set up "independent, impartial, comprehensive and sustained monitoring of the human rights situation"[195] remained unactioned by the UNSC in 2013, the language employed by the UNSG became more pressing towards the parties regarding their responsibilities in upholding human rights.

It results from the analysis of the UNSG reports (and later from the UNSC resolutions) that contemplating the creation of a human rights violations reporting mechanism would, at first glance, seem to constitute a reasonable step towards the pacification of the conflict and the reaching of an acceptable agreement. As we previously mentioned in chapter four, the then-UNSG Boutros Boutros-Ghali recognised that "MINURSO, as a United Nations mission, could not be a silent witness to conduct that might infringe the human rights of the civilian population".[196] Even though the UNSC "welcomed" the UNSG's report of 1993 through Resolution 809,[197] it did not provide a clear response nor support to the UNSG's view on the human rights approach. Nothing constrains the UNSC to do so and given the highly political nature of this organ, any human rights related question can be treated differently depending on the conflict in question. This commitment gap between the UN peacekeeping operation in the field and the decision-making structure (UNSC) renders UNSC resolutions merely symbolic "talk", decoupled to action. According to Michael Doyle, "peacekeeping can be dysfunctional when pressures to 'do something' in response to political or humanitarian crises are met by symbolic responses not supported by the resources or political commitment necessary to act effectively" (Doyle 2001, 537). This is precisely what sociological institutionalist thinkers call "organised

[195] UN Secretary General report S/2013/220, (8 April 2013), available from https://digitallibrary.un.org/record/747101?ln=fr, §116
[196] UN Security Council, Report by the Secretary General, S/25170, (26 January 1993), available from https://digitallibrary.un.org/search?ln=en&p=S%2F25170&f=&c=Resource+Type&c=UN+Bodies&sf=&so=d&rg=50&fti=0
[197] UN Security Council resolution 809 on the situation in Western Sahara, S/RES/809, (2 March 1993), available from: https://www.refworld.org/docid/3b00f15ac.html

hypocrisy" mentioned earlier (Von Billerbeck 2020, 95). This is even more characterised in light of the contradictory approaches at the UNGA level, which are both avant-gardist regarding the use of legal terminology and conservative in the condemnation of human rights violations. The fact that the Assembly is the main forum for multilateral negotiation can explain these opposite stances as explained on the previous section.

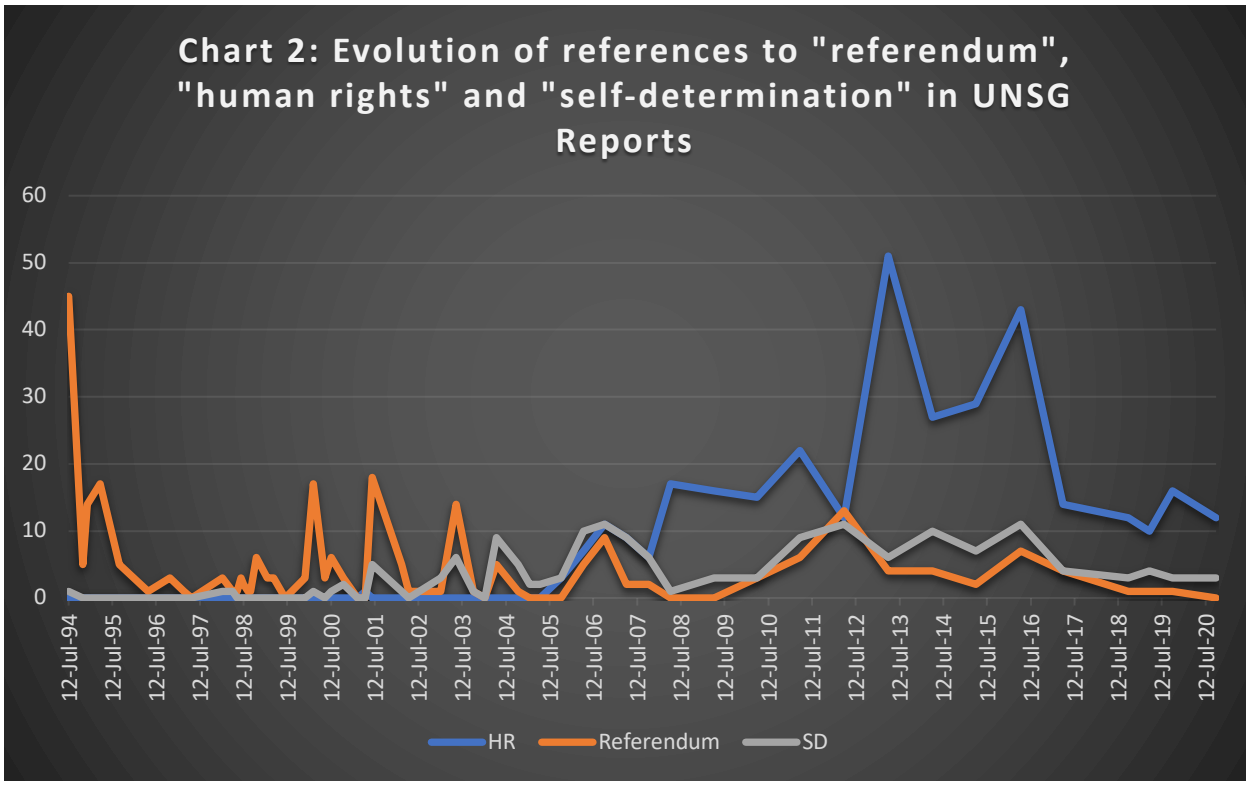
Section 2.3 The UNSG's pioneering role in UN human rights reporting

Ruiz Miguel argues that the very first time a UNSG referred to human rights issues was in the June 1990 report where Javier Perez de Cuellar presented the provisions of the Settlement Plan agreed by both parties almost two years earlier (Ruiz Miguel 2018, 124-125). Indeed, document S/21360 seems to have envisaged the protection of rights connected to the holding of the referendum. Both of them were initially intended to be implemented at the beginning of the transition period, which was never launched. Paragraph 58 of the Settlement Plan states that parties have "accepted the authority of the organisation to take the legislative and administrative steps necessary to accomplish" the organisation and conduct of the referendum. Furthermore, paragraph 64 details the conditions under which it has to be held, which include many human rights provisions such as the freedom of movement, speech, assembly and the press.[198] However, these were linked to the declaration of a "D-Day" (§51 of the Settlement Plan S/21360), marking the beginning of the transition period following the cease-fire and preceding the celebration of the referendum on self-determination, which was never declared.

Arguably, in order to ensure optimum conditions for a "free and fair referendum", the UN should consider including a mechanism whereby this requirement is met on the ground. However, as prospects for the holding of a referendum diminish, these conditions seem to have been relegated to a secondary position. This did not prevent the UNSG to call attention to human rights violations when they became a real concern. When the UNSC waited 2011 - following the Gdeim Izik events - in order to use the term "human rights" in its resolutions, the UNSG first referred to it a decade earlier in report S/2001/398 of April 2001. Even though no

[198] Ibid., note 13

new reference was made until four years later, the issue of human rights received specific and detailed attention from the Secretary General in May 2003 when it was the subject of debate at the UNSC (S/2003/565). No mention was made that year but pointing out human rights issues became common practice from October 2005 onwards. This re-appearance follows the events of May 2005 in Laayoune referred to the “Independence Intifada” by Sahrawi activists (Zunes & Mundy 2010, 154) and during which protests were violently repressed by the Moroccan authorities. These events pushed the UNSG to request the visit by the OHCHR mentioned previously, which took place between May 15 and 23, 2006 and June 19, 2006 and reported in paragraphs 3 and 41 of document S/2007/249. The issue of human rights has even become one of the key chapters of SG reports on Western Sahara from October 2006 (S/2006/817) up until now, with a dedicated paragraph inserted in each report. These specific chapters are drafted on the basis of information and data collected and transmitted by the OHCHR, which remote monitoring will be discussed in the following chapter. Ruiz Miguel noted that the question of human rights gained more importance in the reports of the Secretary General when the process of decolonisation began to encounter obstacles (2013, 121). What he overlooks in his analysis, however, is that the apparent increasing interest in “human rights” issues also includes that of the right to self-determination, as seen in the previous section.



The UNSG's first mention of human rights as an "issue" was made in 2001 in connection to the plight of Moroccan political prisoners held by POLISARIO near Tindouf in Algeria. Their holding for more than 20 years was described as being "a humanitarian and human rights issue that should be addressed on an urgent basis".[199] In January 2003, Kofi Annan choose to refer to the "suffering that this long-standing question has caused to thousands of innocent people"[200] instead of the terms human rights *violations* or *abuses*. Five reports later, in October 2004, he referred to a "much broader phenomenon of trafficking in human beings through the region" when bringing up the appearance of clandestine migrants in the buffer strip (S/2004/827).[201] Finally, in April 2005, he reiterated that "civilians obviously have a right to demonstrate" (S/2005/254).[202] From the moment that the term "human rights" has systematically been used between October 2005 (S/2005/648)[203] and today, a steady increase in its mention can be noticed. However, a peak was reached in April 2013 with 51 references made in what was the second longest UNSG report ever on the situation in Western Sahara (S/2013/220).[204]

This coincided with the year when the ever most serious attempt to include human rights monitoring components in the mandate of MINURSO was ventured by the US delegation and its then ambassador to the UN, Susan Rice (Ruiz Miguel 2018, 125; Van Schmidt 2018, 11; Fernandez Molina & Ojeda Garcia 2019, 88) as described in chapter three. The initiative by former ambassador Rice received only but resistance and hostile reactions from the Moroccan authorities who cancelled a joint US-Moroccan military exercise in protest of the US action (Khakee 2014, 459; Ruiz Miguel 2018, 125). Following strong pressure by the Kingdom with the support of allies at the Council such as France, the proposal fell through. Instead, the Council simply encouraged the main stakeholders to

[199] UN Secretary General report S/2001/398, (24 April 2001), available from https://minurso.unmissions.org/sites/default/files/s-2001-398.pdf, §9.
[200] UN Secretary General report S/2003/59, (16 January 2003), available from https://minurso.unmissions.org/sites/default/files/s-2003-59.pdf
[201] UN Secretary General report S/2004/827, (20 October 2004), available from https://minurso.unmissions.org/sites/default/files/s-2004-827.pdf
[202] UN Secretary General report S/2005/254, (19 April 2005), available from https://minurso.unmissions.org/sites/default/files/s-2005-254.pdf
[203] UN Secretary General report S/2005/648, (13 October 2005), available from https://minurso.unmissions.org/sites/default/files/s-2005-648.pdf
[204] It contained 124 paragraphs when report S/2011/249 comprised a total of 127 paragraphs. For the purposes of analysing the frequency with which the term "human rights" was sued in the report, any reference included in institutions names was disregarded.

promote human rights and develop "independent and credible measures" to ensure those rights are respected.[205]

Section 2.4 The nature of human rights violations and the influence of Personal Envoys

The fact that this push to include relevant components into the mandate at the Council level was facilitated by a strongly worded report regarding human rights by the UNSG is not coincidental as addressed in section 2.1 of this chapter. What is interesting to note, however, is the influence that the Personal Envoy of the Secretary General in charge can have on the content of the UNSG reports with regards to human rights. This can be ascertained, on one hand, based on the quantitative analysis. Human rights have started to be mentioned systematically towards the end of Kofi Annan's term of office as soon as Peter Van Walsum was appointed. Annan was the first UNSG to highlight the anomaly of MINURSO in the absence of human rights monitoring components and reiterated that "while MINURSO has neither the mandate nor the resources to address this issue, the United Nations, as an organization, is dedicated to upholding international human rights standards" (§29).[206] It was then under Van Walsum's tenure (between July 2005 and August 2008) that the term "human rights" appeared for the first time and that a special paragraph dedicated to them was included in the UNSG reports two years later. Human rights issues were then given further importance under Ban Ki-moon's mandate between 2007 and 2016 when they have been mentioned on an average of 22 times per report. This also coincides with the occupancy of the Personal Envoy's office by Christopher Ross between 2009 and 2017. It is also during his tenure that the notion of "exploitation of resources" appeared for the first time[207] and was repeated throughout until April 2019, under Antonio Guterres, when it was withdrawn despite a growing jurisprudence on the links between natural resources exploitation and the right to self-determination. The gap in the number of references made to human rights between Ban Ki-moon's last and Antonio Guterres' first report is also of

[205] UN Security Council resolution S/RES/2099, (25 April 2013), available from https://digitallibrary.un.org/record/748360?ln=fr
[206] Ibid., note 118.
[207] UN Secretary General report S/2012/197, (5 April 2012), available from https://minurso.unmissions.org/sites/default/files/unsg_report_05_april_2012.pdf

significance. They dropped from 43 mentions in April 2016[208] to 14 the following year.[209] The latter report interestingly suffered from the absence of a Personal Envoy due to the post being left vacant between Christopher Ross' resignation in March 2017 and Hurst Kohler's appointment in August of that year. References made to human rights violations have remained at an average of 12 references per report under the current UNSG. In a similar vein, references to "referendum" and "self-determination" have significantly decreased under Guterres, from 7 to 4 and 11 to 4 respectively. However, the notion of "self-determination" has remained central to this day, as explained in the first sub-section.

On the other hand, from a qualitative analysis perspective, references to human rights violations reported by the Secretariat began to emerge under Peter Van Waslum term as seen in the previous sub-section, but also to widen in nature. For the purpose of this analysis, different types of human rights violations have been distinguished: violations of civil and political rights, violations of economic and social rights, indirect violations endured by non-Sahrawis and general violations that were mentioned in the reports without further description. A distinction has been established when violations had specifically been reported in relation to the organisation of the referendum. Incidents referred to by either of the two parties in letters sent to the UNSG have not been considered for this exercise so long as they are not corroborated by other sources. Finally, violations by MINURSO personal – although only mentioned once in 2008[210] – will not be taken into consideration as not being committed by one of the parties to the conflict.

Table 5: References to "Human Rights" in UNSG Reports by Period

UNSG period	Number of paragraphs dedicated to "human rights"	Type of human rights references (when specified)				
		Related to organisation of referendum	Civil and political rights	Economic and social rights	Indirect violations	General incidents and violations
1991-1996	0	0	0	0	0	0

[208] UN Secretary General report S/2016/355, (19 April 2016), available from https://minurso.unmissions.org/sites/default/files/unsg-report-2016.pdf
[209] UN Secretary General report S/2017/307, (10 April 2017), available from https://minurso.unmissions.org/sites/default/files/unsg_report_10_april_2017.pdf
[210] UN Secretary General report S/2008/251, 14 April 2008, available from https://minurso.unmissions.org/sites/default/files/unsg_report_14_april_2008.pdf

(Boutros-Ghali)						
1997-2006 (Annan)	1 in 34 reports	1	2	0	0	0
2007-2016 (Ban Ki-Moon)	112 in 11 reports (average: 10)	2	42	4	3	10
2017-present (Gueterres)	5 in 7 reports (average: <1)	2	16	3	2	2

Personal Envoy period	Number of paragraphs dedicated to "human rights"	Type of human rights references (when specified)				
		Related to organisation of referendum	Civil and political rights	Economic and social rights	Indirect violations	General incidents and violations
1991-1996	0	0	0	0	0	0
1997-2004 (Baker)	0	0	0	0	0	0
No Personal Envoy	0	0	0	0	1	0
2005-2008 (Van Walsum)	11 in 5 reports (average: 2)	2	6	0	1	1
2009-2017 (Ross)	102 in 8 reports (average: 12)	0	39	3	2	9
No Personal Envoy	10 in 1 report (average: 10)	1	3	2	0	1
2017-2019 (Koehler)	7 in 2 reports (average: 3)	1	6	1	2	0
2019-2021	8 in 2 reports (average: 4)	0	7	0	0	1
Since 2021 (De Mistura)	7 in 1 report	0	6	0	0	1

The analysis reveals that the arrival of Ban Ki-Moon in 2007 at the Secretariat has caused a significant rise in the number of violations to civil and political rights accounted for. These had already started to be reported during Kofi Annan's mandate, however, the appointment of Christopher Ross as Personal Envoy seems to have foster an ever-growing interest to human rights violations and their implication in the conflict resolution process. There are indeed six times more paragraphs dedicated to "human rights" as well as six times more references to

human rights violations under Christopher Ross than during Peter van Walsum's tenure. They include a wide range of repeated violations to freedom of expression, association and assembly, rights of defence, right to a fair trial, arbitrary detention, torture and ill-treatment. This can certainly be explained by the Gdeim Izik events of November 2010 as described in this chapter, but it seems that the impacts of these events on the nature of the human rights reporting and discourse have reached their peak in 2016 right before the departure of Ban Ki-Moon and Christopher Ross as UNSG and Personal respectively when references had decreased since then.

As far as socio-economic rights are concerned, they were highlighted for the first time in April 2011 when "local and international human rights organisations notes that protestors at the camp were calling for their right to work and to adequate housing and for an end to the marginalisation and the inequitable distribution of resources in the Territory".[211] They have stopped being referred to since October 2018 when "OHCHR received a number of reports alleging that demonstrations had been forcibly dispersed during protests related to the right to self-determination, the disposal of natural wealth and resources […]".[212]

Indirect violations are in majority those endured by foreign journalists, lawyers, NGO workers and individuals when being expelled from the territory due to their human rights related activities. These have also started to be mentioned in the aftermath of the Gdeim Izik events. The only other example of indirect violations relates to the alleged deportation of irregular migrants from the territory over the border with Algeria reported in S/2007/202. Finally, general references to human rights violations reported in the table mainly relate to the "deterioration of the human rights situation in the camps" (S/2007/202, S/2009/200) the amount of complaints received by the National Council for Human Rights (CNDH) and the number of fact-finding missions they carried out on the ground (S/2014/258, S/2015/246, S/2016/355) and sporadic mention of violence (S/2014/258), included "deadly violence" (S/2012/197) that erupted in the territory. They also include "the lack of accountability for these and other human rights violations"

[211] UN Secretary General report S/2011/249, (1 April 2011), available from https://minurso.unmissions.org/sites/default/files/unsg_report_01_april_2011.pdf
[212] UN Secretary General report S/2018/889, 3 October 2018, available from https://minurso.unmissions.org/sites/default/files/unsg_report_03.10.18.pdf

(mentioned in April 2016 and April 2017) and the fact that "the human rights situation in Western Sahara has been adversely affected by the COVID-19 crisis" (S/2020/938).

In sum, the human rights violations mentioned in the UNSG reports have principally been of a civil and political nature. These are at the heart of the conflict in Western Sahara for which a political process is under way under the auspices of the UN. References to violations of civil and political rights (both in the territory and the camps) seem to have also been given impetus during Christopher Ross' time as Personal Envoy. Between 2009 and 2017 the volume of references made to human rights – with a clear emphasise on violations to civil and political rights – has increased significantly. The Secretariat, for the first time in April 2011, even expected the engagement to resort to the Human Rights Council "to address, on an independent, impartial and sustained basis, the alleged violations of the universal rights of the people of Western Sahara in the Territory and the camps for the next reporting period".[213] This call was confirmed the following years when the UNSG stated in 2012 that "it is important that the mechanisms to address the situation, as envisage in paragraph 121 of my previous report, is given full and immediate effect"[214] and in 2013 that "given ongoing reports of human rights violations, the need for independent, impartial, comprehensive and sustained monitoring of the human rights situations in both Western Sahara and the camps becomes ever more pressing".[215] This position held by the UNSG, with the input from his Personal Envoy, has, however, not let to the consideration by the Council of such a mechanism. The next section will examine the resolutions adopted by the mandating authority in peacekeeping: the UNSC.

Section 3 The UNSC resolutions

The UN Security Council is less researched than other intergovernmental bodies, such as the UN General Assembly (Monteleone & Oksamytna 2020, 53). As the mandating authority in charge of the content of PKO mandates, ending the examination of UN documents regarding human rights in Western Sahara with

[213] Ibid., note 118.
[214] Ibid., note 122.
[215] UN Secretary General report S/2013/220, (8 April 2013), available from https://minurso.unmissions.org/sites/default/files/unsg_report_08_april_2013.pdf

an in-depth analysis of its resolutions seems however pertinent. The political nature of this organ causes PKOs/MINURSO to be dependent on political considerations in a context over which parties have expressed clear political disagreements throughout the years, including regarding the question of human rights monitoring. The analysis of the Security Council's resolutions from 1975 regarding Western Sahara reveals, in this respect, an increasingly remote prospect for a referendum and a crystallisation of the political stalemate over the years as was the case with the UNSG reports (section 3.1). The non-use of the term "occupation" in the resolutions adopted or the disappearance of the word "referendum" since November 2001 are a few indicators of an ever-freezing political context. This stagnation in the political process has incentivised the reconsideration of the notion of self-determination (section 3.2). It can also explain the emergence and further increase in references made to the term "human rights" or similar language in the Council (section 3.3).

Section 3.1 Evidence of an unfolding political stalemate

Neither the 1991 resolution nor the Settlement Plan of 1988 refer to the UN Charter, let alone specifically to a particular chapter, on the basis of which the mission is to be deployed and the referendum to be organised. This was expressed at a later stage, on 31st July 2003, when the MINURSO mandate had to be renewed and the Council specified that it was acting under Chapter VI of the Charter.[216] The Security Council will therefore not take any action without agreement by both parties. This is why the Security Council's room for manoeuvre has narrowed over time and it is now unable to overcome a stalled status quo.

A total of 63 resolutions have been adopted within 31 years by the UNSC regarding Western Sahara since the creation of MINURSO in 1991. For purposes of comparison, 59 resolutions have been passed since the creation of UNFICYP in Cyprus in 1964 (27 years earlier), 35 resolutions regarding UNDOF since its deployment in 1974 (17 years earlier) and 32 for UNIFIL since its creation in 1978 (13 years earlier). This is a clear indication that the Council is (and has been) actively seized of the matter of the Western Sahara conflict.

[216] Ibid., note 13.

One way to put the MINURSO mandate into perspective and explore its specificity in light of other missions with a legal approach is to analyse the wording used in the drafting of the documents enabling the Mission's core existence. Even though the open-ended nature of a peace accord is not unusual, at the time the Settlement Plan was drafted, tabled and agreed, the absence of certain clauses that may result in complications in the future can be highlighted. For instance, the eligibility criteria for voters or the modalities for organising and conducting the referendum remained unclear. Sola-Martin even questions whether the proposals were a plan designed to stop hostilities while creating the momentum to negotiate the question of Western Sahara on Moroccan terms (Sola-Martin, 2004). For example, in the case of UNSC resolution 435 of 29 September 1978 establishing the UN Transition Assistance Group in Namibia (UNTAG), delegates had agreed to incorporate in the text strongly worded legal provisions including the mention of the "*legal responsibility* of the United Nations over Namibia", reference to South Africa's "*illegal* administration" and the ensuring the "early *independence* of Namibia through free elections under the supervision and control of the United Nations" (emphases added).[217] These provisions, even without proper legal implications for the UN as an organisation, set a specific tone and a message geared towards a more significant pressure to put on the main stakeholders – including the UN itself – to resolve the conflict. In the case of MINURSO, the language of the Settlement Plan does not include terms such as "legal responsibility", "illegal administration" or "occupation" and mostly refers to the conflict as a "question". This is a typical reflection of the background political affray occurring in the case of Western Sahara since the UN has been involved in the political process.

As far as the UNSC's level of implication is concerned, it is important to note the length of its resolutions renewing the mandate of MINURSO. From one or two pages listing concrete expectations from the parties, they have over time reached up to five pages with many incoherencies and repetitions. The attempt to seek and reach a solution through political means became clearer over the years and in 1997 the first Personal Envoy in charge of resolving the question was

[217] UN Security Council resolution 435, (29 September 1978), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/NM_780929_SCR435%281978%29.pdf (emphasis added)

appointed by the UNSG. Successive Special Representatives in the late 90's (namely, Yaqub-Khan and Erik Jensen) regularly met with diplomats from key States (mainly the USA, France and Spain) when they travelled to Rabat, Algiers or Nouakchott but these meetings occurred on the basis of their accreditation to the States concerned. The appointment of a Personal Envoy in 1997 illustrated a commitment by Council members to put an end to the dispute at the political level. In that regard, as Whitefield notes, all votes on MINURSO taken by the Security Council until late 1999 were unanimous (Whitefield 2007, 176). Besides, the UNSC was active regarding MINURSO in 1999, with seven resolutions adopted showing a clear push by its members to implement the Settlement Plan. They went down to four (2000 and 2001) and three (2002) before reaching a total of five resolutions in 2003 again. However, since 2008, only one resolution has been issued per year (with the exception of 2018, when two resolutions were adopted).

These trends reversed following two important turning points in UNSC resolutions on Western Sahara: the abandonment in 2003 of the latest Baker Plan aimed at reaching a political solution beyond the initial holding of a referendum; and the shift towards a call for 'negotiations without preconditions' in 2007 followed by proposals by both parties to settle the dispute on the basis of two different sets of clauses. The Peace Plan for Self-Determination of the People of Western Sahara of 2003 (or Baker Plan II) was based on the Framework Agreement (Baker Plan I) and included – among other changes – an option for independence in the referendum envisioned after a five-year power-sharing autonomy. This caused Morocco to reject the plan (Fernandez Molina 2016, 55) as largely explained in a letter annexed to UNSC resolution S/2003/565 of May 2003 and mentioned previously un this thesis.[218] In April 2007, the UNSC called on the parties to "enter into negotiations without preconditions in good faith, taking into account the development of the last months", namely, Morocco's new proposal for autonomy (Fernandez Molina 2016, 64). The resolution was adopted despite the submission by the parties of two different and irreconcilable peace plans (Theofilopoulou 2010). This confirmed the break with Baker's view and paved the way for a stalled political process, which is evidenced by the following resolutions from the Council.

[218] UN Secretary General report S/2003/565, (23 May 2003), available from https://minurso.unmissions.org/sites/default/files/unsg_report_23_may_2003.pdf

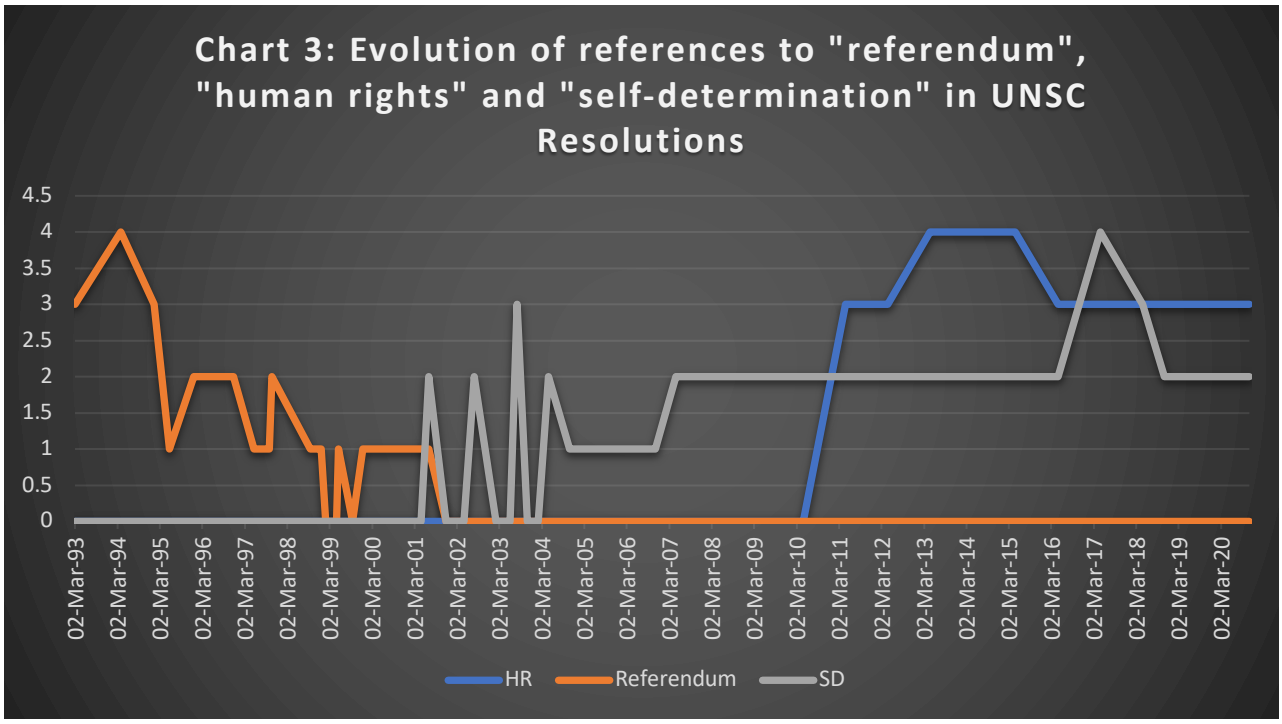
The fact that resolutions have started to be extended for one year since April 2008 rather than the maximum of six months in place since 1991 has clearly deprived the issue of resolving the conflict of any sense of urgency. This confirms the growing detachment by the UNSC from the prospects of ensuring the organisation of a referendum on self-determination. In this regard, since November 2001, the word "referendum" has not been used in any UNSC resolution on MINURSO (other than referring to the acronym of the mission itself). However, the notion of "self-determination" has been referred to multiple times since July 2003.[219] This can be illustrative of the diminishing prospect for the holding of the referendum in Western Sahara while maintaining the desire to implement some form of act of self-determination as discussed above. Almost anecdotally, when the UNSC reaffirmed on one occasion "the provisions contained in paragraph 2 of Article 1 of the Charter of the United Nations" on self-determination (resolution 1359 of 29 June 2001)[220], it was the last time the word "referendum" was used in UNSC resolutions regarding MINURSO. It has been pointed out that Morocco's initial position to agree to a referendum on self-determination was driven by its fear of being diplomatically isolated in the African continent rather than by a genuine commitment to implement all the resolutions on the matter (Aguirre 1991). It seems that from the moment Morocco managed to subtly introduce the idea of an "autonomy plan" and erase that of a referendum which would include an option for independence, resolutions had become lengthier and scarcer. Nevertheless, the right to self-determination has been persistent throughout and the notions of "quality of life" (April 2008)[221] and "human dimension" (April 2009)[222] started to appear in the Council resolutions as part of a singular human rights approach.

Section 3.2 A shifting approach to self-determination

As scholars of the UNSC have noted, "much of the Council's business continues to be conducted in informal consultations, or 'informals' closed to all

[219] Ibid. note 13.
[220] UN Security Council resolution S/RES/1359, (29 June 2001), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1359(2001)
[221] UN Security Council resolution S/RES/1813, (30 April 2008), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1813(2008)
[222] UN Security Council resolution S/RES/1971 (30 April 2009), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1871(2009)

non-Council members and most Secretariat staff and leaving no formal record" (von Einsiedel et al. 2015: 836). This renders the analysis and explanation of the UNSC discourse regarding human rights in Western Sahara even more challenging. As Carlos Ruiz Miguel and Blanco Souto argue, the suspension of the referendum since 2001, with the consequence of the absence of a "transition period", meant grave consequences on the protection of human rights, particularly for the prisoners of war. They note for instance that, since 2001, the UNSC requested the release of the prisoners of war based on international humanitarian law and not on the provisions of the Settlement Plan (Ruiz Miguel and Blanco Souto 2020, 369). The non-realisation of a referendum of self-determination based on the Settlement Plan of 1988 can therefore explain how and why the UNSC decided to take the human rights matter into its own hands (with all the subsequent limitations due to its political nature). This reasoning concurs with the conclusions from the OHCHR report of 2006. The Office acknowledged that "the respect of all human rights of the people of Western Sahara must be seen in tandem with this right [self-determination] and a lack of its realisation will inevitably impact on the enjoyment of all other rights guarantees, inter alia, in the seven core international human rights treaties in force". This provides the context in which the Council has persisted in reiterating the existence of such a right for the people of Western Sahara through the resolutions, regardless of the holding of a referendum. By keeping the right to self-determination in the body of the text, the UNSC seems to retain a textual base regarding human rights, in line with the OHCHR landmark report.



The "right to self-determination" - at the heart of conflict resolution in Western Sahara - is explicitly mentioned as such (as a right) only once in resolution 1359 of 29th June 2001[223], through the reference to Article 1.2 of the UN Charter in the recitals. The emphasis on the notion of "self-determination" on its own (and separately from that of "referendum") only started to emerge in 2001 and did not appear prior to this date. In resolution 1359 (2001), the Council highlights the importance of delivering on the right to self-determination when evoking "a substantial devolution of authority, which does not foreclose self-determination, and which indeed provides for it".[224] This refers to the idea of internal self-determination mentioned in section 2 of this chapter. According to Oeter, such internal self-determination may be embodied in different versions of self-government with the case of "territorial autonomy" of a specific territorial unit as the most prominent example (Oeter 2015, 131). Even though both notions (internal and external self-determination) are based on the free will of the people concerned, the disappearance of the term "referendum" (implying an option for independence) in UNSC resolutions poses a problem regarding the extent to which an act of external self-determination is still considered to be an option in this decolonisation case. The existence of human rights violations in a NSGT can, however, indicate that the notion of external self-determination remains

[223] Ibid. note 222.
[224] Ibid. note 222.

applicable. In this respect, the presence or absence of human rights violations has actually been used as a criterion by the African Human Rights Commission for instance in order to determine whether the people of Katanga could exercise their right to self-determination in denial of Zaire's territorial integrity and sovereignty.[225] The Council has, indeed, acknowledged the existence of human rights violations in the case of Western Sahara at various levels.

Section 3.3 Human rights provisions in UNSC resolutions

It is clear that the deployment of MINURSO marked the starting point of the Council's involvement in the conflict and it appears that the events of Gdeim Izik in 2010 marked a turning point in the UNSC handling of human rights issues in Western Sahara as explained in this sub-section. Some human rights-related terms were mentioned before 2011, and arguably, were already envisaged within the Settlement Plan (Sola- Martin 2006, Ruiz Miguel, 2013) and as described in sub-section 2.3 of this chapter. Therefore, this apparent increase in the attention given to human rights protection by the UNSC is only coupled with evidence of a materialising political stalemate and an abandonment of the referendum (and "D-Day") rather than stronger prospects for a solution.

Analysing UNSC's negotiations requires, as mentioned in the previous sub-section, extensive familiarity with, and access to, its opaque proceedings. Yet, the majority of studies of the institution's dynamic have been qualitative (Monteleone & Oksamytna 2020, 53). Out of the 68 UNSC resolutions analysed for the purpose of this research, only five are dated prior to the deployment of MINURSO while 59 resolutions aimed at extending its mandate. The very first attempt to call attention to the human rights situation through the mentioning of "the suffering of the people" was made in July 2003 in resolution 1495[226], over a decade after the mission was first deployed. Before then, resolutions only point out the "humanitarian aspects" (both 1996 resolutions), obligations under "international humanitarian law" (resolution 1359 of 29th June 2001[227] and 1429 of 30th July 2002[228]) or "humanitarian issues" (resolution 1485 of 30th May

[225] *Katangese_Peoples' Congress_v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), §6.
[226] Ibid., note 13.
[227] Ibid., note 222.
[228] UN Security Council resolution S/RES/1429 (30 July 2002), §5, available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1429(2002)

2003[229]). These references to international humanitarian law have been made systematically since 2017 and several times throughout the mandate renewals: twice in 1996, 2005, 2018 and 2019, once in 2001, 2002, 2003, 2004, 2017 and 2020.

The notion of "human dimension" was incorporated for the first time in 2009 (resolution 1971)[230] and repeated only once the following year (resolution 1920 of 30 April 2010).[231] This mention was the result of a compromise as Morocco refused that the term "human rights" was used (Capella 2011, 7; Ruiz Miguel 2013, 123). In a similar vein, references to the living conditions of the people of Western Sahara (without specifying where they are located) and the notion of "quality of life" have appeared randomly in the resolutions since 30th April 2008.[232] It has been mentioned in every resolution since then, including the idea that these conditions have to be "improved". One exception stands however, as resolution 1979 does not refer to the conditions of life but uses the actual term of "human rights" for the very first time in April 2011 and this term has continued to be mentioned in every resolution since. This is most certainly explained by the Gdeim Izik events of November 2010, which preceded the issuance of resolution 1979. The dismantlement of the protest camps near Laayoune by Moroccan police forces and the violence which unfolded have not only revived the interest of the general public in the conflict but have also formalised the rhetoric of the UNSC with regards to the related human rights issues and questioned the extent to which they should be addressed. These events mark a cornerstone in thinking about human rights protection and conflict resolution in the case of Western Sahara at various levels (civil society, regional organisations, scholars etc.). They directly preceded the adoption of the first resolution by the UNSC employing the term "human rights" under the penholdership of the USA and the Obama administration. [233] This was politically endorsed at the highest level of multilateral diplomacy where all members – at the urging of South Africa, long-lasting support to the POLISARIO Front – voted in favour of the wording in the document.[234]

[229] UN Security Council resolution S/RES/1485 (30 May 2003), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1485(2003)
[230] Ibid., note 137.
[231] UN Security Council resolution S/RES/1920 (30 April 2010), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1920(2010)
[232] Ibid., note 136.
[233] UN Security Council resolution S/RES/1979, (27 April 2011), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1979(2011)
[234] Similarly, a resolution adopted by the EU Parliament on 25 November 2010 called on the addition of human rights monitoring components in MINURSO's mandate for the very first time (cf JOCE, C 99 E, 3 April 2012, p87-88)

Following the issuance of this landmark resolution a decade ago, indications to more specific rights can also be pointed out. From 29th April 2014, the Council started to specify which types of rights they wished their discourse to focus on. Resolution 2152 refers to "the freedoms of expression and association", which has been retained in all the following resolutions ever since.[235] In April 2012, resolution 2044 made an interesting (and unique) reference to the notion of "natural resources" following a meeting between the parties on 9th November 2011 on this topic.[236] This notion has never been incorporated again in any resolution despite recent court cases related to the exploitation of natural resources in the territory and economic and trade partnerships between Morocco and the EU. The right of peoples to permanent sovereignty over their natural resources has indeed been the subject of landmark court cases at the EU level in recent years. Two CJEU decisions (December 2016 on agricultural products and February 2018 on fisheries) were issued within 14 months of each other, at a time when other courts worldwide also ruled on issues related to natural resources, tending to echo the CJEU's first appeal decision of December 2016.[237] In the latter, the Court principally ruled that, given the distinct nature of the territory of Western Sahara and that of Morocco, any agreement between the EU and the Kingdom could not include products from Western Sahara without the consent of the Sahrawi people. This has been re-affirmed in September 2021 in a new decision rendered, in first instance, by the General Court concerning the revised versions of the disputed agreements.[238] The right to permanent sovereignty over natural resources has however, remained out of the UNSC's scope.

In the interest of highlighting gender diversity and equality in the conflict resolution process, the importance of the "meaningful participation of women" in the negotiations was highlighted for the first time in April 2017.[239] This mention does not necessarily invoke or condemn specific violations on the ground but stands

[235] UN Security Council resolution S/RES/2152 (29 April 2014), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2152(2014)
[236] UN Security Council resolution S/RES/2044 (24 April 2012), available from https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2044(2012)
[237] The most notable example relates to the Order issued in the High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) on Friday, 23rd February 2018 in the Case No. 1487/2017 and available from https://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf following the 2017 judgment *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'NM Cherry Blossom' and Others* (15/6/2017), [2017], ZAECPEHC 31; 2017, (5) SA 105 (ECP); [2018], 1 All SA 593 (ECP).
[238] Cases T-344/19 and T-356/19, *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) contre Conseil,* [2021].
[239] UN Security Council S/RES/2351, (28 April 2017), available from https://undocs.org/S/RES/2351(2017)

perhaps as a manifestation by the Council to acknowledge the contribution of Sahrawi women – and in particular 2019 Right Livelihood Award Laureate Aminatou Haidar – in raising awareness on the conflict.

It is to note that the UN, as an organisation, has made increasing efforts to identify and condemn the human rights abuses caused by its own personnel as observed in the literature review. In that respect, the reference to "sexual exploitation and sexual abuse by personnel" has been made in the context of MINURSO every time the mandate was discussed at the UNSC since the adoption of resolution 1675 of April 2006.

In conclusion, it is clear that issues related to human rights are being addressed directly, or indirectly by the UNSC in the case of Western Sahara despite the fact that "D-Day" was never proclaimed. Violations are acknowledged and efforts are asked to be made to both parties. Nevertheless, this apparent political corroboration of the reality of the conflict on the ground is not translated into concrete operational measures through the explicit incorporation of human rights monitoring provisions in the mission's mandate. In the meantime, no referendum has been held and the negotiations are stuck in deadlock. The word "stalemate" was in fact mentioned as early as 31st January 1996 by the Council.[240] There is, however, more evidence of this state of affairs, unfolding in parallel with the human rights question throughout the resolutions and supporting the idea that, as the probability of organising a referendum diminishes, the UNSC had to take a stance on the protection of basic rights in Western Sahara, beyond what the Settlement Plan had envisaged.

Conclusion

It is evident that MINURSO stands as an exception in modern peacekeeping. All related UN documents bear witness to the deadlock that the negotiation process to solve the Western Sahara conflict has reached. This is particularly notable with regards to the issue of human rights, and their absence thereof, in the peacekeeping mandate, Despite the silence of the UNGA, the

[240] UN Security Council resolution S/RES/1042, (31 January 1996), §4, available from https://minurso.unmissions.org/sites/default/files/sc_1042-1996.pdf

UNSC and UNSG are not totally insensitive to the alleged violations that have occurred in the territory. The UNSG has reported and raised the concerns – through the input of the Personal Envoys – to the UNSC, in charge of taking decisions regarding human rights monitoring prerogatives. In fact, there seems to be a shift in the human rights discourse by the UN following the suspension of referendum-related activities and, later, the events in Gdeim Izik of November 2010, which is reflected in the relevant documentation by the Council and the Secretariat. Because human rights monitoring, protection and promotion were envisaged in conjunction with the organisation of the referendum in the Settlement Plan, it seems that the two are linked. As prospects for this referendum to be held disappeared over time (as evidenced in the UNSC resolutions and UNSG reports), there seems to be a transfer of focus on human rights from the original Plan to the UNSC resolutions as well as UNSG reports. This transfer is not completely disconnected to the idea put forward by the OHCHR that the protection of human rights in the conflict in Western Sahara stems from the implementation of the right to self-determination. However, it has not turned into explicit language requesting MINURSO personnel to monitor violations on the ground, nor did it substantially draw the attention to the 193 nations represented at the Assembly.

According to Ruiz Miguel, the erosion of MINURSO's authority did not stem from the failure of demands to include a human rights mechanism, but precisely from its silence in very serious crises such as the deportation of human rights defender Aminatu Haidar in the autumn of 2009, or the destruction of the Gdeim Izik protest camp in autumn 2010 (Ruiz Miguel 2020, 390). In line with this assertion, this chapter reveals that, references to human rights violations did not surface until these major events took place. Even though these events were reported factually in the UNSG reports, they did not formally open the debate for including a human rights monitoring component by the UNSC. The analysis of UNGA resolutions in this chapter even revealed a total silence in this regard in the case of Western Sahara, while the same body condemned human rights violations in the case of Namibia on four occasions[241] or adopted specific resolutions on the “situation of human rights in East Timor” twice while a mission by the UNSC was deployed[242].

[241] UNGA resolution A/RES/3111, (12 December 1973); UNGA resolution A/RES/3295 (13 December 1974); UNGA resolution A/RES/3399 (26 November 1975) and UNGA resolution A/RES/33/182 (21 December 1978).
[242] UNGA resolution A/54/660 (10 December 1999) and UNGA resolution A/56/337 (6 September 2001)

Therefore, the creation of MINURSO and the beginning of a deepened involvement by the UN in the conflict resolution process through the deployment of a PKO in 1991 has not strengthened concerns about human rights issues (particularly from the UNGA).

In a system where the UNSG reports, the UNSC decides and the UNGA is limited to commenting on a conflict situation, it has perhaps appeared to member States that the lack of influential power at the Assembly level has forced them to drift away from taking any strong stance on the issue. Because the UN is an institution which organisational environment is largely constituted by its member States, it "faces the conditions that produce organised hypocrisy, and the characteristics that make an organization more likely to exhibit it" (Lipson 2007, 11). Being both a matter of decolonization and peacekeeping, the question of Western Sahara pulls in several structures from the overall system, which all have different outlooks regarding human rights. This absence of streamlined approach mirrors the fragmentary institutionalization of human rights protection in peacekeeping in general analysed in chapter four.

The parties' diverging interpretations of the MINURSO mandate are also clearly stated and are regarded as a continuous major challenge to the mission's operations, including in one of the most recent reports by the Secretary General on the situation in Western Sahara.[243] Therefore, it seems that the way a mandate is worded can have an impact on how it is implemented and its eventual effectiveness. In the case of the conflict in the Former Yugoslavia for instance, Popovski argues that, because resolutions 819 and 824 of 1993, establishing the six "safe areas" in Bosnia were loosely worded, they did not specifically create a mandate to protect civilians and had ambiguous 'Chapter Six and a Half' mandates (Popovski 2015, 40).

Despite the absence of human rights monitoring components in MINURSO, the UN has not been totally disconnected from the reality on the ground. The Brahimi panel argued that "UN peacekeepers who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of

[243]UN Secretary General report S/2019/282, Situation concerning Western Sahara, (1 April 2019) §.54, available from https://digitallibrary.un.org/record/3799215?ln=fr

basic UN principles." These words will be the basis for the analysis of the possible existence of a customary norm of international law in chapter seven of this thesis. One thing is certain, this anomaly in peacekeeping is attracting more and more interest from civil society members over a decade after the dismantlement of Gdeim Izik protest camps. This increased focus on matters of human rights, including from the UNSC, has however, so far, not led to the incorporation of an explicit provision related to their monitoring, in a context where the prospect for the holding of a referendum is diminishing as years go by. The question now is to determine how this non-monitoring is perceived by the main stakeholders and the impacts they think this can have on the outcome of this 47-year-long conflict.

Chapter 6: Connections between MINURSO's human rights (non) monitoring and conflict (ir)resolution in Western Sahara

The previous chapter empirically examined the content of UN resolutions and reports on the Western Sahara conflict, the extent to which they refer to human rights and the characteristics of their discourse on this matter. This analysis revealed a total silence thereon on the part of the UNGA, serious concerns from the UNSG (based on the data collected by the OHCHR) and a certain reluctance from the UNSC to adjust the MINURSO mandate in response. The subsequent step in the analysis is now to establish how conflict actors and observers perceive these UN stances on human rights in Western Sahara as well as their wider implications in terms of conflict resolution. Based on data collected from interviews with stakeholders involved and previously involved in the conflict resolution process, this chapter aims at examining perceived connections between the absence of human rights monitoring and the wider resolution of the conflict in Western Sahara, i.e., whether the link is positive or negative, and at which level. Beyond the apparent speculative nature of this exercise, the interviews aim at mapping the current debate around the issue of HRMC and how the main actors justify their positions around a potential introduction to the mandate of MINURSO. The various stances also outline the relevance of discussing the absence of HRMC by revealing the impacts that a potential addition is perceived to have by the actors involved.

A total of 22 semi-structured interviews have been conducted in order to gather different views on what impact(s), if any, the addition of human rights monitoring component to MINURSO would have on the conflict dynamics and its resolution, why the mandate is currently lacking such a component and how the future of the mission looks like. The interview subjects do not constitute a representative sample of the actors involved in the conflict resolution process, although the range of views from the interviewees who agreed to take part did offer a variety of responses. Respondents included senior UN officials and national diplomats involved (or previously involved) at the UNSG, UNSC or MINURSO level in the implementation of resolutions related to the functioning of the mission. They also included representatives from international, Moroccan and Sahrawi human rights

organisations as well as the OHCHR. All interviewees were interrogated on what they see as the reasons behind the use or non-use of human rights language as well as its implications for conflict resolution. The NGOs were also asked about the impact that their work has had on the actual monitoring of the situation on the ground regarding human rights violations and the impact of a possible inclusion of a human rights mandate to MINURSO personnel on this work. A handful of individuals working or previously working for MINURSO declined to take part in the interviews on the basis that human rights issues were precisely not part of the mandate. A few institutions also turned down the invitation, without stating any reason. This is the case for the US mission to the UN, the International Committee of the Red Cross (ICRC) and the Royal Advisory Council for Saharan Affairs (CORCAS). Finally, interview requests remained unanswered in the case of several permanent missions to the UN, i.e. Spain, Morocco, Russia, China and the UK (although one former UK Ambassador to the UN did take part in the interview), as well as the Moroccan Association for Human Rights (AMDH). Ten out of 22 interviews were conducted after the resumption of hostilities and the end of the cease-fire declared by the POLISARIO on November 13th, 2020. However, respondents from Human Rights Watch and Amnesty International and the POLISARIO representative to the UN in New York were the only ones to refer to these events.

The findings from interviews confirm that actual human rights monitoring in Western Sahara has been displaced from intergovernmental structures onto non-state actors like NGOs. The specificity of the case of Western Sahara lies in the fact that the monitoring gaps are created at the UN level and filled by external actors, therefore transferring the very responsibility of protecting human rights outside the scope of the UN system. Arguably, the involvement of non-state actors in human rights issue may have two opposing effects on the UN organs: it can either retain the interest of UN member States by keeping an external pressure or it can enable the UNSC to avoid having to discuss its involvement in this matter. Going further, the responses give substantial support to the idea that there is a politicisation of human rights protection, beyond its mere institutionalisation described in chapter foud. This seems particularly striking in the case of Western Sahara, where human rights have become more of a diplomatic tool for conflict actors than a universal concern. Another point of

consensus among the interviewees is that MINURSO has failed to fulfil the mission it was initially tasked with, i.e, the organisation of a referendum on self-determination. However, opinions differ as to its current usefulness on the ground, as well as the impacts a possible extension to human rights might have.

There are different reasons and forms of incorporating human rights into UN action and peacekeeping. This chapter intends to answer the following questions regarding those related to MINURSO: Why was it not done or not done enough in the case of Western Sahara? What are the logical steps of the process? What are the potential consequences? If external actors, observers and organizations have progressively assumed the responsibility of reporting on human rights violations in Western Sahara, what are the benefits of adding such capacity onto the mission by the central political organ of the organisation? The interviews will help to better understand these dynamics between State and non-state actors in human rights monitoring and the rationale behind the UN involvement – or non-involvement - in human rights questions particularly given that negotiations behind closed doors are a common practice in the context of mandate renewals and UNSC negotiations (Torrejon-Rodriguez 2020, 44). Firstly, it will be essential to explain the reasons behind the absence of human rights monitoring prerogatives in the mandate of MINURSO from the perspectives of the interviewees and what this absence means in practice (section 1). As a second step, the findings will be presented thematically, distinguishing between arguments positing that an addition of human rights monitoring component was deemed beneficial (section 2) or detrimental/irrelevant (section 3).

Section 1 Explaining the absence of human rights monitoring components in MINURSO's mandate

There is a consensus among all respondents that MINURSO has failed in fulfilling its principal mission of organising the referendum on self-determination- although the interpretations on whether the mandate still provides that it should organise a referendum differ. They also agree on the responsibility of the UNSC in MINURSO's failure both to fulfil that goal and to appropriately respond to the demands from the UNSG as well as civil society organisations to extend the mandate to human rights monitoring. Human rights monitoring seems, however,

to be taking place in some way according to the responses provided by NGOs representatives as well as the OHCHR desk officer for Western Sahara, Kezia Mbabazi. Whether the extension of MINURSO's role to human rights is perceived to be beneficial or detrimental to the effective implementation of its mandate, and ultimately, to the resolution of the conflict will be discussed later in this chapter. In this first section, the reasons put forward for the absence of monitoring in the mandate of MINURSO will be examined in order to understand the context in which respondents have deemed its addition – when possible – beneficial, detrimental or irrelevant to the resolution of the conflict. Not only does the balance of power at the UNSC level hinders any possible extension (section 1.1), but both the Special Representative of the Secretary General (SRSG) and Personal Envoys have shifted the responsibility of reporting on human rights to each other (section 1.2). Nevertheless, the absence of a clear mandate on human rights issues did not prevent some monitoring of human rights violations in Western Sahara and the refugee camps in Tindouf from taking place, including from other UN entities (section 1.3).

Section 1.1 The role of the UNSC

According to Anna Theofilopoulou, former advisor to the UNSG Personal Envoy James Baker, "the human rights aspect was never put into the MINURSO plan because there was this unreal expectation that somehow – it will be solved quickly – it will not be necessary" (Interview 11, New York City, 10 October 2019). This point of view is somewhat corroborated by the idea that prerogatives related to human rights were embedded in the Settlement Plan and vested in the UNSG and SRSG subsequently. This is reinforced by the relevant literature (Sola- Martin 2006, Ruiz Miguel, 2013) and was described in sub-section 2.3 of the previous chapter. Anna Theofilopoulou's point may be valid when referring to the establishment of the mandate in 1991. However, given that the dynamics of the conflict have changed along the years, the reasons for extending (or not) the existing mandate to human rights monitoring are of a different nature. For instance, former SRSG Weisbrod-Weber (2012-2014) argues that the absence of a HRMC is explained by the fact that it was a "different time in peacekeeping" and the "human rights first slogan from Ban Ki Moon did not exist" (Interview 10, Skype, 2 September 2019). This statement can however be curbed in light of the

findings laid out in chapter four of this thesis, particularly with regards to the mandate of ONUSAL, adopted only three weeks after that of MINURSO (UNSC resolution 693) and which does incorporate a HRMC.

When asked about the reasons for the absence of HRMC after nearly three decades of deployment of MINURSO, most respondents explicitly answered that Morocco was responsible. A couple of them placed the blame on the rigidity of the Council's system, while some of them implicitly suggested a combination of both factors. Two respondents stated that the mission was never intended to deal with such an issue (Permanent mission of France to the UN and the Moroccan National Council for Human Rights - CNDH). Firstly, the principal obstacle to expanding the mandate at the UNSC level was Morocco's opposition to this recommendation from the UNSG. The Kingdom's intransigeance on this question has been confirmed by the Moroccan authorities themselves in several documents and statements. For instance, a letter from the government of Morocco in response to HRW questions in 2008[244] and a leaked document from the Moroccan Ministry of Foreign Affairs[245] both put forward the argument that such initiative would conflict with the principle of territorial integrity. The latter note argue that it would "create two 'parallel jurisdictions in Northern and Southern Morocco', weaken Morocco's authority and complicate the maintenance of public order in the disputed territory (Fernandez-Molina 2016, 68). Additionally, in his annual speech commemorating the anniversary of the Green March, the King made his position on the issue very clear in 2014. He declared: "No to any attempt to revise the negotiating principles and parameters, as well as any other attempt to reconsider or expand the mandate of MINURSO, including the issue of human rights monitoring".[246]

When attempting to explain Morocco's reluctance to agree to an extension of the MINURSO mandate to human rights monitoring, firstly, some interviewees argued that the extension would bring Morocco into the spotlight for the reported violations in the territory of Western Sahara according to the representatives of Human Rights Watch (Interview 15, Zoom, 5 January 2021), CODESA (Interview

[244] Appendix 2 "Response from the Government of Morocco, dated May 30, 2008, to Letter from Human Rights Watch" in HRW report *Human rights in Western Sahara and in the Tindouf Refugee Camps*, December 2008
[245] Ibid., note 83
[246] "Ibid., note 80

2, London, 24 June 2019) or Independent Diplomat (Interview 3, New York, 11 July 2019). Secondly, quoting a former Senior UN Official who worked closely with the last Personal Envoy (President Hurst Koehler), "the Moroccans have been very clever in narrowing down the room to manoeuvre for MINURSO and also the mandate" and as "it has no interest to see a referendum happening […] MINURSO does not have a human rights mandate" (Interview 18, Zoom, 14 January 2021). This implies the existence of a link between the monitoring of human rights and the resolution of the conflict via the organisation of a referendum as arguing against such a referendum seems to entail arguing against a HRMC. This statement by President Koehler's advisor echoed that from Ambassador Christopher Ross (Personal Envoy from 2009 to 2017) who stated that "the Moroccans were there constantly to defend the narrowest possible interpretation of the PE's role" (Interview 28, Zoom, 7 May 2021). Thirdly, "the sensitivity relates to the attachment, to the importance from a national strategic perspective of having Western Sahara remaining annexed" (Interview 24, Zoom, 8 February 2021). Indeed, for Philip Luther, MENA Research and Advocacy Director for Amnesty International, the annexation of Western Sahara might be put at risk, "because whether there be greater scrutiny or greater international engagement, the gain that they see is so important" (Interview 24). It is also "part of Morocco's wider strategy to control any information that comes out of Western Sahara" (Interview 28).

For former SRSG Francesco Bastagli (2005-2006), Morocco is adamant to an extension due to the wider implications at the UN level. In his view, for Morocco, "it is not just a question of human rights, but it is also, if the UN were to deal with these human rights issues, it would confirm the fact that the UN accepts and recognises that there is an overarching responsibility towards the Sahrawis" (Interview 6, Skype, 13 August 2019). Finally, a former senior staff member from MINURSO observed three main reasons why the Kingdom would actively advocate against such an extension. Firstly, "it would undermine their effort to keep and to promote their view on the resolution of the conflict". Secondly, they would not be able to "keep control of the territory and keep peace on the territory if there were an open for human rights". Lastly, he affirmed that "if there was human rights monitoring and people came forward with all their complaints and this was instrumentalised by POLISARIO, it would inevitably raise tensions

between the parties" (Interview 7, Skype, 15 August 2019). It is to note that none of the interviewees pointed out the argument put forward in the literature that the mandate is adopted on the basis of Chapter VI of the UN Charter, which means that any human rights mandate must obtain the consent of both parties (Torrejon Rodriguez 2020, 56).

The respondents mostly highlighted the role of the UNSC in accommodating Morocco's demands. This reveals an interesting paradox regarding the role of the UNSC: human rights are not believed to be a prerogative that the Council is entitled by the UN Charter to take up in practice, and yet, it has the power to include or not include a corresponding monitoring mechanism within the mandates of the missions it deploys, if it wishes to do so. The issue of human rights monitoring is then automatically politicised as the incorporation of a corresponding component– or its exclusion – falls within the remit of discussions amongst less than 10% of the UN member States, five of which can veto any decision without constraint and therefore risking thwarting it completely. According to a former UK Ambassador to the UN, organisational and procedural – as well as political - considerations make it very difficult for human rights to be consensually dealt with at the UNSC (Interview 21, Zoom, 19 January 2021).

Section 1.2 Confusion about the roles of the Special Representative and Personal Envoy of the Secretary General

Arguably, and as explained in the previous chapter, the provisions contained in the Settlement Plan themselves provide scope for some human rights monitoring through the SRSG, who is the head of MINURSO. The Settlement Proposals contained in the UNSG report indeed reiterated twice that "the Special Representative will have sole and exclusive authority over all matters relating to the referendum, its organization and conduct".[247] This idea has been relayed by some of the respondents. Sidi Omar, Polisario representative to the UN in New York since May 2018, recalled that "Settlement Proposals that were agreed and upon which the mission is based, would have given the SRSG exclusive responsibility over all matters – *all matters*- relating to the holding of the referendum" (emphasis added by the respondent - Interview 25, Zoom, 16

[247] Ibid., note 18. §8 and §47(a)

February 2021). This includes, according to him as well as some scholars (Sola-Martin 2006, Ruiz Miguel, 2013), monitoring of human rights, a task they consider to be inherent to the conduct of the referendum based on §10 of the Plan.

Four former SRSGs have been interviewed as part as this research. They all had diverging views on the scope of their mandates in this respect. This is related to contrasting approaches with regards to the division of labour and the relationship to be maintained with the Personal Envoy, a post which was created six years after that of SRSG, in 1997. According to the Settlement Plan, the role of the SRSG, during the transitional period, was to exclusively perform organisational and supervisory functions in relation to the conduct of the referendum. The post of the Personal Envoy, however, was created following an internal review based on developments on the ground and the emergence of a political stalemate (Whitfield 2007, 179-180; Zunes & Mundy 2010, 142; Theofilopoulou 2017, 40-41). The Personal Envoy was to act as the lead UN negotiator (Zunes & Mundy 2010, 143; 207) and the first appointee was to answer three fundamental questions raised by the then UNSG Kofi Annan:

(a) Can the settlement plan be implemented in its present form?
(b) If not, are there adjustments to the settlement plan, acceptable to both parties, which would make it implementable?
(c) If not, are there other ways by which the international community could help the parties resolve their conflict?[248]

According to the mission's website, the negotiations between the parties were to be held "under the auspices of the Personal Envoy". It is clear from the UNSG report of February 1997 that the creation of this post was to bring the parties together and remedy the impasse in which the organisation of the referendum found itself. The impasse, materialised by the fact that the transitional period never officially began, meant, therefore, that the SRSG was never able to perform the referendum-related duties he was entitled to under the Settlement Proposals. For Sidi Omar, the mistake made was that this deviation was formally instituted, "and how the mission and the responsibilities should have stayed in the hands of

[248] UN Security Council, Report of the Secretary-General on the Situation Concerning Western Sahara, (5 May 1997), S/1997/358, available at: https://www.refworld.org/docid/3ae6aecd18.html, §17

the SRSG were taken away". According to him, this is the reason why the issue of human rights in Western Sahara is "taken as a political issue, usually dealt with by the Personal Envoy" (Interview 25). However, when enquiring about the human rights issue as part of the conflict resolution process to a former senior UN official from Koehler's team, he confirmed that "other than a function as potential confidence building measures, human rights did not feature very high on the agenda". Indeed, he described the role of the SRSG as "essentially to make sure that MINURSO fulfils its mandate from the UNSC, which broadly speaking, means that making sure that the mission maintains stability on the territory so that the parties in the conflict can come together and negotiate a peace agreement" (Interview 18). In comparison, the same respondent stated that "the peace process is led by a separate representative – the Personal Envoy of the UNSG". Another former SRSG in post from 2012 to 2014, Wolfgang Weisbrod-Weber, stated he saw his role "not as trying to solve the conflict but trying to be a good peacekeeper. Solving the conflict, I left it with the UN Personal Envoy, Christopher Ross, Ambassador Ross" (Interview 10).

Going further, Ambassador Ross notes that the Personal Envoys' missions have had two different forms. The role of the first Envoy – James Baker – was "to implement the Settlement Plan of 1991 by conducting negotiations with the parties to obtain an agreement to its implementation". Incidentally, this task was to be performed in conjunction with the Secretariat. However, his role was different from that of his successors in the sense that "he created the proposals, the initiative was his and he tried to negotiate them". This role is similar to that of a mediator. For Baker's successors, their role "was to facilitate direct negotiations between Morocco and the Polisario" and they "had no flexibility to introduce proposals of [their] own and their role was to convene meetings and encourage negotiations" (Interview 28). In this case, the Personal Envoy would offer his good offices. This distinction in the Personal Envoys' role was made possible with the establishment of the "negotiations without preconditions" discussed in the previous chapter. It is to note that the margin of manoeuvre of the Personal Envoy seems to be depending on his personality. What distinguished President Koehler's mission from his predecessors' is that Kohler and his team had very close contact with Colin Stewart, SRSG from December 2017 to October 2021. The senior UN official interviewed confirmed that the team "had Colin Stewart on

the phone pretty much every second day, to discuss and so on, and we were briefed on the difficulties that MINURSO had" (Interview 18). Even though the former Personal Envoy made clear very early that he would not go into the details of the mission, he needed to keep a sound understanding of the events occurring on the ground to build a coherent conflict resolution strategy. This, however, would not come in support of a potential fusion of the two roles. According to the same official, if this was to happen, "the Envoy would get stuck in the MINURSO day-to-day work, and it will go nowhere" (Interview 18).

It is clear that there seems to be a void (left by the non-organisation of the referendum on self-determination) in the nature the role that the SRSG has to play and can play with regards to the human rights issue. To emphasise this gap, former SRSG Francesco Bastagli insists on the fact that "one of the cards that could be played to encourage the evolution of this dossier is that the person who heads the mission is not only the head of the mission. He is the Special Representative of the Secretary General in Western Sahara which is a much broader concept".[249] However, Ambassador Ross recalls that "the SRSG, most of the time, can only speak to one person at the Moroccan liaison office in Laayoune, whereas the Personal Envoys had access to all the relevant officials in the various places that they visited".[250] This parameter can have a significant importance when it comes to dealing with human rights on the ground. The diverging views on the respective roles to be played by the SRSG and the Personal Envoy, coupled with the lack of distinctive communication channels between the two offices, fail to provide answers as to whom should bear responsibility for monitoring human rights violations in the case of Western Sahara. However, despite a legal void, human rights violations are still monitored from afar, as confirmed by several observers.

Section 1.3 Alternative UN human rights monitoring mechanisms

The existence of campaigns by NGOs demanding the addition of a HRMC to MINURSO's mandate may suggest that human rights are not being monitored at all in the context of this conflict. The findings from the interviews conducted as

[249] Interview 6
[250] Interview 28

part of this research reveal that this is actually not the case. As summarised by former SRSG Weisbrod-Weber, there is no "need for a monitoring mission to find out that this right [right to self-determination] has been violated".[251] Several respondents have firstly pointed out the existence of alternative mechanisms provided by the UN in order to monitor and report human rights violations in the territory of Western Sahara as well as the refugee camps in Algeria such as the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of freedom of opinion and expression, and the UN Special Rapporteur on Torture. They all mentioned Western Sahara in recent reports[252] or communications. [253] These mechanisms operate outside the peacekeeping framework and within that of the Human Rights Council.

Besides these Special Rapporteur's procedures highlighted by former SRSG Wolfgang Weisbrod-Weber, Amnesty International' representative and OHCHR's official, the role of the country desk for Western Sahara at the OHCHR has proven to be central. As mentioned previously, the post of High Commissioner (and his/her consequent Office) was established in 1993 by the UNGA through resolution A/RES/48/141 with a mandate to "promote and protect the effective enjoyment by all, of all civil, cultural, economic, political and social rights".[254] With that in mind, the OHCHR is "monitoring the human rights situation remotely, because there is no office there" (Interview 14, Zoom, 19 October 2020). Since its establishment in 1993, the Office has been receiving information about ongoing violations, which "comes in through online, through mail, through NGOS, basically depending on the kind of human right, the human rights organisations and their reports." They "also get information from lawyers, […] from victims. Sometimes, they call in, sometimes they write emails, sometimes their families call with details of what is happening in Western Sahara".[255] The absence of a memorandum of understanding with Morocco prevents the establishing of a country office on the ground, but according the Kezia Mbabazi, Western Sahara desk officer at the OHCHR, this is not an exception today. She also confirmed

[251] Interview 10
[252] UN Human Rights Council document A/HRC/27/48/Add.5 (4 August 2014) "Report of the Working Group on Arbitrary Detention: available from https://undocs.org/en/A/HRC/27/48/Add.5 and UN Human Rights Council document A/HRC/22/53/Add.2 (28 February 2013) "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment" available from https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-53-Add-2_en.pdf
[253] News report from the UN Human Rights Council, (26 June 2019), available from https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24745&LangID=E
[254] Ibid., note 155
[255] Interview 14

that this monitoring work by the OHCHR forms the basis on which the UNSG addresses human rights concerns in his annual report. She insists on the existence of a bundle of opportunities for victims to report on the violations of their human rights, outside the framework of peacekeeping such as the Special Rapporteurs procedures mentioned above. In addition, the petitions system or "complaints procedures" from the OHCHR allows for individuals to complain about the violation of their rights, which Sahrawis have made extensive use of, particularly within the Committee Against Torture according to Kezia Mbabazi. She concludes that "the information does not get lost, even if it might not be mentioned in detail in the UNSG report".[256]

A third alternative – and potential option to be considered - to a UN human rights monitoring mechanism is the Fourth Committee of the UNGA. Former SRSG Bastagli reckons that it "should be the responsibility of the Fourth Committee of the UNGA to seek information in relation to Chapter XI [of the UN Charter], which is human rights among other things: asking how these people live, what do they do, what are the concerns, including in the camps".[257] He adds that "what the UNGA could ask from the UNSG is to do the same that is done with all the other Non-Self-Governing Territories (NSGT) because the fact that for Western Sahara, Spain refuses to hold any responsibility, does not exempt the UN from making sure that the Sahrawis get this protection. It is a very simple and legally unsalable argument". Whether this initiative emanates from the UNGA or the UNSG himself, the end result would be similar. However, POLISARIO representative to the UN Sidi Omar insists on the central role that the UNSG has regarding the decision to take on such a responsibility, given that he appoints the High Commissioner for Human Rights, the Special Representative and the Personal Envoy to the UNSG for Western Sahara.

Therefore, despite the undeniable acknowledgement of a responsibility by the UN on the ground described through the inclusion of Western Sahara in all special procedures, an institutional void persists at the UNSG and UNSC level. In light of this disconnection between actions needed (effective protection and promotion of human rights) and decisions taken (absence of a HRMC in the mandate of the

[256] Interview 14
[257] Interview 6

mission), it has been confirmed by the respective interviewees that MINURSO has sporadic contacts with the OHCHR, and NGOs like Amnesty International. However, these contacts are limited in scope and nature. For instance, the Amnesty International interviewee explained that “in very rare occasions, there has been contact because some allegations of violations have occurred in the vicinity of the MINURSO headquarters for instance, in Laayoune for example. Which means that, not because it is MINURSO, but because there may have been MINURSO personnel to witness something, we have had contacts on an informal basis, then MINURSO personnel have exchanged information with us”.[258]

The existence of this void creates information and action “gaps”, which is relayed at the institutional level and mentioned in the UNSG reports regarding the conflict in Western Sahara.[259] These gaps are sustained at the operational level, and, quoting Kezia Mbabazi, the one respondent at the forefront of this monitoring exercise, one can see “that these gaps continue to exist because of the remote monitoring”.[260] The UN involvement appears via the remote monitoring, but “there has not been enough pressure on those involved in the renewal of MINURSO mandate to persuade them that they needed to include a human rights monitoring component” according to the Amnesty International interviewee.[261] The question that flows automatically from this statement is: would extending the mandate of MINURSO be beneficial to all actors and observers involved and to the wider conflict resolution process? The following sections present the contrasting answers given by the interviewees and which provide some insights regarding the relevance of discussing the absence of HRMC in the mandate of MINURSO.

Section 2 Virtuous circles: potential benefits of MINURSO human rights monitoring

The OHCHR, in its leaked report of 2006, asserted that the human rights crisis is a direct result of the non-implementation of the right to self-determination: "almost all violations of human rights noted above stem from the nonrealization

[258] Interview 24
[259] Par.79 of UNSG report S/2015/246, Par.100 of UNSG report S/2016/355, Par.92 of UNCG report S/2017/307, Par.64 of UNSG report S/2018/889, Par.66 of UNSG report S/2019/282, Par.68 of UNSG report S/2020/938
[260] Interview 14
[261] Interview 24

of this right, including civil and political rights as well as economic, social and cultural rights of the people of Western Sahara in all locations where they currently reside."[262] In line with this connection, the Amnesty International interviewee believes that an indirect link exists between the absence of human rights monitoring components and the irresolution of the conflict in the sense that, "the lack of resolution to the conflict and the absence of progress on agreed steps towards resolution and a self-determination referendum, coupled with the sensitivity around the issue within Morocco (and particular the red lines on territorial integrity, as you are not able to challenge that internally without having human rights violated) means that, that situation gives rise to human rights violations, gives rise to violations of freedom of expression, of association and by extension, to treatment in detention and unfair imprisonment and so on".[263] Going further, according to Maima Abdeslam, POLISARIO representative to the UN in Geneva (Interview 13, Geneva, 9 October 2020) and Aminatou Haidar, President of CODESA,[264] it is the absence of a human rights mechanism that has created the current status quo. In a similar vein, Katlyn Thomas, former responsible for legal affairs of the Identification Commission between 1994 and 1996, believes that "the fact that Morocco seems to have been getting away with human rights violations thorough this entire period, certainly has added to the frustration of the people in the territory" (Interview 17, Zoom, 9 January 2021).

Upon this background, all the interview respondents were asked if the addition of a human rights monitoring mechanism within the MINURSO mandate would have any impact, positive or negative, on the evolution and resolution of the conflict. The ones perceiving a connection between the absence of such a mechanism and the challenges faced by MINURSO and the political stalemate suggested potential positive impacts of an extension of MINURSO's mandate on the conflict dynamics at various stages of a peace process detailed and defined below: conflict prevention (section 2.1), conflict management (section 2.2) and, to a lesser extent, conflict resolution (section 2.3).

Section 2.1 Benefits for conflict prevention

[262] Ibid., note 187.
[263] Interview 24
[264][264] Interview 2

The UN's Capstone Doctrine issued in 2008 added the concept of 'conflict prevention' as one of the peace and security activities alongside which peacekeeping was to be characterised and defined (Bellamy & Williams 2010, 15). It was defined as "any structural or diplomatic measures to keep intra-state or inter-state tensions and disputes from escalating into violent conflict".[265] Therefore, based on this definition, preventing escalation and deterioration in the human rights situation and systematic violation of human rights is essential to prevent violent conflicts from emerging.

The position of those perceiving the extension of the MINURSO mandate to human rights monitoring as such a conflict prevention measure can be summarised by a point made by a former UK representative to the UN. He considers that "even though the impact is quite low on finding a settlement of the whole conflict we are talking about, it does have a deterrent effect if people are named and shamed and if there is a threat of actual caught or potential caught in the ICJ or the international courts of human rights or the Human Rights Committee in Geneva, where this can cause political trouble for those who ignored human rights norms".[266] The need to include the relevant clauses therefore, becomes "essential". He justified this position by stating that "unless you make it clear from the centre of peacekeeping at the UN, that human rights matter in conflict areas and in regions where settlements are needed, then you are ceding principles of United Nations and allowing those countries, systems, regimes, fighters, who are happy to ignore human rights norms to get away with it".

Representatives of the international NGOs interviewed concur with this position. Human Rights Watch's respondent stated that "the Moroccan authorities do not let human rights monitors and observers and journalists access the territory. And that helps them obscure human rights violations and probably encourages them to continue violating rights. If the territory was open to scrutiny, including by international journalists, by human rights organisations, that would make violations more difficult".[267] Comparably, Amnesty International's representative declared that scrutiny "would help then prevent violations" adding that "it would

[265] Ibid., note 123, p17.
[266] Interview 21
[267] Interview 15

be helpful for the protection of human rights as well as the truth at a more abstract level".[268] Based upon the fact that human rights violations in the context of this conflict are arguably a consequence of its non-resolution through the expression of the right to self-determination (as the 2006 OHCHR leaked report stated), preventing violations would therefore pre-empt any escalation of violence as well as alleviate the consequences of the absence of resolution.

Beyond the preventative nature from a perpetrator' standpoint, the idea that the escalation of the conflict would be prevented by creating a "safe space" for alleged victims has also been put forward. When asked about the added value of a human rights monitoring mechanism, the Oxfam official evoked the benefit "in terms of opening space to talk about issues that are taboo, but that there is interest among the local population in talking about" (Interview 23, Zoom, 25 January 2021). She adds that "when people are in places where they feel safe, these issues [human rights violations] come up, just like anywhere else. People have concerns about their livelihood, about their quality of life". She concludes that a monitoring mechanism would therefore be useful "in creating some openness, but also some accountability".[269]

Whilst an active armed conflict had stopped for over three decades, human rights violations have been increasingly reported. Therefore, the efficiency with which they are being addressed in the context of this conflict is where a potential benefit of adding a HRMC to MINURSO's mandate lies.

Section 2.2 Benefit for conflict management

"Conflict management" was not identified in the Capstone Doctrine as one of the five peace and security activities. The concept of conflict management is understood in this sub-section – and in line with the definition provided by the Peace Operations Training Institute- as "the limitation, mitigation and containment of conflict, rather than the durable elimination of the causes of the conflict" (Woudhouse 2018, 43). In other words, it comprises the ways with which a mission deployed to resolve a conflict addresses the violence and various

[268] Interview 24
[269] Interview 23

violations it is faced with and can be also referred to as “conflict regulation”. To this effect, extending the mandate of MINURSO to the monitoring of human rights in both the territory of Western Sahara and the camps in Tindouf is considered by many respondents to be beneficial at the operational level. Representatives of Oxfam and Human Rights Watch, POLISARIO, as well as former MINURSO staff, the OHCHR desk officer and two of the SRSGs view an extension of the mandate as an enhancement of MINURSO’s capacity to inform. Even though this monitoring exercise is already taking place through alternative routes as described in the previous section, a mandate extension is believed to have a direct positive impact on this work, and further, on the lives of the Sahrawi people. It would indeed compensate for the current lack of access by NGOs and journalists to the territory, which the UNSG again highlighted in his latest report where he stated that “the Mission’s lack of access to local interlocutors west of the berm severely limited its ability to independently collect reliable situational awareness information and to assess and report on developments across its area of responsibility”.[270] Human Rights Watch’s representative and the former Identification Commission member have also both confirmed this state of affairs in their responses. Respondents from HRW and OHCHR have pointed out the fact that their work relies on local sources which either come from one side or the other. Therefore, granting a monitoring capacity to the personnel of MINURSO would contribute to the researching and documenting work by NGOs and the OHCHR in the absence of access, particularly to the territory of Western Sahara. MINURSO would therefore become a “third body with no political stake in the conflict and that would just give the facts”, therefore saving the time spent “de-bunking lots of claims” in first-hand information Human Rights Watch receive.[271] In addition, these claims seem to only foment animosity between the parties and push them further apart in the conflict resolution process.

On a grander scale, the respondent from Oxfam recalled that “everyone’s human rights should be monitored. In terms of holding the POLISARIO to a higher standard – just like we should hold the Moroccan authorities to a higher standard. I would hope that it brings a little more scrutiny to how things operate in the

[270] UN Security Council Document S/2022/733, Report of the Secretary-General on the situation concerning Western Sahara (3 September 2022), §67 available from https://minurso.unmissions.org/sites/default/files/sg_report_october_2022_0.pdf
[271] Interview 15

camps".[272] Accessing the information first-hand would therefore increase scrutiny, and in a conflict where positions and views from the parties remain diametrically opposed, the UN's position as a moderator seems all the more relevant. For Ambassador Ross, had there been HRMC, the international community would have had access to independent, unbiased information about what was going on. That would have perhaps added to the to the information available to the international community and might therefore have encourage the international community, the UNSC etc.. to do something about Western Sahara".[273] MINURSO being the only tool that the UN has on the ground to inform the Secretariat about any occurring events, Sidi Omar from POLISARIO suggests that it be used to its full capacity.[274]

The POLISARIO representative to the UN in Geneva added that "giving this mandate is also a way [for POLISARIO and Sahrawis in general] to […] receive proper training on the ground from an independent body that is the United Nations".[275] This idea that human rights monitoring would be beneficial as a protection mechanism, irrespective of the political views on the issue or the outcome of the conflict resolution process has been sustained by interviewees from both international NGOs (Amnesty International and Human Rights Watch). In this regard, a former MINURSO military staff member, Janos Besenyo, insists that it should be the case, including if one considers Western Sahara to be an integral part of the Kingdom of Morocco where "they are supposed to be equal citizens" (Interview 5, Budapest, 29 July 2019). Beyond the possibility to collect information more accurately and devoid of any unfounded claim from either side, the extension to human rights monitoring would further increase visibility in order for the mandating authority – the UNSC – to take well-informed decision and encourage the parties to negotiate on the basis of independently collected information as part of the overall conflict resolution process. In addition to the notions of "truth" (Amnesty International representative, Interview 24) and "accountability" (Oxfam representative, Interview 23) referred to in the first sub-section, adding a HRMC to the mandate can arguably foresee an impact that goes beyond conflict prevention and management, and into conflict resolution.

[272] Interview 23
[273] Interview 28
[274] Interview 25
[275] Interview 13

The heart of this research project is indeed to evaluate the impact at the conflict resolution level.

Section 2.3 Benefits at the political level and for conflict resolution

Unlike conflict prevention and management, conflict resolution is a process whereby the parties not only avoid escalation or containment of violence, but they most importantly intend to find a peaceful solution to their dispute. The Capstone Doctrine only mentions the term once in its fourth chapter on deciding to deploy a UN PKO. According to Marlene Spoerri from Independent Diplomat, "the idea that you could really begin to see traction on the political process in the absence of any movement on human rights, in the absence of monitors, in the absence of any kind of any indication on Morocco's part that they are willing be serious about respecting Sahrawis' civil rights and human rights seems preposterous".[276] In perceiving a connection between the extension of MINURSO's mandate to human rights and the resolution of the conflict, respondents have built their reasoning on the assumption that the issue of human rights is linked to a process that is inherently political. According to POLISARIO representative to the UN in New York, by allowing a peacekeeping mission to report on anything but human rights violations, the UNSC has ironically placed the human rights question at the centre of a political negotiation process where it should not be laid.[277] Going further, former MINURSO Captain Janos Besenyo considers that "the political is not supposed to override the human rights".[278] To a certain extent, the representative of the Moroccan Conseil National des Droits de l'Homme (CNDH) also discerns a connection between the human rights monitoring function in a PKO and the finality of the mission. As such, he is not against an extension of the mandate of MINURSO per se, but this requires clarity and "if it is in the logic to find a solution, it is necessary to understand which one" (Interview 26, Zoom, 22 February 2021).

A deeper connection between the positive impact of human rights monitoring mechanisms on the conflict resolution process has also been evoked. It presupposes that a solution to the conflict must automatically entail the addition

[276] Interview 3
[277] Interview 25
[278] Interview 5

of these mechanisms to the mandate. In this respect, for the OHCHR desk officer, a solution to the conflict could be found "if we were able to remove these barriers, this lack of access, if we were able to get cooperation from both sides, if we were able to sit down and actually be given an opportunity to go and get this information first-hand".[279] She adds that if OHCHR was "given actually permission not to keep information confidential – especially on Western Sahara - and if there is a technical mission and we were given the opportunity to make public what we find in the report, that would be a solution in itself as well". Collecting first-hand information and making it public is also perceived as encouraging the international community to engage further in the resolution process. For Ambassador Ross, "in the absence of independent information, it is hard to build a case for greater international involvement". The end result is that there are two "competing versions of what is going on, and the international community does not want to have to choose". It is clear for him that, "had there been independent monitoring, there would have been some basis, some other basis for moving beyond the versions of the two parties".[280]

The most prominent idea amongst the respondents is that an addition of a human rights monitoring mechanism can contribute to the resolution of the conflict if used as a tool by the UN negotiators and UNSC members in the negotiation process. Human Rights Watch's representative believes that "if human rights violations had been exposed more thoroughly, including a UN sponsored mechanism, that would have increased pressure on Morocco to respect rights more".[281] This notion of pressure is at the centre of the reasoning on conflict resolution in the case of Western Sahara. The last Personal Envoy's advisor confessed that extending the mandate to human rights monitoring "was not a major issue to him (the UN Personal Envoy)" and "had we used this, we would have used it to increase our leverage on Morocco". As negotiators, he explained the problem was that they did not "have any leverage to put pressure on Morocco". He concluded that extending the mandate of MINURSO to human rights would be useful "only as a technical tool".[282] In keeping with this logic, former SRSG Julian Harston (2007-2009) did affirm "that human rights are never totally irrelevant" as it is "frequently

[279] Interview 14
[280] Interview 28
[281] Interview 15
[282] Interview 18

used as a tool for leveraging a situation either for better or for worse" (Interview 8, Skype, 26 August 2019).

For Philip Luther from Amnesty International, "if the rights to freedom of expression, association and assembly is better protected within Western Sahara, then, it allows conversations about conflict resolution to happen in a way that they are unable to at the moment (because of the restrictions on the freedom of expression). That, perhaps, would help to advocate for the referendum to actually happen (or some other solution) but at least that the conflict resolution being able to happen. As if there were perhaps a more indirect result".[283]

To better understand the process through which an extension of the mandate to human rights can successfully bring the conflict to an end, one must understand what this addition represents for each party. For Marlene Spoerri from Independent Diplomat, "the issue of human rights with MINURSO has been a main stage of what Sahrawi have been asking for since day one". Therefore, it is always linked to the work Independent Diplomat does, "really insisting that human rights are basically the fundamental principle on which this political process is based". On the other hand, she explains, "Morocco is so fearful of the situation in the territories getting out in the open and being subject to an actual public discussion that just to have the UNSG or someone who is an important figure in the international stage actually draw attention to these issues, would be incredibly important and might change Morocco's calculations to some degree".[284] It is clear that, in her view, there needs to be a monitoring component in MINURSO, but the political process also needs to be built on a foundation of respect for Sahrawis human rights outside of any political agenda. Consequently, in order to solve this crisis, the stakeholders involved "are going to need to see that those human rights provide the basis for how we move the process forward".[285]

Arguably, human rights are going to be key in the process insofar as they are part of the Confidence Building Measures (CBM), deemed essential to the resuming and progressing of negotiations. From a victim's standpoint, wherever they are, in order to have confidence in the political process and ultimately have faith in

[283] Interview 24
[284] Interview 3
[285] Interview 3

any future solution, there needs to be some evidence from the perpetrators, whoever they are, that they are willing to respect their basic rights. In the absence of such confidence, a real, credible, and effective process cannot take root. Capella argues that "an effective human rights monitoring mechanism that improves the well-being of the population could help build confidence between the parties to the conflict" (Capella 2011, 5; Khakee 2014, 459). In line with this statement, for Marlene Spoerri, "that offers the beginnings of a first step: Morocco agreeing to allow human rights monitors into the territory".[286] Nevertheless, various actors interviewed for the purpose of this research consider that extending the mandate of MINURSO to human rights issues is irrelevant in the search of a solution to the conflict, or worse still, would be detrimental.

Section 3 From disconnect to harm: potential detriments of MINURSO human rights monitoring

To some extent, all four SRSGs interviewed believe that there is no straightforward link in substance between the monitoring of human rights and the resolution of the conflict in Western Sahara. In this section, the arguments presented support the idea that the extension of MINURSO's mandate to human rights would be either irrelevant (section 3.1) or straight-out detrimental (section 3.2) to the conflict resolution process. Some respondents even suggested that such solution lies outside the scope of MINURSO (section 3.3).

Section 3.1 No connection between the extension of MINURSO's mandate and the conflict resolution process

Firstly, the majority of respondents believe that extending the mandate of MINURSO to human rights monitoring will never materialise. As the Amnesty International representative points out, "from a purely human rights perspective, unless the situation on the ground changes significantly, I do not see them getting a human rights monitoring mechanism".[287] More serious still, the former Identification Commission member does not believe "that if MINURSO were asked to monitor human rights violations, that the truth would actually come out".

[286] Interview 3
[287] Interview 24

From her experience of the UN hierarchy, she affirms that adding a HRMC "would not allow MINURSO to tell the truth about what is going in the territory as they did not allow MINURSO to tell the truth about what was holding up the referendum, the problems with the referendum that were occurring".[288]

On a purely operational level, Mourad Erraghrib, Director of Cabinet of the President of the CNDH argued that a human rights component to MINURSO would not, in itself, improve the work of the institution he works for.[289] Formerly known as the Consultative Council on Human Rights, the CNDH is a national institution, which was reformed in 2011 in the aftermath of the Gdeim Izik events of November 2010. The reform inserted the CNDH into the Moroccan constitution in an attempt to strengthen its role in protecting and promoting human rights at the national level. According to its website, its main tasks include observing, monitoring and following up on the human rights situation at the national and regional level. The Council shall examine all cases of human rights violations, either on its own initiative or upon complaint by the parties concerned. It is also in charge of granting a legal status to human rights organisations throughout the country, which includes, according to its status and the Moroccan administrative division, the territory of Western Sahara. In this regard, it is comprised of 13 regional commissions (composed of 21 members) with two in Western Sahara: Laayoune-Sakia-El-Hamra and Dakhla-Oued Eddahab. The aim of establishing such a structure is to mitigate the "problems of lack of intermediaries" between the Moroccan authorities and the Sahrawi population (Fernandez-Molina 2015, 242).

Mourad Erraghrib contested the use of "Western Sahara" during the interview and favoured the terms of "Moroccan Sahara", "Southern Provinces" or the "Sahara". He further explained that the CNDH already has mechanisms present on the ground. In each of the two regional commissions, "the 21 members comprise activists of the local civil society, plus administrative teams that are from the region". According to him, the local staff members are all from the territory of Western Sahara and "all intertwined in the social and tribal structures of the region". Therefore, all the information is transmitted to the main office at the very

[288] Interview 17
[289] Interview 26

second when an incident occurs. Consequently, "it is not really in terms of monitoring that they [MINURSO] can be useful, because in terms of monitoring, the teams can know everything, see everything, have access to everything: in the prisons, in the police stations, in the places where things are happening. There is no place where we do not have access by law".[290] The law which entitles the CNDH to operate in the territory comes from the Parliament of Morocco, who, in 2018, adopted the latest piece of legislation related to this institution.[291] From a conflict resolution perspective, however, he affirmed that the CNDH does not deal with political considerations when carrying out its tasks and that "if there is a debate elsewhere, it is for other actors to be dealing with this discussion".[292]

Similarly, for Human Rights Watch's respondent, human rights and the political outcome of the conflict are two separate issues. He makes the point that the respect of human rights should be demanded regardless of one's position on the political status. However, as described in the very first sub-section of this chapter, the discussion around human rights monitoring in this conflict seems to intrinsically involve political considerations. In addition, if the human rights issue is separated from its political context, there is a risk of the conflict being forgotten "once the technical human rights questions are dealt with as part of a conflict management rather than conflict resolution strategy" (Capella 2011, 9).

In this regard, former SRSG Weisbrod-Weber recognises that the conflict surrounds "a human rights problem, insofar as the right to self-determination is a human right". However, despite having a bearing on the situation of the people in the territory, adding a human rights monitoring component "would not have a direct bearing on the solution of the conflict" according to him.[293] This right to self-determination seems to be the exception in the arguments disconnecting the monitoring of human rights from the resolution of the conflict. In this respect, Human Rights Watch's respondent recalls that "it is part of human rights that a people has the right to self-determination, have the right to determine freely the government that they are subjected to". Therefore, "granting the people of Western Sahara the freedom to vote for the representatives, and, at a higher

[290] Interview 26
[291] Dahir No. 1-18-17 of 22 February 2018 on the promulgation of Law No. 76-15 on the reorganisation of the National Council for Human Rights
[292] Interview 26
[293] Interview 10

level, to determine the type of state organisation they want to be under, is also part of their human rights".[294] In this regard, Former SRSG Francesco Bastagli believes that "what has failed is the overarching UN obligation towards a people of NSGT, it is not the MINURSO as such",[295] therefore reinforcing the idea that the main human right at stake in this case is the expression of the right to self-determination to which these territories are entitled under the UN Charter.

Former SRSG Julian Harston outlined that there is a more complex answer, "which is, if there was a proper human rights monitoring system in the camps, would that lead to a more democratic expression of the view of the Sahrawi who are in the camps and would it perhaps lead to a move towards a serious negotiation to get the people home on the one hand; and in Morocco, would a human rights monitoring process make those Sahrawi who are involved in demonstrations and so on in Laayoune and elsewhere, less militant or more militant?".[296] In response to this interrogation, it is relevant to quote the words of Hurst Hannum, who assisted Anna Theofilopoulou in her work with Personal Envoy James Baker and who was also interviewed as part of the research. He argued during the interview that attaching human rights to a conflict resolution process is not necessarily going to help accomplish the intended goal. He declared in the framework of this research that he is "not sure that there always is much connection between human rights components and the ultimate resolution of conflicts" (Interview 22, Zoom, 22 January 2021). Some respondents have even warned against the harmful impacts of extending the mandate to human rights monitoring in the case of Western Sahara.

Section 3.2 Detrimental effects on the conflict resolution process

As discussed in the previous chapter, the issue of human rights violations has emerged prominently in the past decade as a result of the political impasse. This emergence of the human rights issue as a consequence of a stalled negotiation process is not viewed favourably by Mourad Erraghrib of the CNDH. He declared that "it is because we have been in a kind of political impasse for a long time, that we have over-invested in the story of human rights, and we have

[294] Interview 15
[295] Interview 6
[296] Interview 8

done human rights a bit of a disservice. Because we have made it a kind of battle object, where there are true and false affirmations".[297]

In consonance with this standpoint, a former senior staff member from MINURSO, in his answers, alerted against the possibility of escalation of violence in the aftermath of a mandate extension to human rights monitoring. According to him, "there is a reasonable argument to make that, in the absence of the type of constraints that Morocco puts on the Sahrawi population, you could have unrest", and he is "not sure you could say unrest would lead to a better solution or a quicker solution, it might lead to a military solution".[298] This prospect can certainly explain why President Koehler's team "never made the issue of human rights a prominent point with the Moroccans". Not only did they "know it would be extremely difficult to press them", but most importantly, the objective was for them "to get Morocco to come to the table and to commit to a process".[299] This approach allowed President Koehler to be the only Personal Envoy to have met with representatives of the European Union and the African Union. In President Koehler's advisor's view, "making human rights and human rights reporting the issue would have antagonised the Moroccans and would not have helped as much in order to bring them to the table" or, it seems, to extent the Personal Envoy's margin of manoeuvre regarding negotiation practices. Besides, he added that this would have required the support from the international community, which they did not believe to have.[300]

This connection between the monitoring of human rights and the political solution is therefore perceived as being a threat to the conflict resolution process from the point of view of Morocco. As a matter of fact, according to Mourad Erraghrib from the CNDH, reducing the whole conflict to the issue of human rights "is serving neither the resolution of the conflict nor human rights themselves. It does neither of them any good. It is not serving the interests of human rights because it takes them into a political arena, it makes a political use of human rights. And this does not serve the victims, the real ones, when there are or when there will be some".[301] He adds that it does not help, above all, to resolve the conflict "because

[297] Interview 26
[298] Interview 7
[299] Interview 18
[300] Interview 18
[301] Interview 26

we spend our time talking about it. Instead of going to negotiate the problem, to settle the problem on the political basis of things, it will just over-determine the "human rights" dimension of the conflict - as if that were the important thing - but the 'human rights' question will remain". The fact that discussing the issue of human rights at the UNSC would shift the focus away from the main objective of resolving the conflict was also put forward by former advisor to Personal Envoy Baker, Anna Theofilopoulou. Indeed, she stated that the discussions around human rights were actually "distracting the Council" and that, meanwhile, "nothing would happen regarding the real resolution",[302] as she has also argued in the literature (Theofilopoulou 2017, 48).

In line with this idea, Torrejon-Rodriguez' argues that an extension of the mandate to human rights monitoring must fall within the need for an agreed formula for resolving the conflict. In other missions with an explicit human rights mandate, there is a formula for resolving the conflict, and the protection of human rights is posited as a means to a specific end. In the case of Western Sahara, this human rights monitoring would not fit into a plan to resolve the conflict, because there is currently no formula to reach such a solution (Torrejon-Rodriguez 2020, 56-58). Going further, the CNDH representative perceived a noxious intention in the demand to extent the mandate to human rights. According to him, "it is only to delay the resolution of the conflict, to internationalise the conflict, to make it more complicated and so on and so forth and it will go on forever and it will not solve anything at all".[303] Even though the idea of human rights monitoring being detrimental to the conflict resolution process primarily emanates from Morocco - supported by current or recent UN Senior Officials - some other stakeholders involved believe that the solution lies elsewhere and have ventured to suggest alternative ways to resolve the conflict, which include the possibility of discontinuing or reforming MINURSO.

Section 3.3 The possibility of reforming or withdrawing MINURSO

Adding to his assessment on the usefulness of a human rights monitoring mechanism, Mourad Erraghrib from the CNDH deemed the very presence of the

[302] Interview 11
[303] Interview 26

mission as not serviceable to the resolution of the conflict. He declared simply that "if we take it in its political and historical logic, I do not think that its resolution lies with MINURSO. Honestly, I'm telling you this from the point of view of a local actor. The solution is not to be found at the United Nations". For him, the solution must come from within. "The solutions depend on a dynamic, on an internal process in the [Sahara] region in which the main actors are able, without pressure, to bring solutions of life and co-existence: there must be no winner-take-all […] and people must be able to come back and reintegrate but with solutions that can accommodate everyone and with each individual having their face saved and their dignity".[304] In other words, a solution to the conflict should be found outside any holding of a referendum, labelled as a "winner-takes-all" approach (UNSG report S/2002/178 §30; Zunes & Mundy 2010, 170). It should also be found "within" the remit of a Moroccan sovereignty over the territory and in respect of its "territorial integrity", in line with its Autonomy Plan[305] submitted on 11 April 2007 to the UNSC and acknowledged by it in resolution 1754 of 30 April 2007.

On the other side of the spectrum of views, Kezia Mbabazi from the OHCHR believes that "Western Sahara is something for which we need more help, more NGOs, more people taking part, more people writing, more people doing something about it. It doesn't have to be the burden vested on the office".[306] Human rights defender Aminatou Haidar goes as far as recalling the responsibility vested in the African Union since the beginning of the conflict and its resolution process in 1991. In that respect, the African Union has already appointed a Special Personal Envoy for the Western Sahara conflict (former President of Mozambique) and she insists that all stakeholders should keep his role in mind.[307]

As far as the future of MINURSO is concerned, many respondents with various positions concurred in arguing that keeping the mission in place is a necessity. Former SRSG Weisbrod-Weber argues in that sense based on the idea that MINURSO is "a symbol of the commitment of the international community, for the

[304] Interview 26
[305] "Texte de l'initiative marocaine pour la négociation d'un statut d'autonomie de la region du Sahara", submitted on April 11th 2007, available from http://www.sahara.gov.ma/blog/messages-royaux/texte-de-linitiative-marocaine-pour-la-negociation-dun-statut-dautonomie-de-la-region-du-sahara/
[306] Interview 14
[307] Interview 2

solution of that problem".[308] In a similar vein, Katlyn Thomas, former Legal Representative of the Identification Commission, suggested that "as long as there is such a thing as MINURSO, the parties can find a way to have a referendum. If MINURSO is totally disbanded, I think it might be harder for the pieces that have been dumped to be put back together again".[309] Sidi Omar recalled that "MINURSO is the only permanent international community tool in Western Sahara" and as such, it can only be asked to stay.[310] Similarly, Ambassador Ross believes that "if the UNSC and the international community find it to be a useful mechanism for doing what can be done to ensure that the cease-fire does not collapse completely, therefore it is going to stay. It is not a very expensive PKO".[311] This budgetary aspect was also highlighted by former SRSG Julian Harston who reckoned that "it will be left there because it is actually quite cheap and because to get rid of it is the wrong signal". He added that, "the minimum you can ask of a peacekeeping mission, the minimum way you can judge it is that if people behave better if we are there than if we are not, and this is particularly true in Morocco".[312] For the last Personal Envoy's advisor, shutting down the mission would create great insecurity whereas "keeping things stable and quiet on the border – or on the demarcation line, on the sand wall – is something important for the political process".[313]

On the other hand, President Koehler's advisor highlights the fact that "one can of course argue that MINURSO is helping to freeze the situation". Worse still, some believe that its presence is unnecessary. Mourad Erraghrib points out that "we have a perfect anachronism with this situation. Because you have a dynamic that goes in one direction, and you have a mission whose title even refers to another paradigm. And so MINURSO finds itself de facto in a kind of crisis of vocation, of identity, of uselessness even, because obviously there is nothing that goes in the direction of a referendum".[314] With that in mind, the idea that "maybe closing down MINURSO would help generate a new dynamic" as suggested by the same former Senior UN Official has been making its way amongst

[308] Interview 10
[309] Interview 17
[310] Interview 25
[311] Interview 28 – conducted before the end of the cease-fire declared by POLISARIO on 13 November 2020
[312] Interview 8
[313] Interview 18 – conducted two months after the end of the cease-fire declared by POLISARIO on 13 November 2020
[314] Interview 26

stakeholders.[315] It has also been suggested by Marlene Spoerri that "the threat of getting rid of MINURSO would put a lot of pressure on Morocco because they do not have an interest in seeing this conflict break out to violence". As an alternative, she advised that the UN "could turn MINURSO into something that is a very political operation that is really designed to support the political process, that has a strong human rights monitoring component that really picks up some of the political attributes".[316] More radically, former SRSG Francesco Bastagli suggested that MINURSO be closed and that the matter be taken into the hands of the UNSG, particularly with regards to implementing a human rights monitoring function in the territory. He argued that "it's now been 15 years or more that the question of changing the mandate of the mission has been raised and actually the dynamic is now going in the other direction and in a very dangerous way as far as human rights are concerned".[317]

There is certainly a consensus among the interviewees that the framework and tasks of the mission should be amended to better fit the requirements of the political as well as operational situation on the ground. As such, Oxfam's respondent stated that "there needs to be a rethink of the purpose of the mission because, for now, the original mandate is pretty out of touch with what they are able to do on the ground".[318] Going beyond, Philip Luther from Amnesty International suggests that "the question is then whether the international community, in some way, engage seriously with some sort of alternative plan, and whether that plan has a serious human rights component to it, in the sense of actually respecting the right to self-determination but also the right to expression, association and assembly".[319]

Regardless of the desired longer term political outcome to the conflict, the incorporation of a human rights monitoring component into the mission's mandate seems to be of relevance in the shorter term. The former Senior Official from MINURSO who was interviewed in August 2019, predicted the resumption of violence which erupted towards the end of 2020. He stated that "there has to be a solution, it has to be a negotiated solution and it has to come sooner or later".

[315] Interview 18
[316] Interview 3
[317] Interview 6
[318] Interview 23
[319] Interview 24

At the time of the interview, he believed that the mission "has to come to an end […] but it may mean going through a very rough patch before we get there. In other words, we may not be able to maintain stability on the territory, which would put more and more pressure on finding a solution".[320]

Conclusion

At this stage, the role of human rights monitoring and protection would have an entirely different purpose than if this mechanism had been included in MINURSO in the first place. As for the arguments raised during the interviews, it seems that the question of human rights in relation to the Western Sahara conflict was connected to one's position on the conflict, so that supporters of Western Sahara's self-determination denounce human rights violations committed by the Moroccan authorities, while supporters of Morocco either do not raise the issue, or denounce violations in the refugee camps in Tindouf, as the literature review already suggested (Aguirre, 1991: 327, 335-336; Torrejon-Rodrigeuz 2020, 50). Based on the data collected, human rights seem to have become more of a negotiation tool for the parties to the conflict (resolution process) than a universal concern. First of all, this is a means to build or spoil confidence between the parties, and a way to keep the parties at the negotiation table or alienate them. In addition, it has become an element of discussion turned towards the future of the conflict, regardless of the outcome on the status of the territory (whether it would be independent, under Moroccan sovereignty or any other agreed solution). When forward-looking into the role of human rights, their protection will become crucial, especially when looking beyond the resolution of the conflict (peace) and toward a reconciliation process (justice). Indeed, measures such as independent investigations could contribute not only to repairing the damage, but also to improving confidence, and even to initiating a process of reconciliation, which is necessary to ensure peace in the area (Torrejon Rodriguez 2020, 55). The monitoring of human rights as such is happening through alternative routes: NGOs and the OHCHR are collecting information from both sides and the CNDH is also reporting back to Rabat. Kezia Mbabazi from the OHCHR insists that "the office is doing its best to see that these [reporting] gaps no longer exist and, of course, […] there are hindrances in the background, and everything is political at

[320] Interview 7

the end of the day and even though we have no political side, we come in independently, but you notice that access can't be freely given, especially because of the sensitivity, that issues keep going on".[321]

The interviews not only provided some insight as to how the absence of HRMC has become a subject of contention between the parties, but they also divulged the perceived impact mechanisms in the assessment of the conflict resolution process. The need for a coordinated effort from within the UN system is patent. A strong position from the UNSG – via the SRSG - or the Personal Envoy should be compensating for the inaction of the UNSC. In that respect, an argument from the former UK representative to the UN summarises the majority of viewpoints gathered during this research. He believes that "the impact depends not only of course on the peacekeeping unit doing its job in researching and naming human rights abuses, but in getting support from the UNSC and from members widely at the UN and from the countries who have a stake in the resolution or otherwise of the conflict, to make sure that those who are alleged to have committed offenses have to be accountable for them. That needs action by governments, that needs pushing from the UNSG, from countries on the Human Rights Committee, from the OHCHR in Geneva, all of that is part of a system that needs to bare down on those who ignore the norms of the UN and those who are set out to try to implement them. So, it is an important part of it [the conflict resolution process] and the results have been disappointing over the years".[322] This contrasts highly with the position of Morocco and its primary ally at the UNSC, France. For the French representative: "the issue of human rights must be addressed bilaterally with Morocco as well as in Geneva", but with very little external involvement (Interview 4, New York City, 11 July 2019).

The lack of progress and lack of engagement around the peace process by the international community (highlighted by representatives of Human Rights Watch and Oxfam) leads to patterns of human rights violations. The fact that MINURSO does not have a human rights monitoring component exacerbates this situation in the sense that it could, at the very least, be a mitigating instrument to alleviate the intensity of human rights violations. In its absence then, those violations seem

[321] Interview 14
[322] Interview 21

to be left unchecked. In light of the findings from the interviews, the argument can be made that, in the absence (or in this case, deliberate omission) of a human rights monitoring component, a PKO is perceived to be less likely to succeed. If the UNSG and UNGA are unable or unwilling to force the creation of such a component upon the UNSC, alternatives must be sought elsewhere. In the next chapter, the idea that this component cannot be neglected because it is required by customary international law will be evaluated.

Part III Normative/doctrinal legal analysis

Chapter 7: A re-interpretation of human rights norms in UN PKOs: is there a norm of customary international law?

Chapter four revealed that human rights protection in the context of peacekeeping operations has been taken into account more routinely when issuing policies and guidelines by the various organs of the United Nations. This practice seems to have originated around the time when the Brahimi Report on the "comprehensive review of the whole question of peacekeeping operations in all their aspects" was issued in 2000.[323] However, chapters five and six revealed an inconsistency between the importance given to human rights protection in PKOs at policy formulation level and its effective implementation at the diplomatic and operational level by the UN in the case of Western Sahara. This inconsistency has been explained in the answers provided by the interviewees in two ways: the politicization of the issue of human rights in UN peacekeeping due to the way the UNSC operates; and the subsequent lack of pressure and political will at the UNSC level to implement recommendations from the UNSG, including those related to human rights.

The negotiations have effectively been stalled since the aftermath of Baker Plan II and the majority of respondents have put forward the idea that the absence of pressure exerted at the UNSC level has caused the current impasse in Western Sahara, which according to some could be resolved through adding a human rights monitoring component (HRMC) to MINURSO's mandate.[324] They believe that, by allowing a peacekeeping mission to report on anything but human rights violations, the UNSC has automatically placed the human rights question at the centre of a political negotiation process where it should not be laid. This situation, therefore, generates the creation of a political leverage based on a fundamental principle of the organisation, that of human rights promotion and protection. Consequently, the legal dimension is important in the context of this conflict resolution process in order to investigate whether systematic inclusion of HRMC

[323] Ibid., note 1.
[324] See responses in the previous chapter from interviews 3, 25, 5, 14, 15, 18, 8 and 24.

into PKO mandates has become a legal obligation, binding the UN as an organisation or its member States individually in any shape or form. Answering this question could put an end to the political debate between the parties and possibly move the process forward.

This chapter contends that customary international law offers a tangible basis for this analysis. As a prime source for the emergence of unwritten norms of international law, this chapter will discuss whether the systematic inclusion of HRMC into PKO mandates has attained that status of custom. Article 38(1)(b) of the International Court of Justice (ICJ) Statute defines customary international law as "a general practice accepted by law".[325] The evaluation of the existence or emergence of a norm of customary international law has been clarified over time through the ICJ jurisprudence and is based on two cumulative conditions: consistent and widespread practice (objective element) as well as the belief that the acts must occur out of sense of legal obligation or *opinio juris* (subjective element). The "*North Sea Continental Shelf*" cases of 1969 confirmed the necessity for widespread and representative participation, uniform practice, and general recognition of the rule of law. The Court also held that the passage of a considerable period of time was unnecessary for the formation of a norm of customary international law.[326] More recently in 2018, the International Law Commission (ILC) – a UN organ created on the basis of article 13(1)(a) of the UN Charter for the purposes of "encouraging the progressive development of international law and its codification" – issued its Draft Conclusions on Identification of Customary International Law.[327] The Conclusions concern the way in which the existence and content of rules of customary international law are to be determined. Traditionally, the two constitutive elements have been understood to only apply to States. The question of whether international organisations directly contribute to the emergence and development of norms in the international legal system remains unsettled (Daugirdas 2020, 201). Nevertheless, the Draft Conclusions attempted to provide some clarity on the creation of norms by international organisations and will form the basis for the

[325] United Nations, *Statute of the International Court of Justice*, (18 April 1946), available from: https://www.refworld.org/docid/3deb4b9c0.html
[326] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* I.C.J. Reports 1969, p.3, §74
[327] U.N. Doc. A/RES/73/203 (2018); see also ILC, "Draft conclusions on identification of customary international law and commentaries thereto", Report of the International Law Commission, Seventieth Session (30 April-1 June and 2 July-10 August 2018), U.N. Doc. A/73/10 (2018), pp. 119-156.

analysis in this chapter. The pitfalls and weaknesses of the examination through the Draft Conclusions in light of international organisations' practice will be highlighted. In a second phase, it will be relevant to provide some additional examination in order to lift the caveats generated by the main analysis. Indeed, if the requirements for custom are not met in this particular case, there may still be principles, contemplated under section 38(1)(c) of the ICJ Statute, that impose an obligation on the UN and/or its member States to take steps in this direction.

The idea that the most powerful obligations toward human rights monitoring in peacekeeping are constitutive of customary international law (or derive from other sources of international law) has not been explored in any great depth in scholarship. There have been a few singular cases following the Brahimi Report for a universal practice to take hold. Therefore, the aim of this chapter is to investigate whether the UN, as an organisation, has obligations to include HRMC into PKO mandates, wherever these obligations come from. If the UN has customary obligations, these must be based on practice and *opinio juris*. This examination will be mainly based on the analysis of the practice identified in chapter four of institutionalising human rights protection in PKOs and whether it created a rule or legal expectation with which the organisation believes it needs to comply.

This chapter will therefore look into what actually can bind an international organisation, and in particular given the past practice of that organisation, whether that is somehow creating a new rule. For this purpose, it will firstly rule out any written source of law to ascertain the existence of a binding obligation falling upon the UN to incorporate HRMC into PKO mandates (section 1). I will then, set out the methodology in order to understand how the purpose, status and substance of the ILC Draft Conclusions will be used (section 2). It will thirdly review the criteria set by the ILC in its conclusions 2 through 14, taking into account the commentaries accompanying them, the Special Rapporteur's report, as well as the comments provided by some States in order to assess the potential existence of a rule of customary law (section 3). Finally, if custom through the practice of the UN as an organisation that is understood to be binding it in law is not clearly identified, the chapter will look at alternative legal frameworks within which the identified practice can fit and the subsequent liability (section 4).

Section 1: Incorporating HRMC in PKO mandates as a norm of hard law: the unavailability/absence of written/binding legal instruments

Article 38 of the ICJ statute lists – but does not hierarchises - the various sources of international law. Written sources of international law, namely, conventions signed and ratified by State parties and certain international organisations enjoying legal personality as well as judicial decisions and writings of "the most highly qualified publicists", will be considered in this section to assess the obligation to equip PKOs with a human rights component. They form the basis of "hard law", and – alongside custom - engage the international responsibility of States.

The relevant provisions of international law regarding the general protection of human rights are abundant and have already been listed in Table 1 (Chapter four of this thesis). In its Santiago de Compostela session of 1989, the Institute of International Law – the oldest academic and multilateral body dedicated to contributing to the development of international law - adopted a resolution on "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States".[328] The very first article states that "this international obligation [the protection of human rights], as expressed by the ICJ, is *erga omnes*; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights". The resolution includes comprehensively all human rights recognised in the 1948 UDHR without any distinction. Although this concept has not received universal approval (Weil 1983), it can be regarded as settled law today, including when it comes to classic self-determination in the context of non-self-governing territories. Prior to the Institute's resolution, it had been endorsed by the International Law Commission in its 28th session of 1976 (in the process of codification of the rules of State Responsibility).[329]

[328] Institut de Droit International, Session of Santiago de Compostela, *The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States*", available from https://www.idi-iil.org/app/uploads/2017/06/1989_comp_03_en.pdf

[329] International Law Commission, Fifth Report on State Responsibility, 1976, available from https://legal.un.org/ilc/documentation/english/a_cn4_290.pdf

It is, however, pertinent to further analyse the most prominent human right at stake in the case of Western Sahara and which MINURSO is failing to ensure: the right to self-determination. Within the UN Charter, the right is provided for at Articles 1§2 and 73 (a dedicated chapter in the Charter styled as the Declaration Regarding Non-Self-Governing Territories). Common articles 1 of the ICCPR and ICESCR, as well as the 1948 UDHR all mention this right (within the framework of general human rights law). Both Covenants were drawn up and adopted at the same time and codify in treaty form the universal human rights enshrined in the UDHR. They intend to safeguard and assure non-self-governing peoples are able to make an elective choice of international status.

The right to self-determination, present in the Charter and other documents, has been elevated to a peremptory norm of international law in the jurisprudence via, notably, the ICJ 2004 "*Palestinian Wall"* advisory opinion[330], and more recently by the African Court on Human and Peoples' Rights "*Mornah"* Case of 2022.[331] In 2004, the court specifically held that this principle "has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625(XXV)" and that "article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter."[332] The ICJ also considered this right to be of an *erga omnes* nature by the mid-1960s, as stated in the ICJ 2019 "*Chagos Islands"* advisory opinion.[333] As the Court indicated in 1964, obligations of such a character are by their very nature 'the concern of all States' and, 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection'.[334] More relevantly to the case of Western Sahara, in the "*Palestinian Wall"* advisory opinion of 2004, the ICJ would observe that Israel violated a number of obligations, some of an *erga omnes* nature. These include the obligation to

[330] Ibid., note 27
[331] Ibid., note 28.
[332] Ibid., note 27, §88
[333] Ibid., note 16
[334] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1964, Judgement, ICJ, (24 July 1964), available from https://www.icj-cij.org/public/files/case-related/50/050-19640724-JUD-01-00-EN.pdf

respect the right of the Palestinian people to self-determination (§88), and certain of its obligations under international humanitarian law (§89).

Not only, is there a negative obligation not to hinder self-determination clearly affirmed by the court in 2004 and 2019, but the African Court noted in its 2022 decision that the right to self-determination imposes both positive and negative obligations on State parties. It adds that "positive obligations comprise the duty to protect, promote, and fulfil conditions for the realization of the right" (§297). In the case of MINURSO, this would arguably entail the insurance that freedoms of expression, association and opinion are protected in the context of the organisation of a referendum.

Despite the undisputable legal interest in invoking the principle against other States, the exact implications for other subject of international law are not entirely clear. It cannot – and will not – be asserted that this obligation to ensure an act of self-determination is universally binding, particularly to international organisations such as the UN. Additionally, notwithstanding the strength of the substantive obligation of States (and potentially of international organisations) to assure self-determination, and of the pre-eminent binding nature of norms of self-determination, no direct compulsion for the UNSC to confer a mandate for human rights monitoring on PKOs directly results either from the treaty provisions or court decisions. Firstly, the UN Charter and other relevant treaty provisions and court decisions and opinions prioritise the protection of human rights in relations between States, including within the framework of the UN where the deployment of a peacekeeping mission is mandated. States do not carry out PKOs *per se*. PKOs are mandated or defined for State participants to fulfil or meet certain operational expectations as per the UN Charter. The obligation to protect human rights as part of the deployment of a PKO is more of a question of UN direction and responsibility.

Secondly, it cannot be asserted that all treaty (or UNGA resolutions), without exception, ought to be included in the assessment of a norm as a basis to ground the duty to monitor and report about human rights. Monitoring and reporting of human rights violations are quite specific activities that cannot arguably be derived from general declarations of human rights. All of them, whether the UN

Charter, the 1948 UDHR, the 1960 self-determination resolutions through the ICESCR and the ICCPR are too general in nature to be read as applying to monitoring and report of human rights in a PKO. A treaty provision cannot be taken as precisely locating something rather specific. Similarly, the international legal regime regarding human rights protection is rather specific, even self-contained. Practice on reservations regarding human rights treaties as illustrated in chapter four of this thesis or that of dissenting judgments in certain judicial decisions, suggests that departure from the principle of universality is a tribute to the specificity of human rights protection – let alone the specificity of HRMC in a self-determination conflict where the UNSC has an obligation to create measures which preserve the ability of a non-self-governing people to realise such a right.

Therefore, this chapter will assess the existence of a norm specifically binding the UNSC in equipping the PKOs it deploys with a HRMC (as opposed to a general obligation binding States members or States parties in protecting human rights within the framework of a PKO). The following sections aim at presenting the customary international law argument as subsidiary, as an alternative to an apparent missing primarily obligated duty of monitoring and reporting on human rights in the context of a PKO not explicitly stated – and therefore non-binding – amongst the main sources of international law.

Section 2 Analysing the 2018 ILC Draft Conclusions: methodology

The rationale behind the use of the 2018 ILC Draft Conclusions in this chapter is twofold. Firstly, in drafting the Conclusions, the Commission sought to provide workable and authoritative guidance on how to identify rules of customary international law. The comments and observations received from governments following the publication of the 2018 Draft Conclusions are indicative of the outlook on the codification of customary international law in general, and the contribution from international organisation to it specifically by member States. While the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) “agree with the overall scope of the draft conclusions”, the USA made substantial reservations and expressed concerns over conclusions and commentaries that they “believe go beyond the current state of international law such that the result

is best understood as proposals for progressive development".[335] Generally, governments that commented on the matter welcomed the Conclusions and commentaries as "important texts that would greatly facilitate the work of practitioners and academics".[336] They mostly considered that the Conclusions simply but accurately reflect the existing state of international law on the formation and evidence of rules of customary international law. Secondly, article 1(1) of the ILC statute establishes that the Commission "shall have for its object the promotion of the progressive development of international law".[337] Consequently, even though the Conclusions – accompanied by the commentaries - describe the current state of international law, they shall leave room for an open interpretation of the criteria set by the Commission when examining the potential existence of a norm of customary international law. This section looks into the forward-thinking approach of the Draft Conclusions in allowing international organisation to contribute directly to the emergence of custom despite an unsettled debate (section 1.1). It then turns to the substance of the text in order to explain the relevant rules to be used in the context of the main analysis of this chapter (section 2.2).

Section 2.1 The status of the Draft Conclusions

As the ILC Draft Conclusions were only completed in 2018, their utilisation is still scarce, and it can arguably be too early to consider them a settled and well-grounded source of interpretative method for customary international law. Yet, the Conclusions are clarifying in nature, expressing existing law and therefore guiding norms to be actioned. This is not a formal document, but it carries weight, both in so far as it codifies points that are well established and in that it offers answers to certain unsettled issues by way of a progressive development of the law. The UK Supreme Court has even cited the Draft Conclusions on two occasions in 2017[338], illustrating the normative weight they might gain in the future. Consequently, the main analysis in section 2 will rely on the ILC Draft

[335] International Law Commission, *Identification of customary international law, Comment and observations received from Governments*. UN Doc. A/CN.4/716 (2018), p.8/59, available from https://undocs.org/A/CN.4/716
[336] International Law Commission, *Fifth report on identification of customary international law by Michael Wood, Special Rapporteur*, UN document A/CN.4/717, (14 March 2018), §8
[337] Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981
[338] Mohammed and others v Ministry of Defence, [2017] UKSC 2 (17 January 2017), para. 151; Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah [2017] UKSC 62 (18 October 2017), paras. 31–32.

Conclusions as guidance but will not necessarily be applied with the same weight as a binding instrument would be applied.

Because international organisations are understood to be bound by international customary international law (Blokker 2017, 2; Daugirdas 2016, 325-327; Reinisch 2017, 6), they arguably contribute, at least indirectly, to its emergence and development. In this regard, when it comes to assessing evidence of customary international law, the Draft Conclusions put States and international organisations at the same level. Indeed, commentary 8 of conclusion 4 seems to imply that there are two levels of evidence of the existence and content of customary international law: primary (State and international organisations at the same level) in distinction to secondary (NGOs, private individuals, transnational corporations and non-State armed groups), which are the subject of conclusion 4.3.[339] Arguably, recognising that international organisations have a role in creating customary international law may make them more willing to comply with those rules.

International law is traditionally made by States. As international organisations have come into existence, they have been contributing to its development in two main ways. Firstly, they act as fora for States. In the ICJ "*Nicaragua"* case of 1986, the ICJ considered the binding nature of the prohibition against the use of force and the principle of non-intervention. In order to establish the existence of an *opinio juris* among States, the Court looked at UNGA resolutions where States are voting unanimously in favour of such a norm. It concluded that it clearly reflected *opinio juris* of the States, but within the framework of an international organisation.[340] Therefore, while international organisations act as venues, member States themselves, by expressing their *opinio juris*, can actually create State custom, which can next apply to bind the UN. The other way in which international organisations can create custom is by creating it directly through the practice and *opinio juris* of the organisation itself. In this case, UNGA and UNSC resolutions will still be the base for examination, not from the point of view of the State, but rather from the point of view of the collective entity. This idea is based on the findings of the 1949 "*Reparations*" case. In a landmark opinion from 1949,

[339] "Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2."
[340] ICJ, *Nicaragua v. United States,* Judgment, 27 June 1986, ICJ Reports (1986) 14, p.99–100

indeed, the ICJ unanimously declared that the UN, as an organisation, had "objective legal personality"[341] and therefore has rights and obligations under international law, based on a separate and distinct personality. The UN, as an organisation, is by definition legally unique and distinct from its member States and their practice. As a consequence, the organisation may have its own practice, independently from that of its members. In this regard, there is some indication of practice of applicability of custom to international organisations, such as international humanitarian law, for which they may contribute to its development, which is relevant in the context of armed conflicts and peacekeeping.[342]

Both of these perspectives are relevant for the purpose of analysing whether a norm of customary international law exists for the systematic inclusion of HRMC into PKO mandates. Each of them creates credible grounds for analysing the possibility for international organisations to directly contribute to the emergence of international custom. However, in attempting to define this norm for the first time through an international organisation-based approach, a fresh perspective can be found in the context of the conflict in Western Sahara, whose dynamics have recently acquired a significant aspect for human rights protection and monitoring as discussed in previous chapters. The framework of the ILC Draft Conclusions enables such an analysis. As the Australian delegation observed in their comments on the Draft, allowing for some flexibility in setting out the methodology for identification of customary international law "was essential to ensure that the dynamism which characterised the formation and development of rules of custom was reflected in the Commission's guidance on the topic".[343] In addition, according to the ILC Special Rapporteur, the Commission should aim to describe this current state of international law, "without prejudice to developments that might occur in the future" and that the conclusions "ought not to be too rigid" (respectively §21 and §20 of the Special Rapporteur's report).[344]

[341] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, p.185.
[342] Observance by United Nations forces of international humanitarian law, United Nations, Secretary-General's Bulletin, 6 August 1999, UN Doc. ST/SGB/1999/13
[343] UN General Assembly official records A/C.6/71/SR.21, (16 November 2016), §12 (noting that the draft conclusions "provided a flexible and practical methodology for the identification of such rules [of customary international law] and their content"), available from https://undocs.org/A/C.6/71/SR.21
[344] Ibid., note 339

Nevertheless, this approach comes with a methodological caveat. The fact that "there could be greater precision with respect to the relevance of practice of international organisations" according to the Special Rapporteur (§21) emphasises the idea that further development is to be expected. Having established the authoritative nature of the Draft Conclusions is essential to assign meaning to them, their scope, content and relevance, and justify the possible emergence or existence of a norm and other legal consequences for the UN, firstly as an organisation and secondly as a forum for States. It is now relevant to highlight the relevant rules of the document itself before engaging in the substantive analysis.

Section 2.2 The substance of the Draft Conclusions

An apparent obligation to include a HRMC to PKO mandates would alleviate the debate on whether they are required in the context of the conflict resolution process as well as eliminate a cause for political disagreement in the case of Western Sahara. Such a would-be norm presents other interrogations about the connection between the UN and IHRL. It may establish, for instance, that the UN (beyond commentators) considers itself bound by IHRL. Going further, is the UN – or international organisations in general - bound by the same IHRL standards as States, by virtue of these being custom and the UN being in a position to comply with them? Or does the UN have its own distinct IHRL obligations? Thereupon, gauging the potential existence of a norm of customary international law must be done with careful consideration as wider legal consequences can flow from it. As mentioned in the introduction, this chapter examines whether there is a specific customary rule to include a HRMC in all UN PKOs mandate when adopted by the UNSC, the organisation's PKO mandating authority. Consequently, it will seek to supply practice and *opinio juris*, if any, to this specific effect. Alternatively, it may denote that the practice of establishing such mechanisms in the majority of PKOs has somehow concretised into a legal obligation over time without having reached the level of custom, which might become law in the future based on article 38(1) sources. In this case, the trend in incorporating human rights standards in UN policies and guidelines will serve as an explanation as to how that hardening has happened.

The relevance of examining the practice and *opinio juris* of the UN with regards to peacekeeping comes from the Conclusions themselves. The ILC distinguishes between two situations: where member States confer exclusive competences to the international organisation (this is for instance the case of the EU), and where they do not transfer exclusive competences. Indeed, based on the ILC Draft Conclusions, analysing the existence of a norm of customary international law entails an existing practice, by an international organisation, which may arise "where member States have not transferred exclusive competences, but have conferred competencies upon the international organisation that are functionally equivalent to powers exercised by States." (commentary 6 of conclusion 4). One of the examples expressively cited by the Commission is the deployment of military forces such as peacekeeping, which falls into the latter category.[345] Therefore, peacekeeping can be considered to contribute to the formation or expression of rules of customary international law in the particular area of the maintenance of international peace and security.

The 16 conclusions are divided into seven parts. Following a brief introduction (Part 1), the basic approach is set out (Part 2) with the main conditions: general practice (Part 3), accepted as law (Part 4). Part 5 lingers over the significance of certain materials for the identification of customary international law, while Part 6 recalls the persistent objector exception. Finally, Part 7 mentions the case of particular customary international law applicable only among a limited number of States. None of the part or conclusions are solely dedicated to the practice and *opinio juris* of an international organisation. However, conclusion 4.2 makes a direct reference to the practice of international organisation, and commentary 7 of conclusion 6 specifies that the relevant forms of practice listed apply "mutatis mutandis to the forms of practice of international organisations".[346] Similarly, the list provided in conclusion 10.2 specifying which act adopted by States are relevant to evaluate evidence of acceptance as law (*opinio juris*), also applies mutatis mutandis to the form of evidence of acceptance as law of international organisations (commentary 7).

[345] "Practice within the scope of paragraph 2 may also arise where member States have not transferred exclusive competences but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States. Thus, the practice of international organizations when concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territories, or in taking positions on the scope of the privileges and immunities of the organization and its officials, may contribute to the formation, or expression, of rules of customary international law in those areas"
[346] Ibid., note 330, p134.

The commentaries accompanying the Draft Conclusions are to be read in conjunction with the conclusions themselves as recalled by the Special Rapporteur in paragraph 19 of his report.[347] Therefore, any doubt about the same applicability of the rules to both States and international organisations despite the absence of dedicated Conclusions for international organisations, and that of relatively recent scholarship and jurisprudence on the matter is eliminated. This forward-thinking approach adopted in the Draft by the ILC will therefore be replicated in the substantive analysis for the purpose of this research. Even though the overall ILC Draft Conclusions are not a binding document, it is sufficiently authoritative to ensure a reliable examination of the current state of the law regarding human rights protection and peacekeeping within the UN. Nevertheless, it is to note that reserves have been made by some delegations over the lack of absolute clarity and regarding the need for a "rigorous and systematic approach" to be applied when interpreting potential evidence (§17 of the Special Rapporteur's report). Regardless of the findings, the method used will be verifiable as it will follow the ILC's approach based on its objectives and endorsed by a large majority of States.

Section 3 Applying the 2018 ILC Draft Conclusions: substantive analysis

The Brahimi panel argued that "UN peacekeepers who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic UN principles."[348] This second section analysis is based on the very assumption established in the Brahimi Report ("should be presumed"). It intends to examine whether the existing material suggests that there is a norm of customary international law binding the UN, based on the Draft Conclusions' approach and methodology. The two constituent elements are introduced in conclusion 2: "to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice (section 2.1), that is accepted as law (section 2.2)". The 2019 "*Chagos Islands"* opinion reveals how quickly both conditions can result, in the

[347] Ibid., note 339.
[348] Ibid., note 1, p10.

case of self-determination, so rapidly after UNGA Resolution 1514 (XV) of 14 December 1960 was issued. The Court noted that "the adoption of resolution 1514 (XV) represents a defining moment in the consolidation of State practice on decolonization" (§150) and that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a NSGT as a corollary of the right to self-determination" (§160).[349] The identification of only one of these elements, however, does not suffice in order to establish a rule of customary international law. Both are evidentiary and require a showing of conduct and of adoptive behaviours by States and/or international organisations, which will be the guiding thread of our analysis.

Section 3.1 The objective element

In the conditions set by the Commission, the practice of international organisations, when accompanied by *opinio juris*, "may count as practice that gives rise or attests to rules of customary international law". Those rules are of a twofold nature: rules whose subject matter falls within the mandate of the organisations and/or rules that are addressed specifically to them (commentary 5 of conclusion 4).[350] Article 24 of the UN Charter provides that the Council "shall act in accordance with the Purposes and Principles of the United Nations". These purposes are laid out in the very first article of the Charter and therefore establish an explicit framework, indicating unequivocally that "to achieve international co-operation in […] promoting and encouraging respect for human rights and for fundamental freedoms for all" is one of them. In this context, a practice that is general will here be assessed through the issuance of PKO mandates by the UNSC. It is indeed the one mandating organ of the UN responsible for the maintenance or restoration of international peace and security under article 42 of the Charter, on behalf of the organisation. The aim of this section is to determine if the practice regarding human rights monitoring in PKOs by the UN is significant enough to constitute a norm of customary international law based on the criteria set out by the ILC.

[349] Ibid., note 27
[350] Ibid., note 330, p.131

Conclusions 4 and 6 set out, respectively, the requirement and forms of practice applicable to the identification of a norm of customary international law. Its conclusion 4.2 reads: "in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law." The commentaries accompanying conclusion 4.2 provide some insight into which practice is to be taken into account. Firstly, and as mentioned above, the subject of the rules that they may establish must fall within the mandate of the organisation and/or must be addressed specifically to them. In this regard, commentary 6 of conclusion 4 is of particular relevance as it expressly refers to peacekeeping as a pertinent competence conferred, however not explicitly, upon international organisations, which falls within the scope of conclusion 4.2. Despite the absence of an explicit legal basis for peacekeeping in the UN Charter, “deploying military forces” is considered by the Commission to be a competence “functionally equivalent to powers exercised by States” and therefore, well qualified as a base for analysis for the emergence of a norm of customary international law. Secondly, paragraph 1 of conclusion 4 refers to a practice that is general. Generality of practice goes to number of actors and consistency. UNGA and UNSC resolutions intend to implement and enforce the decisions taken by a collective entity of States. Through their resolutions and subsequent practice, they contribute to changing the law internationally. The ILC, through the adoption of the Draft Conclusions in 2018 confirmed this capacity under certain conditions and accounted for the expansion of the criteria related to State practice onto inter-States organisational practice.

Nevertheless, UNGA and UNSC voting mechanisms may be seen as fora for States to express their own *opinio juris* (for which see the “*Nicaragua”* case mentioned previously). Therefore, resolutions adopted in these frameworks may be considered to be a reflection of the relevant practice by States rather than the UN as an organisation. Additionally, the ILC, in its commentary on the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, referred to UNSC resolutions as evidence of customary international law in its article 11 (comment 5); article 20 (comment 5); article 30 (comment 4); article 31 (comment 10); article 41 (comments 7, 8, and 12); and article 50 (comment 5).[351] It is worth

[351] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html

noting that this is evidence of State practice and *opinio juris*, rather than that of the UN as a distinct entity, but it goes to show that they are confirmed to be well-grounded sources for interpretation. In spite of that, UNGA resolutions, for instance, are adopted by consensus and therefore reflect a more widespread practice and *opinio juris*. As the "*Chagos Islands*" opinion recalls, the adoption of one single resolution by the UNGA (resolution 1514 (XV) in that case) can represent a defining moment in the consolidation of State practice.

As far as the practice of the UNSC as an organ of a collective entity is concerned, in its 1970 advisory opinion on Namibia[352], the ICJ referred to "the practice of the UNSC to support its interpretation of the UN Charter, *in spite of the abstention of some of the Council's permanent members*" (emphasis added), (Ammann 2020, 206-207).[353] This statement supports the idea that the UNSC may be acting on behalf of the organisation as a whole, as a distinct entity endowed with a legal personality, despite some Member States abstaining from voting. Finally, we should note the ILC confirmed that only practice 'publicly available or at least known' can contribute to customary international law.[354] Consequently, ad'hoc declarations and meetings that are usually common amongst UNSC members in the leading up to a vote on resolutions cannot be considered for examination.

As far as considering the representativeness of the organisation in weighting the practice is concerned, commentary 7 of conclusion 4 provides some relevant insight. It establishes, as a general rule, that "the more directly a practice of an international organisation is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression of rules of customary international law". Therefore, the nature of the organ whose conduct is under consideration is pertinent and, in this regard, all three main organs can arguably be a source for analysis. Firstly, article 24(1) of the UN Charter designates the UNSC as acting on behalf of all member States on issues of maintenance of

[352] ICJ, *Legal Consequences for States of the Continuous Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 21 June 1971, 16, at 22, para 22.
[353] See also Boon and Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law', 67 American University Law Review (2018) 649 (arguing that the United Nations Security Council (UNSC) resolutions likewise ought to be considered evidence of customary international law that is attributable to all United Nations (UN) member States, not only those States that participate in UNSC decision-making).
[354] Ibid., note 330, p.91.

peace and security. Secondly, the UNGA is the first organ described in the UN Charter and provides a forum to all member States in order to "discuss any questions or any matters within the scope of the […] Charter" according to article 10. Finally, the UNSG acts as the "chief administrative officer of the Organization" (article 97) and "may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security" (article 99). Therefore, they all can be considered to be involved in peacekeeping related activities, with the UNSC, however, responsible for issuing the deploying mandate and the primary focus of our examination.

In this regard, the recent research work by Fox, Boon and Jenkins in 2018 offers insight into the UNSC practice related to human rights obligations in PKO deployment. Although the focus of their research was not to establish whether this practice can serve as evidence of customary international law, their analysis contributes to understanding how "Council-imposed obligations may affect customary law" (Fox et al 2018, 657). Firstly, and relevantly for the analysis in this sub-section, they argued that the UNSC resolutions ought to be considered evidence of customary international law attributable to all UN member States, not only those which participate in the UNSC decision-making process. Given that the UNSC is already involved in norm creation and diffusion at other levels of international law, its actions and decisions are pertinent when analysing practice representing member States when examining norms of customary international law (Fox et al 2018, 724). Secondly, they found that the Council imposed an obligation on peacekeepers to protect human rights in 82% of the resolutions analysed (Fox et all 2018, 668). Even though their analysis was made in the context of obligations for non-state actors to respect human rights for which "the Council has empowered peacekeeping missions to secure rights against violation by non-state groups", they found that "in 82% of non-international armed conflicts in which it invoked Chapter VII, the Council mandated a peacekeeping mission to protect human rights, regardless of the identity of the violator." (Fox et all 2018, 672).

As discussed in chapter four of this thesis, the UNSC has systematically included a HRMC into the mandates of the PKOs it has deployed since the issuance of the Brahimi report in 2000. In fact, this consistent practice can be traced back to 1998

with the deployment of UNOMSIL in Sierra Leone. The UNSC, in its wording, seems unequivocal as to its intention to monitor, protect and/or promote all human rights in the context of the military operations deployed in order to maintain or restore international peace and security. The table below reports the relevant provisions from all the PKO mandates adopted since July 1998 (when the inclusion of HRMC started to become systematic) in this regard:

Table 6: Human Rights Provisions in PKO Mandates Adopted since July 1998

Acronym	Mission name	Start date	End date	UNSC Resolution	HRMC provision(s)
UNOMSIL	UN Observer Mission in Sierra Leone	July 1998	October 1999	Resolution 1181 (1997)	"To report on violations of international humanitarian law and human rights in Sierra Leone, and, […], to assist the Government of Sierra Leone in its efforts to address the country's human rights needs"
UNMIK	UN Interim Administration Mission in Kosovo	June 1999	Present	Resolution 1244	"Protecting and promoting human rights"
UNAMET	UN Mission in East Timor	June 1999	October 1999	Resolution 1246	"4.(a) a political component responsible for monitoring the fairness of the political environment, for ensuring the freedom of all political and other non-governmental organizations to carry out their activities freely and for monitoring and advising the Special Representative on all matters with political implications,"
UNAMSIL	UN Mission in Sierra Leone	October 1999	December 2005	Resolution 1270	"to foster accountability and respect for human rights in Sierra Leone"
UNTAET	UN Transitional Administration in East Timor	October 1999	May 2002	Resolution 1272	"monitoring the fairness of the political environment, for ensuring the freedom of all political and other non-governmental organizations to carry out their activities freely"
MONUC	UN Organization Mission in the Democratic Republic of the Congo	November 1999	June 2010	Resolution 1291	"to facilitate humanitarian assistance and human rights monitoring, with particular attention to vulnerable groups including women, children and demobilized child soldiers"
UNMEE	UN Mission in Ethiopia and Eritrea	July 2000	July 2008	Resolution 1320	"Coordinate the Mission's activities in the TSZ and areas adjacent to it with humanitarian and human rights activities of the United Nations"[355]

[355] The UNSG advised the parties involved that he would include a human rights component in UNMEE. The Human Rights Office (HRO) was established in UNMEE in May 2001 and was in charge of monitoring the treatment of nationals

UNMISET	UN Mission of Support in East Timor	May 2002	May 2005	Resolution 1410	“Decides that internationally accepted human rights principles should form an integral part of training and capacity building carried out by UNMISET”
MINUCI	UN Mission in Côte d’Ivoire	May 2003	April 2004	Resolution 1479	“Approves the establishment of a small staff to support the Special Representative of the Secretary-General on political, legal, civil affairs, civilian police, elections, media and public relations, humanitarian and human rights issues”
UNMIL	UN Mission in Liberia	September 2003	March 2018	Resolution 1509	"to ensure an adequate human rights presence, capacity and expertise within UNMIL to carry out human rights promotion, protection, and monitoring activities"
ONUCI	UN Operation in Côte d’Ivoire	April 2004	May 2017	Resolution 1528	" To contribute to the promotion and protection of human rights in Côte d’Ivoire with special attention to violence committed against women and girls, and to help investigate human rights violations with a view to help ending impunity"
MINUSTAH	UN Stabilization Mission in Haiti	June 2004	October 2017	Resolution 1542	“to monitor and report on the human rights situation, in cooperation with the Office of the United Nations High Commissioner for Human Rights, including on the situation of returned refugees and displaced persons;"
ONUB	UN Operation in Burundi	June 2004	December 2006	Resolution 1545	"to ensure, in close liaison with the Office of the High Commissioner for Human Rights, the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, and investigate human rights violations to put an end to impunity;"
UNMIS	UN Mission in the Sudan	May 2005	July 2011	Resolution 1590	"To ensure an adequate human rights presence, capacity, and expertise within UNMIS to carry out human rights promotion, civilian protection, and monitoring activities;"
UNMIT	UN Integrated Mission in Timor-Leste	August 2006	December 2012	Resolution 1704	“to observe and report on the human rights situation "
UNAMID	African Union-UN Hybrid Operation in Darfur	July 2007	Present	Resolution 1769	“requests the Secretary-General to ensure continued monitoring and reporting of the situation of children”
MINURCAT	UN Mission in the Central African Republic and Chad	September 2007	December 2010	Resolution 1778	"To contribute to the monitoring and to the promotion and protection of human rights, with particular attention to sexual

by the governments of both countries, including the repatriation of nationals under International Committee of the Red Cross auspices and monitored by Human Rights Officers.

					and gender-based violence, and to recommend action to the competent authorities, with a view to fighting impunity;"
MONUSCO	UN Organization Stabilization Mission in the DRC	July 2010	Present	Resolution 1925	“to promote and protect human rights and to fight impunity”
UNISFA	UN Organization Interim Security Force for Abyei	June 2011	Present	Resolution 1990	"Requests the Secretary-General to ensure that effective human rights monitoring is carried out, and the results included in his reports to the Council"
UNMISS	UN Mission in the Republic of South Sudan	July 2011	Present	Resolution 1996	“Monitoring, investigating, verifying, and reporting regularly on human rights and potential threats against the civilian population as well as actual and potential violations of international humanitarian and human rights law”
UNSMIS	UN Supervision Mission in Syria	April 2012	August 2012	Resolution 2043	“bringing an immediate end to all violence and human rights violations”
MINUSMA	UN Multidimensional Integrated Stabilization	April 2013	Present	Resolution 2100	"Promotion and protection of human rights"
MINUSCA	UN Multidimensional Integrated Stabilization Mission in the Central African Republic	April 2014	Present	Resolution 2149	"Promotion and protection of human rights"
MINUJUSTH	UN Mission for Justice Support in Haiti	October 2017	October 2019	Resolution 2350	“assist the Government of Haiti to […] engage in human rights monitoring, reporting, and analysis"

The established practice by the UNSC of incorporating human rights monitoring, protection and/or promotion duties into PKOs mandates takes different forms and involve various actors. While the UNSG oversees the implementation of mission-directed human rights protection in Darfur or Abyei, the Office of the High Commissioner for Human Rights has been requested to intervene in the conflicts in Kosovo, Haiti, Burundi and South Sudan. A Human Rights Unit (UNMISET) or a Civilian Unit with expertise in human rights issues (UNMIL, UNMIS, UNMISS) are also options considered by the UNSC. Ensuring accountability (UNAMSIL) and impunity (ONUCI, ONUB and MINURCAT) of human rights violations seems to be the rationale behind the decision to incorporate relevant monitoring mechanisms. The data gathered in the table above also serves to evidence the existence of a legal obligation at the subjective level for the UNSC, discussed next.

In conclusion, the practice by the UNSC, mandating authority in terms of peacekeeping for the UN as an organisation, has evolved to a consistent, systematic inclusion of human rights monitoring components in missions deployed since 1998. Whether this practice has arisen as a result of a sense of obligation is the subject of the following sub-section.

Section 3.2 The subjective element

The 2018 Draft Conclusions set the requirement of *opinio juris* as a constituent element of custom (conclusion 9) and its forms of evidence as law (conclusion 10). Conclusion 9.1 defines this as a subjective element in that it "means that the practice in question must be undertaken with a sense of legal right or obligation", while conclusion 10 details the various forms with which this understanding can be evidenced. Conclusion 12 recalls that, while resolutions adopted by international organisations cannot constitute, in themselves, rules of customary international law, they "may provide evidence for determining the existence and content of a rule of customary international law or contribute to its development". Yet, as Sloan puts it, it may be "that an *opinio juris* expressed in a resolution of the General Assembly will be itself sufficient or may stimulate a practice which will eventually be consolidated into customary international law" (Sloan 1991, 71-75). This approach was confirmed by the ICJ in the "*Chagos Islands"* case mentioned previously.

To help clarify, Conclusion 10.2 provides a general list of forms of evidence of acceptance as law for States that goes far beyond UNGA resolutions. Commentary 7 of conclusion 10 establishes that this second paragraph applies *mutatis mutandis* to the forms of evidence of acceptance of law of international organisations. The list includes but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". Some of these sources will be more relevant than the others in light of the analysis conducted in this section regarding international organisation's *opinio juris* such as official publications.

Article 1(3) of the UN Charter has clearly established "promoting and encouraging respect for human rights" as one of the purposes of the organisation. Although the organisation has moved beyond these relatively general and limited goals, respect and promotion of human rights have not been the subject of any multilateral agreement in the specific context of the deployment of PKOs. Therefore, assessment of the customary status of the requirement for the UN to add a human rights monitoring component into all PKO mandates cannot be based on treaty provisions for which the UN (or its member States) would be a party. Rather, it will take into account all the policies and guidelines (identified in chapter four), as well as their enforceability/binding effect, the nature of the UN entity that adopted the said document and the language used to refer to human rights monitoring. These possible sources of *opinio juris* include:

Table 7: Prospective Evidence of Recognition of a Legal Obligation Regarding Systematic Incorporation of HRMC into PKOs:

UN entity	Document name	Enforceability	Terminology (emphasis added)
UNSG	Renewing the United Nations: A Programme for Reform (A/51/950)	UNSG report	§79 "A major task for the United Nations, therefore, is to enhance its human rights programme and **fully integrate it into the broad range of the Organization's activities**"
Panel on United Nations Peace Operations	Report of the Panel on UN Peace Operations (Brahimi report)	Letter from the chairman of the panel to UNSG	p.ix "Among the changes that the Panel supports are: **a doctrinal shift** in the use of civilian police and related rule of law elements in peace operations that emphasizes a team approach to upholding the rule of law and respect for human rights." §41 "the human rights component of a peace operation is indeed **critical to effective peace-building**."
OHCHR	Training Manual on Human Rights Monitoring	Training Manual	Chapter 5 "The mandate of the human rights component of a peace mission is derived from the resolution of the Security Council that establishes the mandate of the mission itself, **which usually includes human rights monitoring**, fact-finding or investigation."
UNSG	Report on "Strengthening of the UN: An Agenda for Further Change"	Report of the UNSG	p.2 "The promotion and protection of human rights is a **bedrock requirement** for the realization of the Charter's vision of a just and peaceful world. Good progress has been achieved in integrating human rights throughout the United Nations system" §48 "Good progress has been achieved to date in integrating human rights throughout the United Nations system. For example, **human rights specialists are deployed as part of peacekeeping missions**".
OHCHR	Memorandum of Understanding	Internal documentation	requests that human rights training be provided to all deployed peacekeeping personnel and that DPKO and

	between DPKO and OHCHR		OHCHR work together to integrate human rights in the training provided by Member States
DPKO	"Handbook on UN Multidimensional Peacekeeping Operations"	Internal documentation	p.101 "**Peacekeeping operations have addressed human rights issues by including a human rights component** in many peacekeeping operations, as in Angola, Bosnia and Herzegovina, Cambodia, Central African Republic, Democratic Republic of the Congo, Eastern Slavonia, East Timor, El Salvador, Ethiopia and Eritrea, Guatemala, Kosovo, Liberia and Sierra Leone."
UNSG	UNSG's Policy Committee on Human Rights in Integrated Missions (decision No. 2005/24)		(i) **Human rights should be integrated into peace operations** according to the following principles: a) All UN entities have a responsibility to ensure that human rights are promoted and protected through and within their operations in the field; b) A commitment to human rights and the ability to give the necessary prominence to human rights should be important factors in the selection of SRSGs/DSRSGs, and in the monitoring of their performance, as well as that of the mission; c) OHCHR, as "lead agency" on human rights issues, has a central role to play through the provision of expertise, guidance and support to human rights components. These components should discharge core human rights functions and help mainstream human rights across all mission activities; and, d) Separate public reporting by the mission and/or the High Commissioner on issues of human rights concern should be routine.
DPKO & Department of Field Support	Capstone Doctrine	Principles and Guidelines	p.27 "The integration of human rights and the sustainability of human rights programmes **should always be a key factor** in the planning of multi-dimensional United Nations peacekeeping operations."
DPKO & Department of Field Support	"A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping"		p.3 UN peacekeeping has developed a range of skills, from disarming former combatants and helping them to re-enter civilian life to bringing order and safety to public places, **from protecting human rights** and enabling refugees to return to their homes, to helping organize elections and the establishment of national political, rule of law and security institutions"
UN Secretariat	"Human Rights Due Diligence Policy on UN Support to non-UN Security Forces"	UNSG letter	"Support by United Nations entities to non-United Nations security forces must be consistent with the Organization's purposes and principles as set out in the Charter of the United Nations and with its obligations under international law to **respect, promote and encourage respect for international humanitarian, human rights** and refugee law."
OHCHR, DPKO, DPA & DFS	Policy on Human Rights in UN Peace Operations and Political Missions	"Compliance with this policy is mandatory for all UN peace operations and political missions personnel"	§5 "The maintenance of international peace and security and international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all are fundamental purposes of the United Nations as defined by the UN Charter**. International human rights law is an integral part of the normative framework for United Nations peace operations**. The protection and promotion of human rights are essential elements of United Nations efforts to prevent conflicts, to achieve and maintain peace, and to assist in post-conflict

			reconstruction endeavours and – with due regard to the specific mandate of each peace operation and political mission – due attention to their human rights aspects is instrumental to the success of United Nations work in these areas."
UN Peace Operations Training Institute	Course on "Human Rights and Peacekeeping"		Foreword by course author: "Any effort to build a lasting peace **must incorporate actions to repair the effects of violations, protect from new abuses,** and enable the population to exercise their rights and freedoms"
High Level Independent Panel on Peace Operations	"Uniting our strengths for peace: politics, partnerships and people"	Unadopted Report (?)	The essential contributions that a human rights approach can make to the prevention of conflict and to sustaining peace, as well as **the role of mission human rights components in the protection of civilians, have been set out,** inter alia, in paragraphs 76, 77, 84, 87, 88, 126, 157 and 232 of the present report"
Advisory Group of Experts on the 2015 Review of the UN Peacebuilding Architecture	Report on The Challenge of Sustaining Peace	Recommendations	"**The defence and protection of human rights finds some space in the work of the Security Council,** but it is addressed in a more systematic manner in the Human Rights Council, a subsidiary body of the General Assembly."
UN Women	High Level Advisory Group for the Global Study on the Implementation of SC Resolution 1325		Chapter 12 "describes how the effective use of these mechanisms, and **increased information-sharing with the Security Council,** can build the capacity of the international community, including civil society, to hold Member States to account for their implementation of global commitments on women, peace and security"

Despite that UNGA resolutions are sometimes products of what can be contentious votes, they often voted in order to validate these policies and guidelines. As they are adopted by consensus, special attention may be given to them, particularly when they aim at approving such policies and guidelines. The provisions detailed in Table 7 suggest that the UN, as an organisation, considers protection of human rights a requirement when aiming at ending violence, resolving conflicts, and achieving sustainable peace. However, some reservations can be made as to where and which entity the requirement falls upon. Firstly, there is no hierarchy between the entities mentioned and no executory force regarding the documents they issue. Going further, the 2008 Capstone Doctrine, a key document in the organisation's support and direction to personnel planning and implementing UN PKOs, leaves some questions open about how host States, UNSC members and member States in general ought to discharge their responsibilities regarding human rights issues in peacekeeping.

There is therefore room for evolution, consolidation and further development of customary behaviours for implementation of HRMC into PKO mandates.

Nevertheless, in 1995, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that "of great relevance to the formation of *opinion juris* [...] are certain resolutions unanimously adopted by the Security Council". [356] Thus, the judges based their reasoning on two resolutions on Somalia where the UNSC unanimously condemned breaches of humanitarian law in order to hold the authors of such breaches and those who had ordered their commission 'individually responsible'. Going beyond, on the provisions contained in UNSC resolutions, it is worth noting that the Council "specified in no fewer than eleven resolutions on Somali piracy that the authorizations provided in the resolutions 'shall not be considered as establishing customary international law,' suggesting that in the absence of such a disclaimer, the resolutions could in fact have such an effect." (Fox et al 2018, 656)

Finally, one can also consider the argument of omission when attempting to establish the existence of the subjective element. *Opinio juris*, indeed, can be identified in cases of omission (or "negative practice"), rather than actions, "*for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom".* In the "*Lotus*" case of 1927, the Permanent Court of International Justice (PCIJ) insisted on the psychological aspect in order for a rule of customary law to exist.[357] Conclusion 10.3 of the Draft Conclusions indeed established that "failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction".[358] However, relying on silence in this way can be controversial. For instance, debates over the "unable or unwilling" standard and the use of force against non-State actors in third States are still ongoing among international law scholars and practitioners. The ineptitude or inaction of a government to stop a threat to international peace and security, allowing another to intervene is not yet

[356] ICTY, Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 133 (International Criminal Tribunal for the Former Yugoslavia Oct. 2, 1995)
[357] PCIJ, *S.S. 'Lotus', France v Turkey*, Judgment, Judgment No 9, PCIJ Series A No 10, ICGJ 248,(1927), League of Nations; Permanent Court of International Justice .
[358] Outside the case of MINURSO, Morocco never opposed relevant resolutions/treaty provisions/publication regarding HRMC in PKOs.

clearly defined in international (customary) law. Three points can be made in order to mitigate the argument for omission in our analysis. Firstly, in the "*Lotus"* case, the Court did not specify whether this subjective element referred to the position of States individually. Secondly, unless they are written in a statement, the reasons for abstaining or voting against a decisions can never be known. Thirdly, the advisory opinion on Namibia – previously mentioned – recalls the UNSC may be acting on behalf of the organisation as a whole, despite some Member States abstaining from voting. [359] It is worth noting that, in the latter case, it would be the silence of the UN as an organisation that would be taken into account in the context of an "omission-based analysis" and not that of States.

If a norm is considered to have emerged from Brahimi and is arguably customary, the adoption of the MINURSO mandate in 1991 still pre-dates such formation. Therefore, analysing its retrospectivity is required in order to ensure its applicability. There are arguably two ways around this issue. A first can be seen by analogy in the "*Chagos Islands"* advisory opinion conclusion that "the right to self-determination existed earlier than understood approach". The Court did not refer to self-determination as an emerged customary rule sometime in the late 1960s - or even at the time of the ICJ Western Sahara advisory opinion- but to self-determination when Mauritius achieved independence, i.e. earlier. By analogy, an HRMC-addition duty incumbent on the UNSC or the organisation as a whole may have emerged earlier than Brahimi. This presumes that custom had resulted to require addition of a HRMC to MINURSO's mandate upon its creation. Alternatively, and as contended in this chapter, it seems that undisturbed practice (adoption and State acceptance) and sufficient *opinio juris* has resulted in the years since Brahimi (or 1998 with the deployment of UNOMSIL) to require the UNSC to revise the mandate. Here, we avoid the issue of retrospectivity by contending that mission renewal annually is a return *de novo* to directing the frame of the mandate and a fresh prescribing of MINURSO's role.

At first glance, there is empirical evidence for one constitutive element suggesting existence of a norm of customary international law. The UN practice of systematic incorporation of HRMC into PKOs has indeed emerged. This practice has occurred in parallel with a certain institutionalisation of human rights in UN

[359] Ibid., note 356.

peacekeeping doctrine. However, this institutionalisation is not robustly established in the organisation's constitutive instruments, remains fairly recent (late 1990's, early 2000's), episodic, and leaves the issue of responsibility (and therefore, obligation) unanswered. The lack of legal conviction by the UN, as a collective entity, that the inclusion of human rights monitoring components into PKO mandates ought to be systematic deprives the identified practice of a well-established status of existing customary international law. This, however, does not prevent the existence of an obligation of a different nature.

Section 4 Complementing the 2018 ILC Draft Conclusions: alternatives to international organisations' practice and *opinio juris*

Following the findings from sections 2 and 3, some doubts about the maturation and concretization of a clear norm of international customary law through an international organisation's practice may yet persist. A refocus on the State as a subject matter can therefore be required. This section aims at taking the substantive analysis further and refining the previous section, going beyond the main assessment on the objective and subjective elements regarding international organisations. It looks into State practice and further, into other sources of international law based on a simple obligation that the UN has under the UN Charter, included in the organisation's purposes and objectives but also the provisions of the 1991 Settlement Plan regarding Western Sahara: the respect for and promotion of human rights. Firstly, an analysis which refocuses on the State regarding the creation of custom in the context of PKOs will be conducted (section 3.1). Secondly, the idea that a norm for incorporating human rights components into PKO mandates is part of a set of general principles of international law (non-binding) or even amount to a peremptory norm of international law (binding) will be considered (section 3.2). Finally, the issue of a possible subsequent responsibility for States will be addressed (section 3.3).

Section 4.1 State practice and *opinio juris*

The analysis in this section results from the lack of certainty around the existence of a clear norm of customary international law based on the *opinio juris* of the UN, as a distinct entity. Despite the ICJ 1949 "*Reparations*" case, States

have been reluctant to regard international organisations as truly independent entities. Often the "'international organizations as fora of Member State action' paradigm has prevailed over the 'international organizations as independent actors' paradigm" (Reinisch 2017, 1010). International organisations still occupy a spectrum, as the ICJ "*Nuclear Test"* advisory opinion of 1996, concerning the competency of the World Health Organisation to institute legal proceedings recalls.[360] There are two possible ways to examine State practice further.

Firstly, outside any multilateral settings where States have committed individually to respect certain norms and obligations in bilateral or multilateral agreements. Secondly, within the framework of the organisation, acting as a forum as per the "*Nicaragua"* case of 1969 already mentioned. In the first instance, exploring whether there is any indication of what States consider to be their own obligation in the context of PKOs is required. This would then entail analysing which responsibility derives for a particular State from these obligations as well as potential complicity/circumvention in connection with an act of international organisations. States, indeed, incur responsibility if they circumvent international organisations in order to escape their obligations as per article 61 of the 2011 Draft Articles on the Responsibility of International Organisations mentioned previously. The notion of liability will be touched upon in the last subsection of this chapter.

In the second instance, looking into the voting patterns on how much support there is for a particular resolution can be pertinent. Though, it can be counter deceiving, because there is no absolute certainty around the rationale behind a decision to vote against or abstained from a particular decision, unless it is written in a statement. Yet, a pattern may be a strong indicator and to that effect, it is worth noting that all UNSC resolutions creating PKOs, post-1998 and post-Brahimi, have been unanimous (with only one exception for UNMIK in June 1999 for which China abstained). As far as resolutions by the UNGA are concerned, they have been cited as evidence of State practice (as opposed to evidence of the UN's own practice) determining a rule of customary international law by the International Arbitral Tribunal. In the 1978 award related to the Merits in Dispute

[360] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice, 8 July 1996.

between Texaco Overseas Petroleum Company and California Asiatic Oil Company on one side, and the government of the Libyan Arab Republic on the other side, the arbitrator recalled that "the refusal to recognise any legal value in United Nations resolutions must […] be nuanced depending on the various texts issued by the organisation" and that "the activities of the United Nations have had a significant influence on the content of contemporary international law".[361] In this instance, he considered the voting pattern regarding a specific resolution on permanent sovereignty over natural resources and noted that it was voted by a majority of member States – including many developing countries as well as many developed countries with market economy, of which the most important economically, the United States. Therefore, the way member States voted as well as the nature of their economy were taken into account in the evaluation of the nature and impacts of the vote. The principles set out in this particular resolution have thus obtained the approval of a large number of States representing all geographic regions and economic systems. Applied to the analysis in this chapter, it would be pertinent to subject UNGA resolutions touching upon the subject of human rights monitoring during peacekeeping operations to a similar examination. However, no UNGA resolution deals specifically with the issue of HRMC within PKO mandates. Moreover, as discussed in chapter five of this thesis, none of the UNGA resolutions on Western Sahara mentions the term "human rights", except for the right to self-determination. Nevertheless, the Special Committee on Peacekeeping Operations (or "C34"), a subsidiary body of the UNGA, is mandated to consider the conduct of peacekeeping in all its aspects, presenting annual reports since it was created in 1965. The reports – and therefore, their content - have been endorsed almost systematically by the UNGA in resolutions entitled "comprehensive review of the whole question of peacekeeping operations in all their aspects". Most of the reports deal with financial and budgetary aspects of PKOs. However, the following reports deal, if in general terms, with the human rights aspect of peacekeeping:

Table 8: Provisions Regarding Human Rights Protection and PKOs in C34 Reports[362]

[361] Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, YCA 1979, at 177 et seq. (also published in: ILM, 1978, at 1 et seq.; Int'l L. Rep. 1979, at 389 et seq.; Clunet 1977, at 350 et seq.). §83

[362] The 1983, 1988, 1989, 1990, 1991, 1995, 1996, 1997, 2002, 2003, 2013, 2019 reports do not mention "human rights". Reports from 1978, 1982, 1984, 1985, 1986, 1987, 2006 are not available.

Year	Provisions (emphasis added)	Reference
1971	Stresses the importance of achieving agreed guidelines to enhance the **effectiveness of United Nations peace-keeping operations in conformity with the Charter** and to this end urges the Special Committee to accelerate its work;	§3
1972/1975	Urges the Special Committee to accelerate and intensify its work so as to make substantive progress, in view of the importance of achieving, in pursuance of its mandate, **agreed guidelines for carrying out peace-keeping operations in conformity with the Charter of the United Nations**	§5
1974	Draft articles of guidelines for United Nations peace-keeping operations under the authority of the Security Council and in accordance with the Charter of the United nations (establishing the prime authority of the UNSC over matters related to PKOs and that the UNSG is the commander in chief of UN PKOs).	Appendix of report 3239 (XXIX)
1979	"Urges the Special Committee on Peace-Keeping Operations to expedite its work for an early completion of agreed guidelines which will govern the conduct of peace-keeping operation of the United Nations in accordance with the Charter"	§4
1992	"Delegations […] noted with satisfaction the considerable expansion during recent year of the involvement of civilians in peace-keeping operations through such activities as policing, election monitoring and **human rights verification**. In view of this expanding role of civilians, some delegations believed that it might be useful to formulate a set of guidelines concerning civilian units in peace-keeping operations."	§90
1993	"Increasingly, United Nations operations were moving beyond the confines of their traditional concept and taking on more complex tasks in sometimes very difficult situations. Elements such as electoral assistance, humanitarian relief activities, **human rights monitoring**, assistance to nation-building, border monitoring and sanction enforcement monitoring had come to be associated with United Nations peace-keeping" "Concern about the lack of qualified civilian personnel"	§19 §22
1994	§19 of the report mentions that several delegations reiterated that UN operations have come to **incorporate human rights monitoring elements as part of their peacekeeping activities**. However, other delegations "expressed reservations […] reiterating that many of the activities were independent of peacekeeping operations, with different sources of mandate and financing and that this independence needed to be preserved. According to some delegations the inclusion of these elements in a peace keeping operation was conditional to the consent of all parties involved". §11 of the report evokes the Under-Secretary-General for Humanitarian Affairs' address to the Committee and how humanitarian activities included "not only measures to improve to improve material well-being, but also **to ensure respect for basic human rights**".	§19 §11
1998	"A number of delegations underlined the importance of **enhanced coordination of human rights tasks** at all levels of peacekeeping operations, from the planning phase onward."	§14
1999	"Many delegations expressed the view that the scope of peacekeeping had to be multidisciplinary in nature and not solely restricted to military tasks, but also to include civilian police activities, humanitarian assistance, disarmament and demobilization measures, actions against the proliferation of small arms and light weapons, and **human rights monitoring**." Adopted as a resolution by the UNGA without vote.	§14
2000	"Many delegations stated that if human rights and humanitarian assistance tasks were to be included in a mandate by the Security Council, they must be **fully integrated into the planning of peacekeeping operations and their functions made clear from the start.".**	§42
2007	"The Special Committee acknowledges that peace and security, development and human rights are the **pillars of the United Nations system and the foundation for collective security and well-being**."	§137
2021	"the primary responsibility for the protection of civilians as well as for **the protection and promotion of human rights rests with the host State**, and emphasizes in this regard the importance of cooperation by United Nations peacekeeping operations, *where mandated*, with national authorities in support of their efforts" (emphasis added).	§128

	§133 adds that the Committee "continues to encourage the troop- and police contributing countries to take all the needed measures concerning the protection of civilians, in accordance with the Charter, international humanitarian law and **human rights law**, and in line with the basic principles of peacekeeping, taking into consideration the mandate and the relevant rules of engagement."	

Up until the 1980's, most of the discussions evolved around the mandate of the Committee and its purpose. The "limited progress" is often noted and the fact that the task of achieving agreed guidelines on peacekeeping remains a difficult one is frequently outlined (1975, 1976, 1977, 1979, 1980, 1981). The 1981 report notes "it has been evident that long-standing basic differences remain and that the task before the Committee will continue to be a difficult one, owing to the fundamental nature of the issues with which the Special Committee is faced."[363]

The first time the issue of human rights protection was discussed at the Special Committee level was in 1992. This particular report followed the released by the UNSG of the Special Report on an "Agenda for Peace", which it took note of. Seven reports since then have not touched upon the issue of human rights at all. When they do, the discussion is more concerned with the human rights obligations' incumbent on UN personnel. Despite the increasing acknowledgement of the existence of a distinct component dedicated to human rights monitoring, some caveats have come to limit the scope of a potential systematic inclusion of these prerogatives for PKOs. The 2000 report was adopted shortly after the issuance of the Brahimi report (20 March 2000) and the corresponding UNGA resolution was indeed adopted on May 25th without vote (A/RES/54/80 B). What is clear from §42 of that report is that the integration of human rights tasks is to be done when the mission is first deployed. The Committee also recalls in the latest report of 2021 that the primary responsibility in terms of human rights protection rests with the host State and that cooperation with peacekeepers is important, but only "when mandated". In light of these caveats, one could argue that incorporating HRMC into PKO mandates is not an obligation for the UNSC *per se*. However, the content of these reports does not preclude the existence of such obligation falling upon the organisation itself and which States, via the deployment of peacekeeping operations at the UNSC, ought to honour. This obligation is discussed next.

[363] UN General Assembly document A/36/49, *Comprehensive review of the whole question of peacekeeping operations in all their aspects*, (9 September 1981), available from https://digitallibrary.un.org/record/23602?ln=fr, §6.

Section 4.2 Other sources of international law

Determining whether a State or an international organisation acted unlawfully depends on the existence of an obligation falling upon the State or the international organisation. Article 38 of the ICJ Statute categorises the sources of law to be applied by the Court when settling a dispute. International custom is listed alongside international conventions "establishing rules expressly recognised by the contesting States" and "the general principles of law recognised by civilised nations".[364] The assessment undertaken in section 3 for the purpose of this chapter was the first to evaluate normative patterns across peacekeeping-specific UN resolutions and policies and the potential legal requirement to include a HRMC in each mandate as a norm of customary international law. This subsection examines whether other sources of international law can form the basis of a norm regarding HRMC in PKOs constituting an obligation falling upon the UN.

As far as unwritten sources of law are concerned, the third source listed in the ICJ statute comprises the general principles of law. They are a separate category of international law from written sources (conventions) and unwritten sources (customary international law).[365] "They are comprised in part of legal principles that are common across different national legal systems and that can be validly transposed to the international level" (Pauwelyn 2003, 125). They typically include good faith, *res juridica* or the impartiality of judges. Those are therefore not singularly relevant in the context of our research as they principally relate to the functioning of a legal system.

As far as conventions and treaties are concerned, whether member States consider human rights protection in general to be an objective in conducting their role as States is not implemented universally and uniformly. Despite the high level of accession – signature and ratification – of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) leading to a high universal conduct on the principal

[364] Ibid., note 328. Art. 38 1(c) (instructing the International Court of Justice (ICJ) to apply 'the general principles of law recognized by civilized nations').
[365] Ibid note 328.

human rights treaties, the average ratification level of the treaties identified in chapter four in the UN Treaty Body database relating to human rights is 78%, leaving almost one-fourth of States not having ratified an instrument. Beyond what has been asserted in the first section of this chapter, this assessment can be strengthened by the extent to which some treaties have been ratified. For instance, there is a significant gap between the ratification rate of the Convention on the Right of the Child (99.4% of UN member States) and that of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (28.5%). Therefore, the protection of human rights is not unanimously considered an objective of Statehood, including in the absence of armed conflicts. Yet, one important observation can be made with regards to the nature of the norm at stake. Conclusion 15.3 indeed indicates that the Draft Conclusion "is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)." This suggests that consideration should be given to the idea that human rights protection in peacekeeping doctrine may derive from peremptory norms of general international law (jus cogens) or questions concerning the *erga omnes* nature of certain obligations. Human rights obligations are undeniably those of an *erga omnes* duty of the UN, as described in the first section, and arguably, they do not require an explicit incorporation in a PKO mandate.

States are also to support non-self-governing peoples to attain self-determination as a "sacred trust". Article 73 of the UN Charter reads that Administering powers "accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories".[366] The notion of sacred trust in article 73 arguably refers to the *erga omnes* nature of a norm of international law, owed to the organised international community. This is coupled, in Western Sahara, with specific commitments of the UN under the defining 1990 and 1991 UNSC resolutions to deliver on self-determination as detailed in chapter five of this thesis. The circumstances of a free and fair referendum may require some maintenance of human rights 'order' (or security) to achieve a credible, assured outcome as the provisions of the Settlement Plan suggest. The diminishing

[366] Ibid., note 14.

perspective of a referendum is not to interfere with the realisation of the right to self-determination in any other way as per the *erga omnes* nature of this right. Extending the mandate to human rights protection arguably comply with this obligation.

Therefore, a PKO for self-determination has a different sensibility about UN-guaranteeing of rights. Arguably, the PKO is directed to assuring the 'highest' of international human rights, which is well established in common article 1 of the ICCPR and ICESCR. The next subsection discusses the consequent responsibility that can be engaged if the obligation to ensure human rights monitoring in a PKO is considered to have been breached.

Section 4.3 State responsibility

Under international law, States and international organisations can be responsible for a breach of international rules that are binding upon them. Whether they acted unlawfully depends upon the existence of an obligation of States or international organisations to respect or enforce a rule of international law. It is therefore relevant to engage in a discussion on the legal consequences on liability of the absence of such HRMC in the mandate of MINURSO at a normative level. If the UN practice becomes customary law, or if this obligation exists at any other level, does the absence mean non-compliance with a legal norm? Which responsibility is engaged as a consequence of this non-compliance? This sub-section aims at generating elements of discussion regarding the responsibility which derives from an obligation for States and/or the UN to ensure HRMC are incorporated into PKO mandates, as States consenting to agreed referendum and peacekeeping plans may be under such a positive obligation. Two options will be considered: the first will look into State responsibility in a bi-lateral or multi-lateral agreement, while the second will address the circumvention of international obligations.

Firstly, one of the relevant findings from the piece of research by Fox, Boon and Jenkins previously mentioned is that peace agreements are legally binding (Fox et al 2018, 676/677) as evidence of customary international law. If a peace agreement is legally binding, one of the consequences might be that it can be

invoked in national or international courts, and, arguably, "breach by a state party could lead to state responsibility." (Fox et al 2018, 679). By consenting to the 1991 Settlement Plan for a referendum (also endorsed by the UNSC), one can argue that Morocco and POLISARIO impliedly agreed the civil population must have a human rights monitoring provided by MINURSO.

With regards to the circumvention of an international obligation, the 2011 ILC's Draft Articles on the Responsibility of International Organizations (thereinafter, DARIO) include two possibilities for a responsibility to be incurred. The first addresses international organisations circumventing their international obligations by acting through States (article 17 of the DARIO). The idea that an international organisation can incur international responsibility is based on the assumption that it has a distinct legal personality from that of its member States. Commentary 4 notes that circumvention "implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation".[367] The intentionality may be difficult to evidence for the organisation as a whole. However, the voting patterns at the UNSC or UNGA may help to identify member States' intentions and objectives. In this regard, article 61 of the DARIO provides some useful insight.

The second, indeed, addresses States circumventing their international obligations by acting through international organisations (article 61 of the DARIO). It implies for the State to be "taking advantage of the fact that the organisation has competence in relation to the subject-matter of one of the State's international obligations" in order to cause the organisation "to commit an act that, if committed by the State, would have constituted a breach of the obligation".[368] In the case of an existing norm compelling the UN and UNSC to incorporate HRMC into PKO mandates, any Council member impeding the incorporation at the time of deployment or at a later stage would be regarded as being non-compliant with the norm. The difficulty being that most negotiations happen behind closed doors at the UNSC, gathering evidence of such circumvention may

[367] ILC, *Draft Articles on the responsibility of international organizations"*, sixty-third session, (2011), submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87), available from https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf
[368] Ibid.

be arduous. Yet, in the case of an extension of MINURSO's mandate to human rights monitoring, a vote at the UNSC would reveal members' intentionality. In this case, one would have to argue that this obligation is also incumbent to any State individually, or that it has been definitely transferred upon the international organisation in question. This is yet to happen in the case of MINURSO and reports of alleged threats to veto any extension does not suffice to establish such a liability.

Conclusion

The 2018 Draft Conclusions, applied in refinement of the two-part 'test' of custom, were used in order to answer the question of compelling a HRMC mandate addition to MINURSO. The debate goes far beyond that of the emergence of a norm of customary international law and touches upon the discussions around the role that international organisations can or must play in this process. The nascent doctrine seems to be in agreement with the International Law Commission and favours a direct contribution by international organisations to the emergence of norms of customary international law. As Daugirdas concludes, "international organizations are certainly bound by the customary international law rules that they help to create […] International organizations could never have *opinio juris* that is relevant to the formation of customary international law unless they understood those rules as binding them." (Daugirdas 2020, 232). States, however, have shown a certain reluctance in granting international organisation with that power and use the very same organisations as forum to show their disagreement. The findings may not reach the level of where we can unambiguously say it is now a customary international rule and is part of international law, from the point of view of the UN as a separate entity. However, international organisations, then, may represent a place where State practice can be influenced and where custom can be framed rather than created. Looking at State practice, it seems that the systematic inclusion of HRMC into PKO mandates can be turned into a rule of custom through that way overtime and strengthen the existing material. The question would then be: is this inclusion made by States, or is it attributable to the UN with States disappearing behind its legal personality?

Alternatively, one can look at other sources of international law and at a higher-level principle or higher-level rule. There might be a risk of stagnating into the realm of 'soft law' and discerning norms not quite yet binding or obligatory. However, using the *erga omnes* nature of human rights protection – and self-determination in particular – one can conclude that including HRMC in this particular context is merely a reflection of the general obligation owed to the international community (or "sacred trust"), that the UN, as an organisation, has to respect and to promote human rights. If one considers that most of the material point into that direction, leading to the conclusion that a mechanism should be included, then this is what is warmly required by the principle of respecting and promoting human rights.

The analysis in this chapter brings some elements to conclude the existence of a norm, if not customary, at least somehow binding on the UN. Specific cases might derogate from it by UNSC direction or (dis)agreement of the parties as is the case with MINURSO. Case by case analysis is necessary when it comes to customary international law and disagreements can emerge as to the process and evidence used. The most significant finding is that UN/UNSC practice is relevant to unresolved debates such as that on human rights and conflict resolution. It does not establish a new norm but rather crystallise one. Other questions may then arise from this analysis: would any other UN actor organisation or body attract the obligation of a new duty in customary law, should the UNSC not act? What does Western Sahara hold for the conception of human rights involvement of the UN in future PKOs and other situations of agreed intervention? These will be addressed in the conclusion of the thesis.

CONCLUSION

This thesis focused on the case of MINURSO in peacekeeping and the particularity of its mandate. The main analysis evolved around the absence of a human rights monitoring mechanism within the mandate of MINURSO and its implications in terms of the wider UN peacekeeping doctrine. It aimed at identifying firstly whether this absence signified the existence of an anomaly in modern peacekeeping and further at evaluating the consequences on the resolution of the conflict in Western Sahara. The situation on the ground has changed over the course of this research. At the time of submission, the cease-fire is no longer in place, the US recognised Morocco's sovereignty over the territory of Western Sahara on 10 December 2020 by way of presidential proclamation, and the General Court of the European Union rendered a new decision invalidating the trade agreements between Morocco and the EU which explicitly included the disputed territory. Even though these events have not had a direct impact on the content of MINURSO's mandate at the time of each renewal, the changes in conflict dynamics have attracted some attention among key actors and observers from the international community. The issue of human rights monitoring in the conflict in Western Sahara had already attracted attention from the organised international community following the Gdeim Izik events of November 2010. These very incidents resulted in the first mention of the term "human rights" in a UNSC resolution five months later (resolution 1979 of April 2011). The climax was reached in April 2013 when the USA, as penholder, had reportedly included a HRMC in the draft mandate to be circulated amongst UNSC members. It has never been discussed at this level since and has, consequently, turned into a point of contention between the parties.

One may argue that a thorough monitoring of human rights in the context of this conflict could have prevented the cease-fire from being broken due to the escalation of violence and human rights violations. Similarly, a rigorous observation and management of natural resources originating from a NSGT as it was performed in the case of Namibia, may have created a robust legal framework preventing any risks of breaches of international law on the part of Morocco or the EU. The issue of human rights monitoring in the case of Western

Sahara is therefore never totally disconnected from the rest of the conflict's elements and this research comes about at a time when the issues of relevance and practicality of reforming MINURSO are raised after just over 30 years of existence.

In order to provide some answers to the research question, an empirical analysis has been conducted for the first time regarding human rights monitoring for MINURSO. It was based on a mix of primary sources (UNSC and UNGA resolutions, UNSG reports, UN policy documents) and semi-structured interviews with individuals involved in implementing, directly or indirectly, the mandate including UN staff, representatives of the five UNSC permanent members and NGOs working in Western Sahara and the refugee camps in Algeria. The deployment of MINURSO has firstly been analysed and placed within the context of a unique decolonisation process and self-determination conflict resolution. The content of the mandate has, then, been examined against the rest of the UN PKOs – across all generations - in order to discern whether it was an outliner case given the newly established UN peacekeeping doctrine. It has then been dissected with a view to establish whether it was completely deprived of any human rights protection language or if there is room for interpretation. A few actors involved in the conflict resolution process as well as the monitoring of human rights in Western Sahara have then been interviewed to shed light on their interpretation and the role that human rights (non)monitoring has had on how the conflict unfolded and its potential benefits and drawbacks on its future development. Given the complexity of the conflict dynamics, this research is pluri-disciplinary in nature. A legal approach to the absence of HRMC has been taken in order to identify a potential remedy based on international law. Customary international law has been gauged to evaluate the existence of a norm that would require each UN peacekeeping mission to include a HRMC in its mandate without it being the subject of political considerations at the UNSC level. After applying this multimodal research method to answer the main and secondary questions, several key findings have been drawn.

Firstly, and most importantly, MINURSO is an outlier case. After having established the particular features of the decolonisation process in Western Sahara and reviewed all current and past PKOs, it can be asserted that

MINURSO does stand as an anomaly in modern peacekeeping regardless of whether one considers that they were incorporated with the proclamation of "D-Day" as part of the 1990 Settlement Plan. The conditionality of a task considered inherently part of UN's objectives indeed seems abnormal. The multi-dimensional nature of UN peacekeeping operations deployed after the end of the Cold War has been ascertained and described in large by scholars as referenced in the literature review of this thesis. When conducting this empirical analysis, it appeared that two events have impacted the content of PKO mandates, and the tasks provided to peacekeepers in terms of human rights protection and promotion in armed conflicts. On one hand, none of them included a HRMC before the end of the Cold War while some had started to be explicitly equipped with such prerogatives. On the other hand, the issuance of the Report of the Panel on UN Peace Operations (Brahimi report) in November 2000 has definitely catalysed this practice by the UNSC, with all PKOs deployed since then, being in charge of monitoring human rights violations. The fact that ONUSAL, the first PKO to be explicitly mandated with human rights monitoring prerogatives was established only three weeks after resolution 690 establishing MINURSO was adopted, raises an interesting question as to what has driven the UNSC to explicitly mention HRMC in one and not the other. The empirical research also revealed that since the creation of ONUSAL in May 1991, the number of mandates that either included explicitly a human rights component or allows for coordination with relevant agencies and organisation regarding human rights issues, is 34 (including ONUSAL) out of 51. Another seven of them have partial or implicit human rights related duties, which means 80 per cent of mandates adopted since the deployment of ONUSAL in May 1991 take a stance on human rights issues. This discovery has been particularly beneficial when conducting the examination of a potential emergence of a norm of customary international law, through the evaluation of the organisation's practice in this matter.

The second main finding of this research is the existence of a remote monitoring in the case of Western Sahara. The interviews revealed that the conflict in Western Sahara is not totally deprived of any monitoring of the human rights situation on the ground, including from the UN. The OHCHR has a dedicated desk officer in charge of receiving complaints from alleged victims. Despite the physical absence on the ground, the UN is committed to collect information in full

transparency. This remote monitoring is in line with the idea put forward in the Handbook on UN Multidimensional Peacekeeping Operations that "although the human rights component has the lead role on human rights issues in a peacekeeping operation, human rights work is everyone's responsibility. Consistent with the Secretary-General's directive in his 1997 UN reform proposals, human rights should be central to every activity undertaken by the UN".[369] This task, however, comes with specific challenges in the case of Western Sahara regarding the cross-checking of information and possible retaliation.

Thirdly, the research has revealed that adding a HRMC to MINURSO's mandate, would largely be beneficial to the resolution of the conflict, insofar as Morocco agrees to such addition. This conclusion is based on the semi-structured interviews conducted between June 2019 and April 2021. The role of human rights monitoring would be crucial, especially when looking beyond the resolution of the conflict (peace) and toward a reconciliation process (justice). The impacts would, *au contraire*, be weaker in terms of ensuring an effective, operational, "on the ground" protection to the people concerned. It is clear that this issue has become a bone of contention between the parties over the last decade, particularly following the Gdeim Izik events of November 2010. The climax was reached at the UNSC level in April 2013, when the USA – penholder in the drafting of MINURSO's mandates – suggested adding a human rights monitoring mechanism in the first draft circulated to Council members. To this day, no other attempt has been made in order explicitly include such a mechanism into the mandate, and – although suggestions have been made by some interviewees – no official document attests to the fact that France has threatened to veto any addition. In order to remedy this uncertain political situation and to adjudicate the issue, a closer look was taken at the state of the law internationally.

The fourth key finding from this research is the emanation of a norm of customary international law to include HRMCs to PKO mandates. Given that customary international law constitutes a prime unwritten source of international law based on article 38 of the ICJ Statute, it provides a workable ground for examination of

[369] UN, Dept. of Peacekeeping Operations, Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations*, (10 December 2003), p.102, available from https://peacekeeping.un.org/sites/default/files/peacekeeping-handbook_un_dec2003_0.pdf

the emergence of such a norm. The 2018 Draft Conclusions on identification of customary international law by the International Law Commission served as a comprehensive and authoritative based for this analysis. The existence of both constitutive elements of a norm of customary international law have been gauged with regards to the practice of the UN (objective element) and the belief that it must comply with this norm (subjective element or *opinion juris*). The criteria have been assessed against the relevant international jurisprudence and scholarly work. In consideration of the fact that the emergence of custom on the part of international organisations is a rather recent matter, for which many debates remain amongst States and scholars, it cannot be established for certain that a norm of customary international law exists today for the systematic incorporation of a HRMC into UN PKOs. Despite that the nascent doctrine seems to be in agreement with the idea that international organisation can be direct contributors to the emergence and development of international custom, in the present case, the evidence collected did not suffice to establish the existence of a clear norm. However, international organisations may represent a place where State practice can be influenced and where custom can be framed and consolidated. Therefore, the systematic inclusion of HRMC into PKO mandates can be turned into a rule of custom through that way overtime and strengthen the existing material already collected. This obligation of a new duty in customary international law, should the UNSC not act, would therefore fall upon either the UNGA or the UNSG as a world forum and the head of the UN administration respectively. Alternatively, one can consider that human rights protection (including self-determination) is of an *erga omnes* nature and consequently, simply reflect an existing obligation owed to the international community. In any event, international law certainly provides a tangible framework when searching for a remedy to the absence of HRMC and bypass any blockade of a political nature. In this regard, the September 2021 decisions by the General Court of the European Union annulling the trade and partnership agreements between the EU and Morocco bring further elements of solution to the political dispute between the parties and close attention will have to be paid to the final decision following the appeal by the EU institutions.

The impact and relevance of this research can be measured in terms of its novelty and its contribution to, not only the relevant literature, but also the knowledge brought to the actors and observers of the conflict. Firstly, a doctoral thesis

entirely dedicated to the UN Mission in Western Sahara has never been published. The arguments advanced by both parties regarding the benefits or the drawbacks of adding a HRMC have never been backed up with empirical evidence. Asserting that adding a HRMC to the mandate of MINURSO would automatically contribute to resolving the conflict in Western Sahara is ignoring the entire dynamics around how they came to not be explicitly included and why the case of Western Sahara has been dealt with in a distinct way from the start. Indeed, making the monitoring and protection of human rights conditional upon the announcement of "D-Day" in the Settlement Plan, where a certain number of conditions are required, is possibly the mistake the UNSC has allowed to be made when endorsing the Settlement Plan. This is endemic of the malfunctions of a UN peacekeeping system which has not benefited from a clear normative and operational framework and had to structure itself as conflicts unfolded across the globe. This research revealed that the UN has indeed displayed a more robust wish to take human rights violations and protection into account in its conflict resolution approach worldwide. This process can even transform into the emergence of a norm of customary international law as discussed in this thesis. Yet, the decision to implement an effective human rights protection in armed conflicts, remains in the hands of the UNSC and, intrinsically, a question of a political nature. Consequently, in line with Katayanagi's findings (Katayanagi 2002, 224; 259), strong legal documentation should constitute the base of the mandate for human rights monitoring functions to be effective in multifunctional PKOs and eliminate any room for (mis)interpretation. Maus' proposal (Maus 2010, 77) to establish a new legal regime of human rights *post bellum* as a remedy seems difficult to articulate and implement in a case where a conflict does not seem to reach the "post bellum" stage seemingly due to the absence of human rights monitoring.

Even though violations had been occurring since the beginning of the conflict in 1975, the question of their role and relevance in the negotiation process was only raised over three decades later and almost two decades after the deployment of the UN Mission. Therefore, the existence of violations and the continued irresolution seemed unconnected at first glance. However, as the conflict started to find itself in a dead end, a few factors have incited the parties to contest the functioning of MINURSO, if only for different reasons. The voter's identification

process had been jeopardised and eventually undermined when the final list of voters was rejected by one of the parties in 1999. Consequently, the term "referendum" has not been appearing in the UNSC resolutions since June 2001. As a response, Morocco officially proposed an Autonomy Plan in 2007, whereby it would remain sovereign in the territory of Western Sahara, which is entirely rejected by POLISARIO. According to Anna Theofilopoulou – former advisor to Personal Envoy James Baker - the mistake made by the Council was to introduce the term "negotiations without preconditions" in its resolutions following Morocco's proposal.[370] The impasse is, therefore, the result of the apparent negotiability of the right to self-determination and its non-realisation as initially agreed by both parties. As it is considered part of core human rights by the UN (article 1 in both International Covenants), the question of the UNSC's responsibility in ensuring its implementation is raised de facto. How can the Council deploy a peacekeeping mission in charge of having an act of self-determination performed if no mechanism allowing its monitoring and protection is included? The case of Western Sahara highlights the idea that the protection of a collective human rights – the right to self-determination - and the implementation of human rights towards individuals are mutually exclusive.

Despite that the situation in Western Sahara has been researched in various fields of studies (law, international relations, anthropology), MINURSO has not been the subject of thorough research at doctoral level. Incidentally, the first comprehensive volume dedicated to this particular mission has just been published at the time of writing. Empirical research that includes an analysis of primary sources and interviews with individuals involved from near or far in the implementation of the mandate in order to shed light on its meaning and practical implications in the present and future was long due. This research establishes clearly that MINURSO has not been successful in fulfilling its aim. The decolonisation process in Western Sahara is now the longest in the history of the UN and the absence of a listed administering power taking responsibility for helping its people to attain self-determination does not augur well for the future of the territory.

[370] Interview 11

Some limitations to the work of this research on several levels ought to be mentioned. Firstly, the fact that the conflict is ongoing has required a constant observation of events and updating of the primary sources during the works. Secondly, positionality constituted an important strain in conducting this research and caution had to be exercised while choosing the most accurate terminology. Indeed, a few terms are contested by each of the parties and their inclusion into this thesis had to be supported by official documentation. The very name of the territory is the subject of disagreement on the part of Morocco. For instance, the adjective "Western" is not recognised by the authorities as confirmed by Mourad Erraghrib, Director of the Cabinet of the President of the CNDH, during the interview.[371] Moreover, the term "occupation" has been entirely rejected by Morocco and the UN has not taken a strong stand on the issue, as evidenced by the non-use of the term in the UNSC resolutions regarding Western Sahara. On the POLISARIO's side, the referral to Morocco as the "Administering power de facto", as recently put forward by the EU institutions before the Court, has also been disputed. In this matter, the Court confirmed that such a terminology was not accurate when referring to the Kingdom, which – as the judge recalls – does not consider itself as such.[372] Additionally, (un)conscious bias is often an issue faced by researchers. In the case of this thesis dealing with a sensitive issue such as that of human rights violations and protection, may engender some empathy on the part of the researcher. Discussing whether adding a mechanism aimed at monitoring basic rights would be beneficial to resolving a conflict may seem deprived of common sense at first. However, human rights too, are the subject of disputes amongst world leaders as well as researchers (Hannum 2019) and this thesis also contributed to this debate. By differentiating between conflict prevention, management and resolution, the impacts of the implementation of a HRMC were categorised based on the interviews in a way that suggests various levels of interconnections between human rights and conflict resolution. Thirdly, and as far as the substance of the research is concerned, the relative (non)existence and constant development of the law of PKOs and customary international law have brought some elements of uncertainty concerning the strength of the arguments made. The essence of any empirical research is,

[371] Interview 26
[372] Ibid., note 10.

however, to clarify and bring answers to the grey areas that a field of study may contain.

In its response to the final draft report of the OIOS evaluation of the effectiveness of human rights monitoring, reporting and follow-up in the United Nations multi-dimensional peacekeeping operations, the OHCHR stated in March 2019 that "the integration of human rights in peacekeeping operations has been successful and is one of the United Nations' best tools for preventing human rights violations in crisis and conflict contexts".[373] However, the evaluation did not cover operations where there are no specific human rights monitoring and reporting mechanism, such as MINURSO. This is precisely where this research can be valuable and further work should be done by the UN as well as the wider academic community in order to evaluate the broader implications of incorporating HRMC to PKOs deprived of one. Because this thesis was based on a single case study of the UN mission in Western Sahara, its findings cannot be generalised to the other PKOs without HRMC. Yet, it contributed to challenging the UN peacekeeping doctrine, which is based on the endorsement of the recommendations made in the 2000 Brahimi report and consequently equipped all the missions with HRMC since it was issued. In addition, the 2018 Draft Conclusions on the identification of customary international law provide, as mentioned, some further ground for work with regards to the emergence of a norm which would require the UN to systematically include a HRMC in the mandates of the PKOs it deploys. However, given the recent and ongoing debates around the capacity of international organisations to create custom independently from that of States, it cannot be established that this norm exists at the time of writing and should be the subject of further research in the future.

This research was never about whether human rights violations are indeed occurring in the territory of Western Sahara or the refugee camps in Algeria. Nor was it intended to ascertain the responsibility of either of the parties in the perpetration of human rights violations. It is clear, however, that the absence of a dedicated mechanism has affected and continues to affect the visibility of events on the ground, which might, in turn increase the committing of violations and impair the search for justice and accountability. Given the outlier nature of

[373] Ibid., note 161, p33.

MINURSO, the non-monitoring of human rights and the unfinished decolonisation process, the words of Reverend Dr Martin Luther King Jr speak volume in the debate around human rights protection and conflict resolution: “there can be no justice without peace, and there can be no peace without justice”. Even though they were spoken just under a decade before the war in Western Sahara began, they are more relevant than ever in future research conducted in the region.

LIST OF INTERVIEWEES

Number	Name	Date
1	**Senior member of MINURSO**	Declined on 19-May-19
2	**Aminatou Haidar**	24-Jun-19
3	**Marlene Spoerri (Independent Diplomat)**	11-Jul-19
4	**French representation to the UN**	11-Jul-19
5	**Janos Besenyo (former member of MINURSO)**	29-Jul-19
6	**Francesco Bastagli (former SRSG)**	13-Aug-19
7	**MINURSO Senior Official**	15-Aug-19
8	**Julian Harston (former SRSG)**	26-Aug-19
9	**US Mission to the UN**	Declined on 27-Aug-19
10	**Wolfgang Weisbrod-Weber (former SRSG)**	02-Sep-19
11	**Anna Theofilopoulou (Former advisor to Personal Envoy James Baker)**	10-Oct-19
12	**Michael O'Flaherty (academic)**	25-Aug-20
13	**Maima Abdeslam (POLISARIO representative to the UN in Geneva)**	09-Oct-20
14	**Kezia Mbabazi (OHCHR desk officer)**	19-Oct-20
15	**Human Rights Watch representative**	05-Jan-21
16	**Former Personal Envoy**	Declined on 08-Jan-21
17	**Kathlyn Thomas (former Legal Representative of the Identification Commission)**	09-Jan-21
18	**Senior member from Horst Koehler's team**	14-Jan-21
19	**CORCAS**	Declined on 4-Jan-21
20	**Red Cross**	Declined on 13-Jan-21
21	**Former UK representative to the UN in New York**	19-Jan-21
22	**Hurst Hannum (academic)**	22-Jan-21
23	**OXFAM representative**	25-Jan-21
24	**Phil Luther (Amnesty International)**	08-Feb
25	**Sidi Omar POLISARIO representative to the UN in New York**	16-Feb-21
26	**Mourad Arraghrib (Conseil national Marocain des droits de l'homme)**	22-Feb-21
27	**Former Deputy SRSG**	Declined on 04-Mar-21
28	**Christopher Ross (Former Personal Envoy)**	30-Apr-21
	Former MINURSO official	Contacted 4th January 2021
	AMDH	Contacted 5th January and 11th March 2021
	Former US ambassador to the UN in New York	Contacted 8th January 2021

No answer	**UK Mission to the UN**	Contacted 8th January 2021
	Spain mission to the UN	Contacted 8th January 2021
	Russia mission to the UN	Contacted 8th January 2021
	China mission to the UN	Contacted 8th January 2021
	Moroccan mission to the UN (morocco.un@maec.gov.ma)	Contacted 27th May 2019 and 11th January 2021

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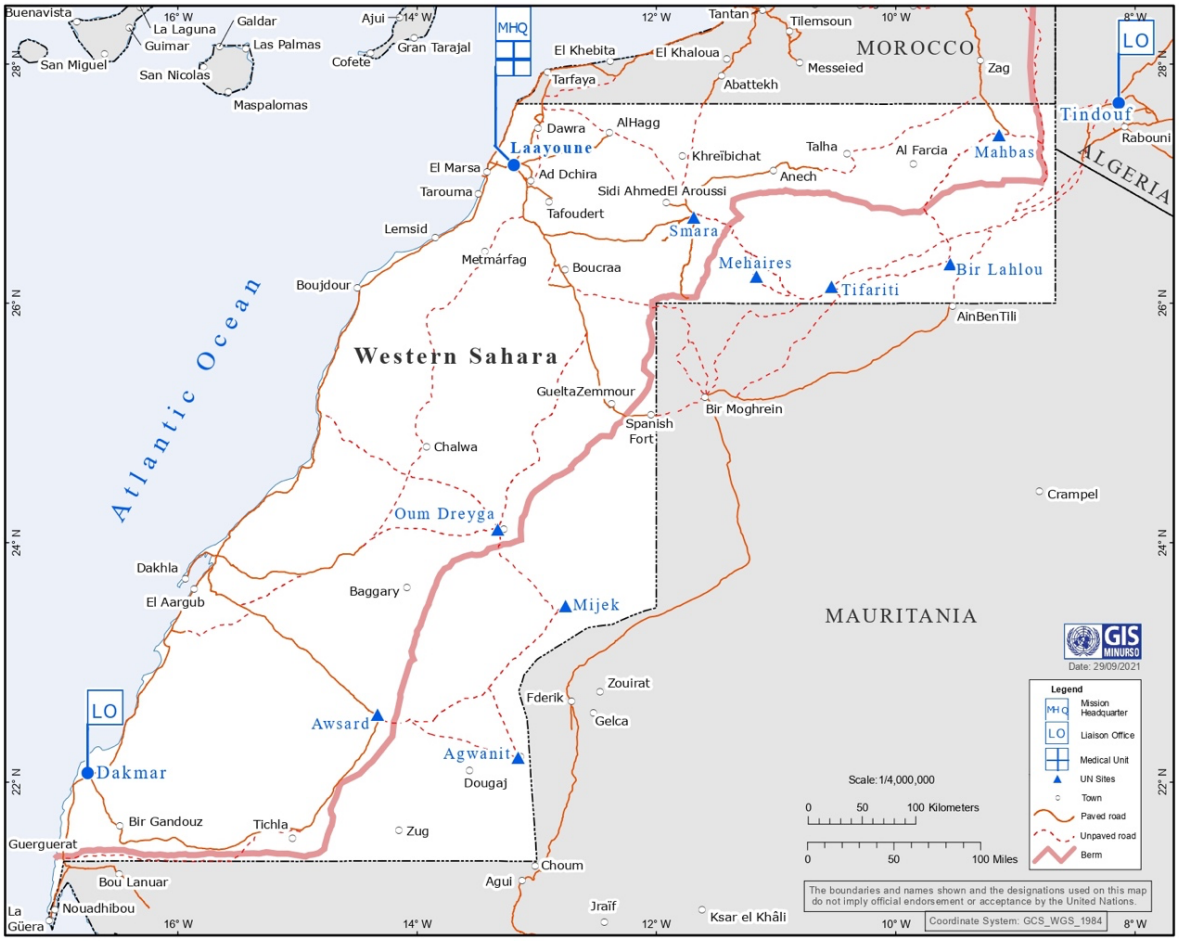
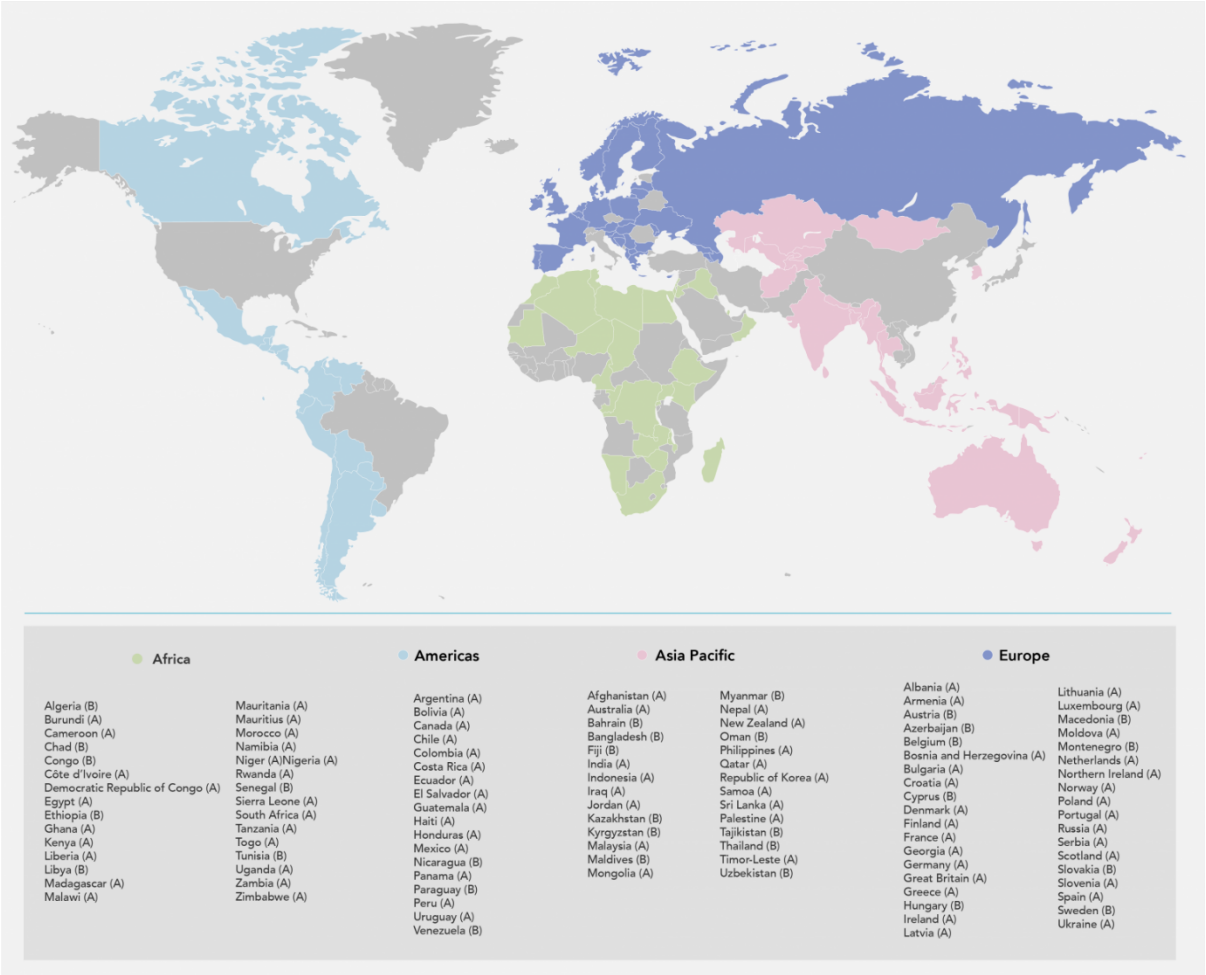
ANNEXES

I - MAPS

Map of Western Sahara from MINURSO's website



Map from the Global Alliance of National Human Rights Institutions:



II – List of interview questions

- What is your current position? What is/was your role with the context of the conflict in Western Sahara?
- How would you assess MINURSO's work since its creation?
- Would you say that the MINURSO mandate is or isn't lacking human rights protection prerogatives?
- When do you think the question of human rights has started to be raised?
- Why do you think there is none and why is it such a sensitive issue? Why is there such a reluctance to talk about human rights?
- Would you say that this has had an impact on the status of the conflict?

- What would be the best way to address human rights violations issues in the WS conflict?

- From what you have experienced, what could be improved within MINURSO in order for the operation to fulfil its mission if anything at all? What could lead to a breakthrough in the Security Council?

- How do you see the future of MINURSO? Would an exit plan be worth considering?

III – Ethic Form

Ref (for office use only)

201819-135

COLLEGE OF SOCIAL SCIENCES AND INTERNATIONAL STUDIES

All staff and students within SSIS should use this form; those in Egenis, the Institute for Arab and Islamic Studies, Law, Politics, the Strategy & Security Institute, and Sociology, Philosophy, Anthropology should return it to ssis-ethics@exeter.ac.uk. Staff and students in the **Graduate School of Education** should usessis-gseethics@exeter.ac.uk.

Before completing this form please read the Guidance document
which can be found at http://intranet.exeter.ac.uk/socialsciences/ethics/

Applicant details		
Name	**Meriem Naili**	
Department	**Politics**	
UoE email address	**Mn380@exeter.ac.uk**	
Duration for which permission is required		
Please check the meeting dates and decision information online before completing this form; your start date should be at least one month after the Committee meeting date at which your application will be considered. You should request approval for the entire period of your research activity. Students shoulduse the anticipated date of completion of their course as the end date of their work. Please note that retrospective ethical approval will never be given.		
Start date:01/06/2019	**End date:31/12/2021**	**Date submitted:17/04/2019**
Students only		
All students must discuss (face to face or via email) their research intentions with their supervisor/tutor prior to submitting an application for ethical approval. **Your application must be approved by your first or second supervisor (or dissertation supervisor/tutor) prior to submission and you MUST submit evidence of their approval with your application, e.g. a copy of an email stating their approval.**		
Student number	**680042937**	
Programme of study	**Doctor of Philosophy (PhD)**	
Name of Supervisor(s) or Dissertation Tutor	**Dr Irene Fernandez Molina & Dr Aurel Sari**	
Have you attended any ethics training that isavailable to students?	Yes, I have taken part in ethics training at the University of Exeter EG the Research Integrity Ethics and Governance: http://as.exeter.ac.uk/rdp/postgraduateresearchers OR Ethics training received on Masters courses. If yes, please specify and give the date of the training: **Presentation by Matt Lobley as part of the Qualitative Methods in Social Research Module.** 14/02/2019	
Certification for all submissions		

I hereby certify that I will abide by the details given in this application and that I undertake in my research to respect the dignity and privacy of those participating in this research. I confirm that if my research should change significantly I will seek advice, request approval of an amendment or complete a new ethics proposal. Any document translations used have been provided by a competent person with no significant changes to the original meaning.

Meriem Naili
Double click this box to confirm certification ☒
Submission of this ethics proposal form confirms your acceptance of the above.

TITLE OF YOUR PROJECT

Human Rights and International Conflict Irresolution: Challenging the UN Capstone Doctrine on Peacekeeping Operations through a study of the UN Mission for the Referendum in Western Sahara (MINURSO)

ETHICAL REVIEW BY AN EXTERNAL COMMITTEE

No, my research is not funded by, or doesn't use data from, either the NHS or Ministry of Defence.

If you selected yes from the list above you should apply for ethics approval from the appropriate organisation (the NHS Health Research Authority or the Ministry of Defence Research Ethics Committee). You do not need to complete this form, but you must inform the Ethics Secretary of your project and your submission to an external committee.

MENTAL CAPACITY ACT 2005

No, my project does not involve participants aged 16 or over who are unable to give informed consent (e.g. people with learning disabilities

If you selected yes from the list above you should apply for ethics approval from the NHS Health Research Authority. You do not need to complete this form, but you must inform the Ethics Secretary of your project and your submission to an external committee.

SYNOPSIS OF THE RESEARCH PROJECT

Maximum of 750 words.

In November 2018, the United Nations Security Council (UNSC) unanimously extended the mandate of the UN Mission for Referendum Western Sahara (MINURSO) for the 44th time since its creation in 1991 without any human rights monitoring and/or reporting prerogatives. This is the only UN modern (post-cold war) peacekeeping mission that does not include explicit observation and report of human rights violations, yet abuses have been committed by the two parties (Morocco and the Sahrawi liberation movement named as Polisario) according to reports from Amnesty International and Human Rights Watch, and the conflict remains unresolved since a cease-fire was agreed 28 years ago. Both the European and international justice systems have restated the legal status of Western Sahara as a non-self-governing territory provided by the UN in 1963. Yet, since Spain withdrew from its former colony in 1976, Morocco exercises control over 80% of the territory in contravention of the International Court of Justice (ICJ)'s advisory opinion of 1975, which did not find *"legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory" (para. 129, 162).*

The research project will examine the impact of the absence of human rights protection mechanisms in UN peacekeeping operations (PKOs) on the resolution of a corresponding conflict. Most UN peacekeeping missions are provided with these mechanisms and personnel on the ground are entitled and commanded to report any violations that they witness and/or investigate any violation claims that is brought to their attention. This approach is consistent with the UN Capstone Doctrine on Peacekeeping Operations of 2008, which establishes a theoretical and normative framework for PKOs, placing human rights protection and promotion at the heart of their deployment. However, MINURSO does not benefit from such prerogatives and Western Sahara is the only NSGT listed by the UN's Fourth Committee on Decolonization without an Administrating Power since Spain unilaterally declared withdrawing any "international responsibility" in 1976. Yet, it hasn't fulfilled its initial mission: organising a referendum forthe people of Western Sahara to express their right to self-determination as recognised by numerous UN resolutions as well as the International Court of Justice's opinion of 1975.

How does the presence or absence of human rights components in UN peace keeping missions impact the resolution of self-determination conflicts, with a particular focus on the case of Western Sahara? By answering this question, the research will investigate the existence of potential causal relationships between human rights and conflict resolution at the level of UN peace operations mandates adoption and implementation. It will assess the main assumption that human rights have to be incorporated and monitored during peace keeping missions in order to be successful and to draw conclusions on how to progress self-determination-based conflicts to a peaceful completion. The use of a case study as research method will justify the selection of Western Sahara as a deviant case.

The research will pursue two main objectives based on two different dimensions. By determining whether a connection exists between the absence of explicit human rights prerogatives in MINURSO and the irresolution of the conflict through an UN-supervised referendum on the future of the territory, I will be able to provide empirical evidence of the role of human rights monitoring mechanisms in peacekeeping operations in order to be successful. Once the nature of the connection is identified, the research will further evaluate the normative aspect of the relationship by discussing two alternative options: amending or reinterpreting the mandate by exploring the possibility that the researched human rights protection mechanisms are inherent in the terms of the 1991 Settlement Plan, which constitutes the basis of the MINURSO mandate. In the latter case, no amendment of the mandate would therefore be required. Consequently, the objectives of the research project are:

1. To better understand the connection between human rights, UN peacekeeping operations and conflict resolution and the extent to which the case of Western Sahara has differed from other cases (empirical dimension);
2. To consider a legal basis for including human rights in the process, and explore the potential of human rights norms in strengthening peacekeeping deployment and offer a new perspective on conflict resolution (normative dimension)

INTERNATIONAL RESEARCH

The 40 or so semi-structured interviews for which I am seeking the SSIS Ethics Committee's approval by the present application will primarily target diplomats/officials and NGO workers who have been involved in some capacity in either the UN handling of the Western Sahara conflict, the drafting or adoption of UN Security Council resolutions on this matter pre and post 1991 for the former; or in the monitoring and reporting of human rights violations in Western Sahara and the Sahrawi refugee camps in Algeria. The NGOs staff will be selected based on the work carried out by their organization in relation to Western Sahara (mainly Human Rights Watch and Amnesty International) as well as their interest and direct implication in the conflict as far as the Moroccan and Sahrawi organizations are concerned. All face-to-face interviewees will be based in the USA (New York and Washington DC) and Europe (UK, Hungary and Switzerland). Complementary Skype/phone interviews may be arranged to facilitate their participation.

The research ethical practices followed in the USA and Switzerland do not significantly differ from those in the UK. The interviews will be all conducted by myself. No locally employed research assistants or other staff will be involved. As far as the UN staff is concerned, the UN Ethics Office has advised me that Staff Rule 1.2(t), Staff Rules and Staff Regulations of the United Nations regulates the participation of UN staff members in outside activities, regarding which they shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that does not relate to the purpose, activities or interests of the United Nations. This will be brought to their attention prior to confirming the interview.
In order to ensure my own safety as a researcher during this fieldwork, I will check and comply with the Foreign and Commonwealth Office (FCO)'s travel guidance for the United States of America, Hungary and Switzerland, where visits are currently described as "trouble-free". I will also take out the University Travel Insurance for any travel involved as part of my research.

The following sections require an assessment of possible ethical consideration in your research project. If particular sections do not seem relevant to your project please indicate this and clarify why.

RESEARCH METHODS

Given the dual-dimensionality of the research project, a multi-methods approach will be adopted:

- Empirical dimension
- Normative dimension

- In order to answer the research question, I will require empirical evidence of a potential causal relationships between human rights implementation and conflict resolution at the level of UN peace operations deployment. Consequently, **text and discourse analysis** through a qualitative analysis of the human rights discourse - considered to be central to the organisation- used in resolutions, reports, meeting minutes and other official UN documentation, will be conducted in order to evaluate the importance givento them in the resolution process of the conflict in Western Sahara through an UN-led referendum on thestatus of the territory. This would help understand how the human rights aspect comes into play in the UNapproach to peacekeeping in this particular case (if at all). Additionally, this method will be applied to thehuman rights narrative of both parties in the conflict in order to understand to what extent it is used as a negotiation tool potentially contributing to status quo/irresolution of the conflict. The existence of a possible correlation will require a qualitative analysis of:
  - The nature of the human rights at stake in this particular mission; using the right to access naturalresources as an example;
  - The human rights related issues in the leading up to the creation of MINURSO and other more successfulmissions (Namibia and East Timor);
- The human rights related issues in the negotiations process post-MINURSO creation;
- The perception of conflict resolution prospects amongst all parties/media.

Additionally**, semi-structured interviews** will be conducted with individuals involved (or, to the extent possible, previously involved) at the UN Security Council or MINURSO level in the drafting of the mandate's renewal and its implementation as well as representatives from international, Moroccan and Sahrawi organisations dealing with human rights questions. The former will be interrogated on what they see as the reasons behind the use or non-use of human rights narrative and the latter will be asked about the impact that their work has had on the actual monitoring of the situation on the ground regarding human rights violations and the impact on the negotiation process. The interviews will help to better understand the rationale behind the use of human rights questions in particular contexts identified through the qualitative analysis of primary sources (UN resolutions, official statements, meeting reports, NGOs reports and other related documents as mentioned above). The text and discourse analysis will allow me to detect the presence of human rights related questions in the MINURSO narrative, while the semi-structured interviews will help identify their role.

- In order to explore the potential strengthening of UN peacekeeping deployments through a re-writingof the mandate or its re-interpretation, I will apply a **doctrinal legal research methodology** using the primary sources of international law: treaties; international customs; general principles of law as recognized by civilised nations; the latest jurisprudence and scholarly writing. The idea that the most powerful obligations toward human rights monitoring are those of an *erga omnes* duty of the UN (obligations owed towards the community of States as a whole) and that States are to support non-self- governing peoples to attain self-determination (coupled, in Western Sahara, with specific commitments of the UN under the defining 1990 and 1991 SC resolutions to deliver on self-determination), has never been explored at an academic level.

The difficulty behind the interview exercise is to ascertain who is eligible to participate given the confidential nature of certain parts of UN negotiation and diplomatic processes. Interviewees will be selected on the following criteria:

- National diplomats and UNSC members of staff involved in some capacity in the drafting of the MINURSO mandate covering any aspects (voters identification, cease-fire, human rights, budget etc);
- Member staff from international as well as Moroccan and Sahrawi human rights organisations tasked with the investigation of human rights violations reporting in the territory under Moroccancontrol as well as the refugee camps in Algeria;
- Other interested parties: academics, journalists, activists who have explored, to some capacity, the questions raised by the absence of protection mechanisms in the MINURSO mandate.

They will be invited (by email) to take part in a semi-structured interview of a maximum duration of 2 hours.

Being a member of the Western Sahara Campaign UK Committee and the International Academic Observatory for Western Sahara Steering Committee, I may witness both positive and negative impacts on access to interviewees as well as their attitudes towards the research project and myself. The former is an independent non-governmental organization which works towards generating public and political support in the UK and Europe in order to advance the right to self-determination and promote human rights in the conflict. The latter aims to produce and exchange academic knowledge about the historical, social, economic and political dynamics of the region of the Western Sahara. These two organisations are generally perceived to be "pro" Sahrawi as they intend to advance the expression of the right to self-determination which is the official position of the Sahrawi representatives. Even though my views are in line with this approach, the questions being asked during the interviews will remain neutral and designed to only generate honest answers from all respondents. The study may involve discussion of sensitive topics to a certain extent, as enquiring about human rights violations (particularly given the fact that their very existence is being questioned and/or denied by both parties) can be perceived as taking sides. Consequently, respondents might be reluctant to answer to the full of their knowledge or become hostile. This is not expected to be in such extent that the interview will cause psychological stress or anxiety to the participants or myself.

PARTICIPANTS

The participants in the semi-structured interviews (expecting around 30-40) will include:

- National diplomats and UNSC members of staff involved in some capacity in the drafting of the MINURSO mandate covering any aspects (voters identification, cease-fire, human rights, budget etc);
- Member staff from international as well as Moroccan and Sahrawi human rights organisations tasked with the investigation of human rights violations reporting in the territory under Moroccan control as well as the refugee camps in Algeria;
- Other interested parties: academics, journalists, who have explored, to some capacity, the questions raised by the absence of protection mechanisms in the MINURSO mandate.

No financial inducements will be offered to participants. Some participants may be displaying communication difficulties using the English language therefore interviews will be conducted in either English, French or Spanish for which I do not need interpretation for.

THE VOLUNTARY NATURE OF PARTICIPATION

Participants will be recruited through my making direct contact with them by email or phone, starting from my professional and academic network that includes high rank UN officials (and former) and academics as well as members of their own networks (snowball sampling method). Participants will be offered the opportunity to provide written consent in the first instance (see consent form below). If they prefer not to do this, verbal consent to participate will be obtained based on my explaining of the nature of the project and that all participation will be recorded, confidential and anonymous unless they explicitly agree to be quoted, which will be offered to them. I will make clear they have the right to withdraw from the research at any time. No children, potentially vulnerable adults or persons engaged in potentially illegal activities will be involved. When participants wish to remain anonymous, I will not refer to them by the name of their organisation, ~~and not~~ their position or whether they are currently or formerly part of that organisation (~~unless this makes them identifiable, in which case I will only mention the name of the organisation~~). I will refer to their field of expertise (humanitarian, politician, lawyer etc) when relevant to the point made in the research and this will be explained to them before conducting the interview. I do not anticipate participants to remain anonymous but if this was to be the case, anonymity and absence of reference of their organisation should not have any deleterious effect on the research.

I do not foresee that interview participants, who will be mostly diplomats and international organisation officials, will indicate they have carried out any activity that may be illegal or involve abuse of or harm to others. In such unlikely scenario, I would seek advice from the legal services of the University of Exeter about the legal regime applicable and the steps to follow to inform the relevant authorities.

SPECIAL ARRANGEMENTS

No need for special arrangements.

THE INFORMED NATURE OF PARTICIPATION

Participants will be offered the opportunity to provide written consent in the first instance (see consent form below). If they opt for a verbal consent process, verbal consent to participate will be obtained based on my explaining of the nature of the project with the support of an information sheet (see below).

Participants will be asked to specifically confirm that:

(1) There is no compulsion for them to participate in this research project and, if they do choose to participate, they may withdraw at any stage prior to pseudonymization and publication, dates ofwhich they will be informed in advance;
(2) They have the right to refuse permission for the publication of any information about them;
(3) Any information which they give will be used solely for the purposes of this academic researchproject, which may include publications or academic conference or seminar presentations;
(4) The information they give may be shared with any of the other researchers participating in thisproject in an anonymised form if requested;
(5) All information they give will be treated as confidential; the researcher(s) will make every effortto preserve their anonymity unless they explicitly agree to be quoted.

ASSESSMENT OF POSSIBLE HARM

No physical, psychological, legal or economic harm to participants will result from our interviews. There could be some political harm only if confidential information from the interview was shared or if their anonymity were compromised without consent, which will be made clear to them.

To note, after having contacted the Ethics office of the United Nations, I have been advised that Staff Rule 1.2(t), Staff Rules and Staff Regulations of the organisation regulates the participation of UN staff membersin outside activities, regarding which they shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that do not relate to the purpose, activities or interests of the United Nations. This will be brought to the relevant UN participants accordingly.
All interviews will take place in the premises of the institutions for which the interviewees work or a public space, such as cafés, libraries or hotel lobbies. I will check in with my secondary supervisor Dr Aurel Sari (my primary supervisor scheduled to be on maternity leave from May 2019 to January 2020) before every interview and check out once the interview is complete. He will then escalate to the university if I happen to not report to him and remain missing.

DATA PROTECTION AND STORAGE

Anonymity will be used by default and participants will only be potentially identifiable if there is a wish and justification. Their anonymity will be ensured by not noting names or titles on our interview notes, keeping a separate list of names and contact information and using a numeric key to identify participants (participant 1, participant 2 etc.) which will be identifiable only to the researcher. The interview audio files, transcripts or notes will be uploaded at the earliest opportunity to the University of Exeter U: drive, i.e. the University's central fileserver, which is regularly backed-up centrally by the University. Audio files will be removed from the sound recording device after being transferred to the same U: drive. In the meantime, they will be stored on a password protected laptop upon my return to the university premises after the interviews take place. Recordings will be stored for double-checking purposes until the submission of the PhD dissertation. The written material and interview transcripts/notes will be retained at the end of the project and may be shared and continue to be drawn upon in future academic research or publications related to this project. Access to all of these data will be protected by a password known only to me. The research data will be retained for a period of 5 years after completion of the project in accordance with GDPR regulation.

DECLARATION OF INTERESTS

I am a self-funded PhD student and have no conflicts of interests to declare. I am a member of the Western Sahara Campaign UK Committee and the International Academic Observatory for Western Sahara Steering Committee, two independent organisations, however intending to advance the expression of the right to self-determination of the Sahrawi people.

USER ENGAGEMENT AND FEE DBACK

Participants will not be given the opportunity to review their own transcripts and feedback their thoughts on published work unless explicitly requested by them. They will however be informed of the outcome of the study.

INFORMATION SHEET

Title of Research Project

Human Rights and International Conflict Irresolution: Challenging the UN Capstone Doctrine on Peacekeeping Operations through a study of the UN Mission for the Referendum in Western Sahara (MINURSO)

Details of Project

This interview is part of a research project that aims to understanding the impacts (if any) of the absence of human rights monitoring mechanisms in the mandate of the UN Mission for the Referendum in Western Sahara on the resolution of the 43 year-old conflict and the holding of the planned UN-led referendum. It is based on the assumption that human rights have to be incorporated and monitored during peace keeping missions in order to be successful and to draw conclusions on how to progress self-determination-based conflicts to a peaceful completion. This study provides a new angle to approach the *erga omnes* duty of the UN (obligations owed towards the community of States as a whole) to protect human rights and implement resolutions in light of the 2008 so-called Capstone Doctrine on peace operations and pave the way for a renewed outlook on human rights and conflict resolution in peace operations deployment.

The project will aim to provide an empirical basis for the relevance of incorporating explicit human rights monitoring mechanisms in any peace keeping mission mandated by the UN Security Council and to evaluate on a normative level whether a re-drafting or re-interpreting of the mandate is deemed appropriate. This will be achieved through a multi-methods approach which include interviews with national diplomats and UNSC members of staff involved in some capacity in the drafting of the MINURSO mandate; member staff from international as well as Moroccan and Sahrawi human rights organisations and any other interested parties who have explored, to some capacity, the questions raised by the absence of protection mechanisms in the MINURSO mandate.

Script for the Verbal Consent Process

As an interview participant, you will be offered the opportunity to provide written consent in the first instance. If you opt for a verbal consent process, you will be asked to specifically confirm that:

- You are voluntarily accepting to participate in this research project and may withdraw at any stage; prior to pseudonymization and publication, dates of which you will be informed in advance;
- You have the right to refuse permission for the publication of any information about you;
- Any information which you give will be used solely for the purposes of this academic research project; specific identifying information will never be revealed without your consent;
- If the information you give is shared with any other researcher participating in the project, it will be always anonymised;
- All information you give will be treated as confidential; the researcher(s) will make every effort to preserve your anonymity unless you agree to be quoted.

For UN Staff participants

You understand that Staff Rule 1.2(t), Staff Rules and Staff Regulations of the organisation regulates the participation of UN staff members in outside activities, regarding which you shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any outside activities that do not relate to the purpose, activities or interests of the United Nations.

Contact Details

For further information about the research and interview data, please contact:Meriem Naili
Department of Politics, University of Exeter
Amory Building, Rennes Drive, Streatham
CampusExeter EX4 4RJ United Kingdom
mn380@exeter.ac.uk

CONSENT FORM

Title of Project:

Name of Researcher:

Participant Identification Number:

I have been fully informed about the aims and purposes of the

project.I understand that:

- There is no compulsion for me to participate in this research project and, if I do choose to participate, I may withdraw at any stage prior to pseudonymization and publication, dates of which I will be informed in advance by the researcher;
- I have the right to refuse permission for the publication of any information about me;
- Any information which I give will be used solely for the purposes of this academic research project, whichmay include publications or academic conference or seminar presentations; specific identifying information will never be revealed without my consent;
- If applicable, the information, which I give, may be shared between any of the other researcher(s) participating in this project in an anonymised form;
- All information I give will be treated as confidential; the researcher(s) will make every effort to preservemy anonymity unless I agree to be quoted;

Please select:

(iii) I wish to be identified throughout the research as well as the final publication;

(iv) I prefer to remain anonymous and my participation will be pseudonymised.

Data Protection Notice

The information you provide will only be used for academic research purposes and your personal data willbe processed in accordance with the General Data Protection Regulation (GDPR) and the University of Exeter's notification lodged at the Information Commissioner's Office. Your personal data will be treated in the strictest confidence and will not be disclosed to any unauthorised third parties. The results of the research will be published in anonymised form unless you prefer otherwise. Interviews will be recorded only if you give your verbal consent. The interview notes/transcripts will be typed up and the material willbe uploaded to the University of Exeter U: drive. Recordings will be stored for double-checking purposes until the submission of dissertation that will be the final outputs of the project. The written material and interview notes/transcripts will be retained at the end of the project and may continue to be drawn uponin future academic research.

Name of Participant	Date	Signature
Name of researcher	Date	Signature

SUBMISSION PROCEDURE

Staff and students should follow the procedure below.

Post Graduate Taught Students (Graduate School of Education): Please submit your completed applicationto your first supervisor.

All other students should discuss their application with their supervisor(s) / dissertation tutor / tutor and gain their approval prior to submission. Students should submit evidence of approval with their application,e.g. a copy of the supervisors email approval.

All staff should submit their application to the appropriate email address below.

This application form and examples of your consent form, information sheet and translations of any documents which are not written in English should be submitted by email to the SSIS Ethics Secretary viaone of the following email addresses:

ssis-ethics@exeter.ac.uk This email should be used by staff and students in Egenis, the Institute for Araband Islamic Studies, Law, Politics, the Strategy & Security Institute, and Sociology, Philosophy, Anthropology.

ssis-gseethics@exeter.ac.uk This email should be used by staff and students in the Graduate School ofEducation.

Please note that applicants will be required to submit a new application if ethics approval has not beengranted within 1 year of first submission.