

INTERNATIONAL HUMAN RIGHTS IN THE TINDOUF REFUGEE CAMPS

Who is responsible for the international human rights of
Sahrawi people living in the Tindouf refugee camps?

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Table of Abbreviations

1951 Convention	1951 Convention relating to the Status of refugees
African Charter	African Charter on Human and People's Rights
ARIO	Draft articles on the Responsibility of International Organizations, International Law Commission, 2011
AU	African Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICJ	International Court of Justice
IGO	International intergovernmental organisation
IHRL	International human rights law
MINURSO	UN Mission for the Referendum in Western Sahara
NGO	Non-governmental organisation
NSA	Non-State actor
Polisario	Frente popular para la Liberacion de Saguia el-Hamra y del Rio de Oro [Popular Front for the Liberation of Saguia el Hamra and Rio de Oro]
SADR	Sahrawi Arab Democratic Republic
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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1. INTRODUCTION

47 years ago, the Sahrawi people seeking refuge from the conflict in Western Sahara fled to Algeria and started living in camps in the area of Tindouf. Despite the prolonged existence of this conflict and the severe humanitarian conditions in the camps, the situation is largely unknown to the global community.¹ In theory, that is not supposed to change the fact that Sahrawi refugees should enjoy certain universal human rights that should be protected at all times.² Nevertheless, there have been many allegations of human rights abuses in the refugee camps. This includes violations of the prohibition of torture, extrajudicial killings of political prisoners and the violation of the right to self-determination of the Sahrawi people, all with impunity.³

Who then should one turn to when seeking protection from such violations? Traditionally, one would simply point to the State on which territory one is situated when looking for the responsible actor. This approach is what is referred to as the State-centric approach to international human rights law.⁴ While this may seem logical at first sight, this assessment changes when taking a closer look at the situation in practice. This is due to the fact that not every territory or every person clearly and uncontestedly pertains to one State or another. Furthermore, States are far from the only entities that can influence the human rights enjoyed by a certain population. Both of these critiques can be observed in the case of the Sahrawi refugees. Thus, this paper aims at looking beyond the standard approach to human rights obligations and it will seek to answer: Who is responsible for the international human rights of Sahrawi people living in the Tindouf refugee camps?

In order to answer this question, this paper looks at the main legal instruments of the international human rights system. It relies on their interpretation by the International Court of Justice and various United Nations (UN) actors to see how they apply to the case at hand. Furthermore, a literature review of current doctrine surrounding the place of non-State actors in the international human rights system is conducted. Additionally, for necessary facts about the situation on the ground, UN and human rights observers' documentation is drawn upon, as well as the extensive ethnological research in the Tindouf camps by Alice Wilson.⁵

¹ African Union (Peace and Security Council) 'Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues' (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), para 29.

² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Art. 2; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention).

³ Stephen Zunes and Jacob Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution* (Syracuse University Press 2010), p. 118; Eric Goldstein, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps: A Commentary' (2010) 43 *Belgian Review of International Law* 30, p. 30; Alice Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs* (The Ethnography of Political Violence, University of Pennsylvania Press 2016), p. 11.

⁴ Frederic Megret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3 edn, Oxford University Press 2018), p. 88f.

⁵ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*.

Thus, section 2 firstly provides an introduction to the context of the case study, explaining what the Western Sahara conflict is about and which actors are involved in it. Secondly, the relevant legal framework is discussed in section 3. There, it can be seen which actors are commonly bearing human rights obligations and what contemporary approaches there are to adapting this system to fill certain lacunae in the human rights system as it stands. Section 4 then applies this framework to the case of Sahrawi refugees in Algeria and constitutes the main answer to the research question posed above. Lastly, section 5 will provide a discussion on ‘who *should* be responsible for the human rights of Sahrawi refugees’, what changes would need to be made in order to fulfil the promise of human rights being afforded to all humans alike?

As can be seen in the above outline, this paper aims at going beyond the State-centric approach to human rights law and will also consider the possibility of imposing human rights obligations on non-State actors, generally seen as a ‘pressing challenge’ for the international human rights regime.⁶ Furthermore, while Sahrawi people elsewhere also suffer from an uncertain human rights situation, the focus will lie on Sahrawi refugees in Algeria, as human rights of migrants are often the most vulnerable ones and the question of who is responsible for them frequently unclear.⁷

2. THE WESTERN SAHARA CONFLICT

Before looking at the conflict lying at the root of the existence of the Tindouf camps, it should be noted that, as is common for situations of competing territorial claims, it is virtually impossible to describe such situations in terminology perceived as neutral by everyone involved. This paper does not aim at picking a side in this conflict but simply at analysing the legal responsibility for the human rights situation in the Tindouf camps, from an international law perspective. To this end, it will largely rely on the facts and findings found in reports by international organizations, most importantly the UN and the African Union (AU).

2.1 Historical Background

The territory now referred to as Western Sahara was historically inhabited by nomadic tribes, represented by a multitude of different local leaders with no clearly defined governing entity.⁸ It then became a Spanish colony in 1884 and was later declared to constitute a ‘non-self-governing territory’ in accordance with the *UN General Assembly Resolution 1514(XV) of 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples* in 1963.⁹

⁶ Philip G. jurist Alston, *Non-state actors and human rights* (Oxford University Press 2005), p. 36.

⁷ Ayten Gündoğdu, *Rightlessness in an age of rights : Hannah Arendt and the contemporary struggles of migrants* (Oxford University Press 2015), p. 10.

⁸ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 1975, p. 12, paras 87 & 162.

⁹ UNGA Res 1514 (XV) ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (14 December 1960) UN Doc A/RES/1514(XV); *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 1975, p. 12, para 77; African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) ‘Legal Opinion on the Legality of the Context of International Law, Including the Relevant United Nations Resolutions and OAU/AU Decisions, of Actions allegedly taken by the Moroccan Authorities or any other State, Group of States, Foreign Companies or any other entity in the Exploration and/or Exploitation of

This categorisation meant that the people of that territory, the Sahrawi people,¹⁰ were deemed to have a right to self-determination.¹¹ This right can also be found in the UN Charter¹² and is reiterated for instance in the *International Covenant on Civil and Political Rights* (ICCPR), which states that ‘[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.¹³ In the case of Western Sahara, this right was held to ‘require a free and genuine expression of the will of the peoples concerned’,¹⁴ meaning that the realisation of this right required a referendum amongst the population of the territory. Thus, in accordance with paragraph 5 of the UN resolution 1514, the colonial and administering power Spain was asked to arrange this referendum.¹⁵ This request was met by claims by both Morocco and Mauritania, alleging that Western Sahara should form part of their territories. Their claims were based on alleged ties with the Western Sahara territory before Spanish colonialization. The International Court of Justice (ICJ) in an Advisory Opinion however rejected the existence of any such ties and also stated that any potential links between the countries and the Western Sahara tribes should not have any effect on the decolonization and self-determination process of the territory.¹⁶ Nevertheless, soon after, Morocco occupied the territory,¹⁷ not only contrary to the ICJ’s Advisory Opinion, but also contrary to the *UN Security Council Resolution 379 (1975)*. The latter had called upon Morocco to refrain from marching into Western Sahara.¹⁸ Following a tripartite agreement with Morocco and Mauritania, Spain withdrew from the territory without having implemented the referendum on the Sahrawi people’s right to self-determination.¹⁹ Spain’s withdrawal was immediately followed by two incidents. Firstly, the ‘Green March’, a

Renewable and Non-renewable Natural Resources or any other Economic Activity in Western Sahara’ (AU 2015) [Legal Opinion] <<https://au.int/en/newsevents/13174/legal-opinion-legality-context-international-law-actions-allegedly-taken>> accessed 29 June 2019, para 7; UN, ‘The United Nations and Decolonization: Non-Self-Governing Territories’ [Website] <<http://www.un.org/en/decolonization/nonselvgovterritories.shtml>> accessed 29 June 2019.

¹⁰ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 16.

¹¹ African Union (Peace and Security Council) ‘Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues’ (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), paras 3-4; UNGA Res 1514 (XV) ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (14 December 1960) UN Doc A/RES/1514(XV), para 4.

¹² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 1(2); see also: Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (African Charter), Art. 20(1).

¹³ ICCPR, Art. 1(1).

¹⁴ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 1975, p. 12, para 70.

¹⁵ African Union (Peace and Security Council) ‘Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues’ (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), para 3-4.

¹⁶ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 1975, p. 12, para 162.

¹⁷ African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) ‘Legal Opinion’, para 9.

¹⁸ UNSC Res 379 (2 November 1975) <<http://unsr.com/en/resolutions/doc/379>> accessed 29 June 2019

¹⁹ African Union (African Commission on Human & People’s Rights) ‘Report of the Fact-Finding Mission to the Sahrawi Arab Democratic Republic’ (AU Banjul 2012) <http://www.achpr.org/files/sessions/12th-ec/mission-reports/promotion_mission-2012/mission_report_sahrawi_cpta_eng.pdf.pdf> accessed 29 June 2019, para 7; African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) ‘Legal Opinion’, para 11.

Moroccan initiative of sending around 300,000 Moroccan civilians, accompanied by armed military, into the Western Saharan territory.²⁰ Secondly, the proclamation of the independent *Sahrawi Arab Democratic Republic* (SADR) by the Western Sahara liberation movement Polisario (see section 2.4).²¹ This proclamation was succeeded by 16 years of armed struggle over that territory between Morocco and Polisario²² and a migration movement of thousands of people fleeing from the Moroccan-occupied territory to Algeria (see section 2.3).²³ Initially, Mauritanian armed forces were fighting alongside Morocco, but decided to withdraw in 1979 and subsequently recognized the SADR as a legitimate, sovereign State.²⁴ The SADR also enjoys recognition as a State from various other countries and perhaps most importantly, from the AU, of which it is also a member.²⁵

2.2 Western Sahara: A Divided Territory

To this day however, Western Sahara is divided into an Eastern part under control by Polisario, and a Western part under Moroccan control, the latter encompassing 80% of the territory and most of its natural resources.²⁶ These two spheres are separated by the ‘longest man-made wall ever built since the Chinese wall’, referred to as the ‘berm’ (see figure 1).²⁷

Despite the UN’s periodic reiteration of the right to self-determination of the people of Western



Figure 1: Map of the Western Sahara Area

²⁰ African Union (African Commission on Human & People’s Rights) ‘Report of the Fact-Finding Mission to the Sahrawi Arab Democratic Republic’ (AU Banjul 2012) <http://www.achpr.org/files/sessions/12th-ao/mission-reports/promotion_mission-2012/mission_report_sahrawi_cpta_eng.pdf.pdf> accessed 29 June 2019, para 10.

²¹ African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) ‘Legal Opinion’ paras 10-11.

²² African Union (Peace and Security Council) ‘Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues’ (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), para 4.

²³ Alice Wilson, ‘“For Us, Parliament Is a Tool for Liberation”: Elections as an Opportunity for a Transterritorial Sahrawi Population’, *Global, Regional and Local Dimensions of Western Sahara’s Protracted Decolonization* (Palgrave Macmillan US : New York 2017), p. 314.

²⁴ African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) ‘Legal Opinion’, para 13.

²⁵ African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) ‘Legal Opinion’, para 15.

²⁶ Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. xxii; African Union (African Commission on Human & People’s Rights) ‘Report of the Fact-Finding Mission to the Sahrawi Arab Democratic Republic’ (AU Banjul 2012) <http://www.achpr.org/files/sessions/12th-ao/mission-reports/promotion_mission-2012/mission_report_sahrawi_cpta_eng.pdf.pdf> accessed 29 June 2019, para 8.

²⁷ UNSC ‘Situation concerning Western Sahara – Report of the Secretary-General’ (2019) UN Doc S/2019/282, Annex II; Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 19 Enrico Milano, *Unlawful territorial situations in international law : reconciling effectiveness, legality, and legitimacy* (Martinus Nijhoff Publishers 2006), p. 172.

Sahara, there has been no referendum on this as of 2019.²⁸ According to many observers, the situation is unlikely to change any time soon since neither Polisario nor Morocco are likely to agree to any voter lists put forward by the opposite party. For example, due to Morocco's policy of encouraging Moroccan citizens to settle in the Western Saharan territory under its control, Moroccan settlers there are now said to outnumber indigenous Sahrawi people.²⁹

2.3 The Tindouf Camps

The Sahrawi people seeking refuge from the conflict in Western Sahara found shelter just across the Algerian border in several refugee camps around the city and military base of Tindouf and live there to this day (see figure 1). While they have not been registered by Algerian authorities, they have been recognised as refugees by UNHCR, which is why this term will be used in this paper.³⁰ The population of the camps is estimated at around 200,000 Sahrawi people and it depends almost exclusively on humanitarian aid.³¹ Due to a 'chronic lack of funding', malnutrition as well as inadequate access to water, sanitation, education and other essentials are common.³² From the Moroccan side, the camps have been framed as 'prison camps', alleging that Polisario and Algeria hold people there against their will. Supporters of Polisario on the other hand, describe the camps as a 'viable self-contained nation-state in exile'.³³ While no UN or international human rights institutions has so far supported the claim of Polisario holding the camps' population hostage, the limited information about the human rights situation in the camps has been criticised as opening up possibilities of abuse and lack of accountability.³⁴

2.4 Polisario

The main actor fighting for the Sahrawi's right to independence is the liberation movement *Frente popular para la Liberacion de Saguia el-Hamra y del Rio de Oro* (Polisario). This movement is primarily based in the refugee camps and may be compared to a political party, the only party allowed in the SADR.³⁵ While Polisario is not the same as the SADR government, their functions are closely intertwined and the two entities are often hard to

²⁸ African Union (Peace and Security Council) 'Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues' (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), paras 3-4.

²⁹ Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. xxi

³⁰ UNSC Resolution 2285 (2016), p. 2; UNSC Report of the SG on the situation concerning Western Sahara S/2017/307, p. 11; Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, (2014), p. 20.

³¹ Michael Bhatia, 'The Western Sahara under polisario control' (2001) 28 *Review of African Political Economy* 291, p. 291; African Union (Peace and Security Council) 'Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues' (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), para 6.

³² UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2017) UN Doc S/2017/307, p. 11 & 16.

³³ Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. 112 & 114

³⁴ *Ibid*, p. 2; UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2018) UN Doc S/2018/277, para 66.

³⁵ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 2.

differentiate.³⁶ Nevertheless, according to SADR reports to the *African Commission on Human and Peoples' Rights*, the actor representing its interests in the conflict with Morocco is Polisario.³⁷ Apart from seeking to establish State power in the territories controlled by Morocco, Polisario is also considered the 'de facto authority' in the Tindouf camps,³⁸ based on its almost exclusive control over and administration of the camps ever since their establishment.³⁹ It is this party is addressed in calls for improvements of the human rights situation in the camps and who is considered the main cooperation partner on the side of the Sahrawi people by UN and AU institutions.⁴⁰

It is in the context described above in which the human rights situation of the Sahrawi refugees in the camps situated in Algeria will be analysed in this paper.

3. LEGAL FRAMEWORK: HUMAN RIGHTS OF REFUGEES

In order to determine who is responsible for the protection of human rights of the refugees living in Tindouf, it is important to first understand the general structure of the international legal protection system applying to them. This will thus be laid out in the following section by first looking at the relevant fields of law, the traditional approach to human rights obligations and, lastly, the contemporary discussions on adapting and extending this approach to non-State actors.

3.1 Applicable law

As a starting point it is important to recall that international human rights law (IHRL) is part of international public law.⁴¹ The main instruments are the *Universal Declaration of Human Rights* (UDHR), the ICCPR and the *International Covenant of Economic, Social and Cultural Rights* (ICESCR), which together form the international bill of human rights.⁴² With certain

³⁶Ibid, p. 2 Wilson, "For Us, Parliament Is a Tool for Liberation": Elections as an Opportunity for a Transterritorial Sahrawi Population', p. 320; The Constitution of the Sahrawi Arab Democratic Republic (adopted by the 14th Congress of the Frente POLISARIO, 16-20 December 2015), Art. 32; Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. 117.

³⁷ African Union (African Commission on Human & People's Rights) 'Periodic report of SADR to African Commission on Human and Peoples' Rights' (2011) <http://www.achpr.org/files/sessions/55th/state-reports/2nd-2002-2012/periodic_report_sahrawi_eng.pdf> accessed 29 June 2019, para 17.

³⁸ Goldstein, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps: A Commentary', p. 32; Bhatia, 'The Western Sahara under polisario control', p. 291.

³⁹ Miguel G. Guindo and Alberto Bueno, 'The Role of Sahrawis and the Polisario Front in Maghreb-Sahel Regional Security', *Global, Regional and Local Dimensions of Western Sahara's Protracted Decolonization: When a Conflict Gets Old* (New York: Palgrave Macmillan US: Palgrave Macmillan 2017), p. 169 & 177.

⁴⁰ African Union (Peace and Security Council) 'Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues' (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), para 7; UNSC Res 690 (29 April 1991) UN Doc S/RES/690; UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2018) UN Doc S/2018/277, para 17-20; Maja Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility* (Martinus Nijhoff Publishers 2014), p. 221; Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 5.

⁴¹ Megret, 'Nature of Obligations', p. 86.

⁴² Paul Williams, *The International Bill of Human Rights* (Entwhistle Books 1981), p. ix & xvi.

exceptions for economic and social rights,⁴³ international human rights apply equally to all individuals within the territory and jurisdiction of a State, regardless of their immigration or other status, thus also to refugees.⁴⁴

International refugee law in turn can be seen as a subcategory of IHRL. The central element of this field of law is the *1951 Convention relating to the Status of Refugees* (1951 Convention). It sets out the specific rights and needs of refugees and must be applied without discrimination.⁴⁵ International refugee law is therefore the primary source of protection of refugees, with general IHRL applying parallel to it.⁴⁶ In particular, Article 7 of the 1951 Convention sets out that the rights of refugees should be at least similar to those of the general population in the host country.⁴⁷ These instruments thus set out the human rights that refugees should enjoy. Yet, who is the bearer of these obligations and responsible for ensuring that refugees can in fact enjoy them? This will be considered in the following section.

3.2 Human Rights Obligations of States

While the substance of obligations arising under human rights law may vary, it has, just like other fields of international law, developed in a State-centric manner. IHRL is thus tailored around States having the primary responsibility for the human rights of people within its territory or subject to its jurisdiction.⁴⁸ Furthermore, it is commonly accepted that IHRL is based on the principle of State consent, meaning that States are only bound by the obligations that they have committed themselves to.⁴⁹ Thus, one would not hold a country liable for violating rights set out in a treaty it has not ratified. A deviation from this requirement can be found in international customary law, which is however also based on the behavioural norms States themselves accept to be law. Nevertheless, a State may exempt itself from being bound

⁴³ ICESCR, Art. 2(3).

⁴⁴ ICCPR, Art. 2(1); Alice Edwards, 'International Refugee Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3 edn, Oxford University Press 2018), p. 539 & 544.

⁴⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention), Office of the United Nations High Commissioner for Refugees, 'Introductory Note' (Geneva 2010).

<<https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfce1d47>> accessed 29 June 2019>, p. 2f.

⁴⁶ 1951 Convention, Art. 5; Edwards, 'International Refugee Law', p. 539; Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility*, p.29; Edwards, 'International Refugee Law', p. 539.

⁴⁷ 1951 Convention, Art. 7; Niamh Kinchin, 'The Implied Human Rights Obligations of UNHCR' (2016) 28 International Journal of Refugee Law 251, p.263.

⁴⁸ ICCPR, Art. 2(1); ICESCR, Art. 2(2) and for example 14; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc E/C.12/GC/24, para 10.

⁴⁹ Megret, 'Nature of Obligations', p.88f; M. Weller, *Contested statehood: Kosovo's struggle for independence* (Oxford University Press 2009), p. 263; *Lotus Case* (France vs Turkey) (Merits) [1927] PCIJ Rep Series A No 10, para 44.

by a rule of customary law by persistently objecting to it.⁵⁰ Lastly, there are norms of *ius cogens* character. Such norms are those that are ‘accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.⁵¹ They trump other obligations States have voluntarily entered into and must be complied with at all times.⁵² It remains contested whether this form of rule, once accepted by a majority of countries, can also be binding upon States that have not consented or have even objected to them.⁵³ In any event, there are certain norms that are generally seen as constituting *ius cogens* norms. While not all *ius cogens* rules are human rights norms, many of them are and some of the most prominent examples are the prohibition of torture and the right to self-determination which are thus most probably binding upon every State.⁵⁴

3.3 Human Rights Obligations of Non-State Actors?

In addition to obligations of States through State-consent and *ius cogens*, there is also a debate on the human rights obligations under international law for non-State actors (NSAs). This is based on an issue that has been largely neglected in the State-centric driven way of establishing human rights, namely that there are many entities out there that are not States but can have an influence on the international human rights situation closely resembling the impact States can have.⁵⁵

Before delving into this legal framework of human rights obligations of NSAs, it should be mentioned that there is no international consensus on this topic.⁵⁶ It is still widely accepted that States must be considered as the main creators of and actors under international law.⁵⁷ Nevertheless, there are several scholars arguing that the legal importance of NSAs is growing and that such NSAs can have considerable effects on the human rights situation of individuals.⁵⁸

⁵⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA) (Merits) [1986] ICJ Rep 1986, para 184f; Anders Henriksen, *International law* (Oxford University Press 2017), p. 27

⁵¹ Vienna Convention on the law of treaties (concluded 23 may 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 53.

⁵² Menno T. Kamminga and Martin Scheinin, *The impact of human rights law on general international law* (Oxford University Press 2009), p. 4-6.

⁵³ G. M. Danilenko, 'International jus cogens : issues of law-making' *European journal of international law* <<http://www.ejil.org/journal/Vol2/No1/art3.html>> accessed 29 June 2019, p. 47-51.

⁵⁴ Kamminga and Scheinin, *The impact of human rights law on general international law*, p. 4-6.

⁵⁵ Alston, *Non-state actors and human rights*, p.4; Ralph Wilde, 'Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations' (2008) 12 *Journal of International Peacekeeping* 93, p. 94; Ralph Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law' (1998) 1 *Yale Human Rights and Development Law Journal* 107, p. 107.

⁵⁶ Kinchin, 'The Implied Human Rights Obligations of UNHCR', p. 253.

⁵⁷ Henriksen, *International law*, p. 62.

⁵⁸ See for example: Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12 *ILSA journal of international & comparative law* 395, p. 396; James C. Simeon, *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013), p. 286f; Anthony Aust, *Handbook of international law* (2nd ed. edn, Cambridge University Press 2010), p. 15.

In order to understand these approaches better, this section will firstly give an introduction into the concept of NSAs and then explore the main legal arguments underlying their alleged responsibility for human rights, focusing specifically on the examples of intergovernmental or international organisations (IGOs) and de facto governing authorities.

The term non-state actor (NSA) is extremely broad and applies to a variety of entities, as long as that entity is not a State. Thus, the term can refer to individuals as well, but is most commonly used when talking about corporations, IGOs, non-governmental organisations (NGOs) and armed opposition groups.⁵⁹ There is hence no exhaustive definition of this term, but generally it can be said that NSAs are not State organs, can influence political outcomes and participate in the international system.⁶⁰ As mentioned above, two NSAs that are especially relevant when looking at the case of the Sahrawi refugee camps are de facto governing authorities and IGOs. 'De facto governing authorities' is in itself an umbrella term that can, for example, apply to national liberation movements ('representing a people struggling for self-determination'⁶¹) or governments in exile.⁶² An organization can be considered a de facto (governing) authority if it exercises effective control over a certain territory and/or population, in which it provides certain government-like functions, such as the provision of public services.⁶³ Examples of such situations are the Turkish Republic of Northern Cyprus and the Palestinian Authority.⁶⁴

Furthermore, the International Law Commission's 2011 'Draft Articles on the Responsibility of International Organizations' (ARIO), which at least partly constitute international customary law,⁶⁵ define IGOs as an 'organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'.⁶⁶ They are established by States and have States (and potentially other entities) as members.⁶⁷ Still, they are non-State entities and are considered independent of States, based on their distinct legal personality. Thus,

⁵⁹ Aust, *Handbook of international law*, p. 15; Andrew Clapham and Law Academy of European, *Human rights obligations of non-state actors* (Oxford University Press 2006), p. 59.

⁶⁰ Alston, *Non-state actors and human rights*, p. 3 & 15; Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015), p. 2.

⁶¹ Clapham and Academy of European, *Human rights obligations of non-state actors*, p. 59.

⁶² Aust, *Handbook of international law*, p. 13 & 26; African Union (Office of the Legal Counsel and Directorate for legal Affairs of the African Union Commission) 'Legal Opinion', para 13; Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 2f.

⁶³ Michael Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights* (Nijhoff 2004), p. 209f; Scott Pegg, 'De Facto States in the International System' (1998) Working Paper 21 Institute of International Relations The University of British Columbia, p. 2.

⁶⁴ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p.10; Pegg, 'De Facto States in the International System', p. 2; United Nations, *The Question of Palestine and the United Nations* (Rev. edn, United Nations Publications 2008), p. 71.

⁶⁵ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 42.

⁶⁶ International Law Commission, Draft Articles on the Responsibility of International Organizations (June 2011) UN Doc A/CN.4/L.778 (ARIO), Art. 2(a).

⁶⁷ ARIO; Art. 2(a); Simeon, *The UNHCR and the Supervision of International Refugee Law*, p. 287.

acts of IGOs are not considered as State acts but as acts of the organization.⁶⁸ The most prominent example of an IGO is the UN, which has been described as a 'supreme type of international organization' by the ICJ.⁶⁹

The ARIO built on the ICJ's 1949 Advisory Opinion of *Reparations for Injuries Suffered in the Service of the United Nations* which stated that the capacity to hold rights and obligations under international law is not limited to States alone. Instead, also other entities can do so, as long as they are subjects of international law, meaning that they must have international legal personality.⁷⁰ This can apply to IGOs as well as de facto governing authorities.⁷¹ The Court stressed that having such international legal personality does not mean that the entity constitutes a State itself or that the entity's rights and duties are the same as those held by States. It clarified that, '[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity ... must depend upon its purposes and functions specified and implied in its constituent documents and developed in practice'.⁷² NSAs such as IGOs and de facto authorities can thus in principle have international legal personality, albeit the extent of this, and thus also that of its obligations under international law, depend on the entity's purposes and functions.⁷³

The above does of course not yet clarify which obligations exactly NSAs have under IHRL. In this regard, the starting point can be Niamh Kinchin's claim that bodies with international legal personality should not be exempted from generally accepted rules within which they operate. These general accepted rules refer to Article 38 of the Statute of the ICJ, specifically international customary law and its rules of *ius cogens* character.⁷⁴ International customary law is not only binding on all States, but is commonly used to hold NSAs responsible under international law.⁷⁵ While not all rules of customary law are human rights rules, the ICJ has stated that basic human rights norms do fall within this category, this includes the prohibition of torture, slavery, racial discrimination and arbitrary imprisonment.⁷⁶ Furthermore, the UDHR

⁶⁸ Ibid, p. 287; Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake', p. 401; International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (November 2001) Supplement No. 10, UN Doc A/56/10, Art. 57.

⁶⁹ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p. 179.

⁷⁰ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p.178f.

⁷¹ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p.207.

⁷² *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p.179f.

⁷³ Henriksen, *International law*, p. 78-81.

⁷⁴ Kinchin, 'The Implied Human Rights Obligations of UNHCR', p. 255.

⁷⁵ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 39.

⁷⁶ D'Amato Anthony, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' Georgia Journal of International & Comparative Law, p. 1.

has also been held to constitute, at least partly, international customary law.⁷⁷ Lastly, since rules of *ius cogens* character are even higher in the hierarchy of international law norms, it seems logical that they should then also apply to NSAs. After all, they are rules that do not allow for any derogations, no matter by whom. Therefore, it has been held that *ius cogens* rules apply to de facto States in the same way as they apply to sovereign States.⁷⁸

Moreover, there is increasing recognition that having effective control over people or territory necessitates giving an entity certain human rights obligations.⁷⁹ As implied by the word ‘governing’, an obvious application of this approach are de facto governing authorities. Another type of NSA that is often found to exercise such effective control are IGOs, most notably the UN.⁸⁰ An underlying rationale for this approach is that NSAs exercising government-like functions are bound by human rights norms when their conduct affects the human rights of individuals under their control. It has thus been held that customary human rights law obligates authorities in control to protect the most fundamental human rights, especially those of *ius cogens* status.⁸¹ This understanding has also led to treaty norms being applied to NSAs exercising effective control, either by others or by these entities themselves.⁸² This can be exemplified by NGOs campaigning about human rights abuses by NSAs,⁸³ as well as more and more human rights protection mechanisms including recommendations not only to organisations with effective control but also to IGOs in general.⁸⁴

Lastly, responsibility of NSAs can also be based on self-imposed human rights obligations.⁸⁵ Michael Schoiswohl discusses this concept when exploring possible mechanisms for holding de facto regimes responsible.⁸⁶ Accordingly, there have been several instances of de facto States issuing unilateral declarations in which they adopt international human rights standards.⁸⁷

⁷⁷ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 42.

⁷⁸ *Kadic et al. v Karadzic* (Opinion Chief Judge Newman) US ILM, vol. 34 (6), 1995, p. 1595-1614. Here, acting like a State (such as controlling a population within ones power and entering into agreements with other governments) was seen as sufficient for incurring liability for violating international law, such as the prohibition of torture.; Pegg, 'De Facto States in the International System', p. 21.

⁷⁹ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p. 209f.

⁸⁰ Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 115; Kinchin, 'The Implied Human Rights Obligations of UNHCR', p. 255.

⁸¹ UN Human Rights Council 'Human Rights Situation in Palestine and other occupied Arab Territories' (2008) UN Doc A/HRC/8/17, para 6; UN Secretary-General 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (2011) <<https://www.refworld.org/docid/4db7b23e2.html>> accessed 29 June 2019.

⁸² Andrew Clapham, 'Non-State Actors' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3 edn, Oxford University Press 2018), p. 571.

⁸³ *Ibid.*, p. 577.

⁸⁴ *Ibid.*, p. 567.

⁸⁵ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p.238.

⁸⁶ *Ibid.*, p. 238.

⁸⁷ For example the Palestinian Authorities, see: United Nations, *The Question of Palestine and the United Nations*, p. 71.

Similarly, corporations as well as IGOs have started committing themselves to complying with certain human rights obligations, regardless of any legal obligation forcing them to.⁸⁸ According to the ICJ, actors that are subjects of international law are bound by obligations stemming from their own constitutions, a ruling which may be extended to other self-imposed obligations.⁸⁹

Pulling these threads together, human rights obligations in the context of refugees can arise from treaty law, international customary law, rules of *ius cogens* status and potentially also unilateral declarations. Following the State-centric approach to such obligations, the primary actor responsible for upholding them or complying with them are States themselves. Nevertheless, they are not the only entities in the international community that can have international legal personality and NSAs can thus potentially also be bound by certain human rights norms. This is often based on exercise of effective control over a population or a territory and will thus be referred to as the ‘effective-control approach’. To ascertain which relevant actors could be considered responsible for human rights in the present case study, the following section is dedicated to applying the above discussion specifically to the Tindouf camps.

4. THE CASE OF THE TINDOUF CAMPS IN ALGERIA: WHO IS RESPONSIBLE?

There are of course a great number of actors active in the area of the Tindouf camps that might be relevant when considering the human rights situation there. There are local NGOs,⁹⁰ international actors such as the World Food Programme,⁹¹ the AU and various States that may influence the Sahrawi people’s rights depending on their decision to recognize the SADR or provide humanitarian aid. Nevertheless, not all of these actors can be considered within the constraints of one paper. Instead, it focuses on the main entities that are usually considered by UN resolutions and human rights reports when assessing the case of the Sahrawis, which are Algeria, Morocco, Polisario and the UN. While some potential relevant NSAs are excluded from this analysis, the below application of the framework for obligations of NSAs can hopefully serve as an example that can subsequently be used to analyse the potential obligations of any other actors involved.

4.1 Algeria

It has been established above that under the State-centric approach, States are considered the primary actors and duty bearers in the international legal system. Thus, when looking

⁸⁸ August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005), p. 46.

⁸⁹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Reports 1980, p. 73, para 37.

⁹⁰ UNSC ‘Situation concerning Western Sahara – Report of the Secretary-General’ (2019) UN Doc S/2019/282, para 49.

⁹¹ UNHCR ‘Fact Sheet – Algeria’ (2019)

<<http://reporting.unhcr.org/sites/default/files/UNHCR%20Algeria%20Fact%20Sheet%20-%20February%202019.pdf>> accessed 29 June 2019, p. 1.

specifically at the situation in the Tindouf camps, one should firstly consider the responsibility of Algeria, the camps' host State. Firstly, as outlined in section 3.2, States have the primary responsibility for human rights of everyone within their territory and jurisdiction.⁹² In this regard, it is noteworthy that Algeria has ratified, amongst others, the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Protection of the Rights of All Migrant Workers and their Families, and the Convention on the Rights of the Child.⁹³ All these oblige Algeria to extend protection also to Sahrawi people living on its territory.⁹⁴ Furthermore, Algeria has also signed the 1951 Convention.⁹⁵ It has thus committed itself to granting the refugees to which the Convention is applicable the rights set out therein.⁹⁶ An example of this would be treating refugees and nationals alike when it comes to (access to) elementary education and not discriminating between refugees based on their origin.⁹⁷ Algeria is thus, in that sense legally responsible for the human rights of the Sahrawi population.

However, Algeria has chosen to relinquish jurisdiction concerning the Sahrawi refugees in Tindouf in favour of Polisario. It has thus 'delegated the authority over the refugee camps and in the territory between them to Polisario'⁹⁸ and stated that 'Polisario alone is responsible for ensuring the human rights of Sahrawis in the Tindouf refugee camps'.⁹⁹ In practice this means that once a person passes a camp checkpoint, they are under Polisario jurisdiction.¹⁰⁰ Underlying this delegation (or perhaps denial) of responsibility is Algeria's policy of supporting the Sahrawi right to self-determination.¹⁰¹ It has thus claimed that by not exercising jurisdiction

⁹² ICCPR, Art. 2(1); ICESCR, Art. 2(2) and for example 14; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24, para 10.

⁹³ UN Office of the High Commissioner of Human Rights 'UN Treaty Body Database' [Website] <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=3&Lang=EN> accessed 29 June 2019.

⁹⁴ Art. 2(3) ICESCR does in fact allow for varying applications of the rights set out therein to national and non-nationals. Nevertheless, a certain minimum core obligations will always have to be respected by State parties, regardless of the nationality of the individual in question, see: UN Committee on Economic, Social and Cultural Rights 'General Comment No. 13: The Right to Education (Art. 13)' (1999) UN Doc E/C.12/1999/10 para 57; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Convention)' (2003) UN Doc E/C.12/2002/11, para 37(b).

⁹⁵ UNHCR 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' [Website] <<https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>> accessed 29 June 2019.

⁹⁶ 1951 Convention, Art. 1.

⁹⁷ 1951 Convention, Art. 22(1) & 3.

⁹⁸ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p.21.

⁹⁹ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 19.

¹⁰⁰ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p.24; Guindo and Bueno, 'The Role of Sahrawis and the Polisario Front in Maghreb-Sahel Regional Security', p. 196.

¹⁰¹ UN Human Rights Council, Working Group on the Universal Periodic Review 'National Report submitted in accordance with paragraph 5 of the annex to the Human Rights Council resolution 16/2 – Algeria' (12 May 2017) UN Doc A/HRC/WG-6/27/DZA/, para 169f; Laurence Thieux, 'Algerian Foreign Policy towards Western Sahara', *Global, Regional and Local Dimensions of Western Sahara's Protracted Decolonization: When a Conflict Gets Old* (New York: Palgrave Macmillan US: Palgrave Macmillan 2017), p. 122 & 125.

over Sahrawi people and the refugee camps it is recognizing Polisario's struggle for self-determination.¹⁰²

According to *Human Rights Watch*, Algeria's move is contrary to international human rights law,¹⁰³ and indeed there is no clause in any of the above cited Conventions that would allow for such an approach. Despite this position being common among host states of camps controlled by governments in exile,¹⁰⁴ it paves the way to a situation in which human rights protection is only granted to those with the right nationality status instead of everyone within a State's jurisdiction. Algeria has thus during the UN Human Rights Council's *Universal Periodic Review* been called upon to finally register the Sahrawi refugees, establish the rule of law for the camps' population and implement their rights under the 1951 Convention.¹⁰⁵

On the other hand, Algeria is also considered Polisario's main supporter when it comes to political, military, humanitarian and financial means. One could thus argue that Algeria is still supporting the protection of human rights of Sahrawis, albeit through Polisario, as Algeria claims that its actions are based on the support of the Sahrawi people's human right to self-determination.¹⁰⁶

Regardless of the legality of Algeria's position in this regard, or the fact that the country will still remain ultimately responsible for the human rights of *all* people on its territory,¹⁰⁷ the above goes to show that considering only the human rights responsibilities of Algeria would bypass the realities of this case.¹⁰⁸ Furthermore, while host States are deemed to always bear ultimate responsibility, this does not preclude that other entities are not also responsible.¹⁰⁹

4.2 Morocco

Before considering the responsibility of NSAs in the case of the Sahrawi refugees, there is one more State that is often held to be responsible for the human rights situation in the Tindouf

¹⁰² Ibid, p.122 & 125.

¹⁰³ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 19.

¹⁰⁴ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 217.

¹⁰⁵ UN Human Rights Council, Working Group on the Universal Periodic Review 'National Report submitted in accordance with paragraph 5 of the annex to the Human Rights Council resolution 16/2 – Algeria' (12 May 2017) UN Doc A/HRC/WG-6/27/DZA/1, paras 73-75; UN Human Rights Council, Working Group on the Universal Periodic Review 'Summary of other Stakeholders' submissions on Algeria' (12 May 2017) UN Doc A/HRC/WG.6/27/DZA/3, para 62.

¹⁰⁶ UN Human Rights Council, Working Group on the Universal Periodic Review 'National Report submitted in accordance with paragraph 5 of the annex to the Human Rights Council resolution 16/2 – Algeria' (12 May 2017) UN Doc A/HRC/WG-6/27/DZA/1, para 169f; Thieux, 'Algerian Foreign Policy towards Western Sahara', p. 122 & 125.

¹⁰⁷ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 19; Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 4.

¹⁰⁸ Seeing as on a daily basis refugees only experience Polisario as governing authority and Algerian forces are requested to seek permission before entering the camps, see: Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 12 & 21.

¹⁰⁹ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 17.

camps, namely Morocco. This is due to the fact that there are some that say that the non-realization of the right to self-determination of Sahrawi people is the root of and reason for every other human rights violation this people is suffering from.¹¹⁰ This non-realization is in turn then ascribed to Morocco, its long-term partial annexation of the Western Sahara territory and its categorical ‘rejection of any solution other than the full sovereignty of Morocco over Western Sahara’.¹¹¹

It is true that without the territorial conflict, the Sahrawi people would not be living in the Tindouf camps. However, the causal link becomes more blurred or questionable when looking for example at allegations of acts of torture committed by Polisario.¹¹² It would seem nonsensical to hold Morocco instead of Polisario responsible for something that can by no means be seen as necessitated by any territorial conflict. Thus, one should also consider the potential human rights obligations of the actors present in the camps, as will be done below.

4.3 Polisario

Firstly, it might be questioned why this paper is considering the responsibilities of Polisario as opposed to the SADR. After all, from the perspective of the AU, the SADR is a recognized State and, as a signatory of the *African Charter on Human and People’s Rights* (African Charter), has human rights obligations in respect of the people under its control.¹¹³ Nevertheless, this paper is not concerned with regional, but with international human rights law. Furthermore, Polisario is usually seen as the actor in control over the camps and its relevance for the human rights of Sahrawi people has not only been emphasized by the UN, but also by various other commentators criticizing Polisario’s alleged restrictions of civil and political rights as well as alleged commissions of torture.¹¹⁴ Thus, the following application of the ‘effective control-approach’ will assess the human rights obligations of Polisario instead of the partially recognised State SADR. This is also based on the fact that Polisario is an entity whose existence is not denied even by those actors not recognizing the SADR¹¹⁵ and lastly, all

¹¹⁰ UNSC ‘Report of the Secretary-General on the situation concerning Western Sahara’ (2018) UN Doc S/2018/277, para 72; Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 234.

¹¹¹ UNSC ‘Report of the Secretary-General on the situation concerning Western Sahara’ (2018) UN Doc S/2018/277, para 11.

¹¹² Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 11.

¹¹³ African Union (African Commission on Human & People’s Rights) ‘Ratification Table: African Charter on Human and People’s Rights’ [Website] <<http://www.achpr.org/instruments/achpr/ratification/>> accessed 29 June 2019.

¹¹⁴ Guindo and Bueno, ‘The Role of Sahrawis and the Polisario Front in Maghreb-Sahel Regional Security’, p. 169-171; OSPDH ‘A parallel report by The Observatory of Sahara for Peace, Democracy and Human Rights on the implementation by the State of Algeria of the articles of International Covenant on Civil and Political Rights, submitted to the Human Rights Committee’ (Laayoune, Western Sahara, 6 June 2018) <<https://www.ecoi.net/en/document/1438763.html>> accessed 29 June 2019, para 15; Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 32; Goldstein, ‘Human Rights in Western Sahara and in the Tindouf Refugee Camps : A Commentary’.

¹¹⁵ E.g. Morocco and the UN negotiating and cooperating with Polisario but not recognizing the SADR as a State, see: UNSC ‘Report of the Secretary-General on the situation concerning Western Sahara’ (2018) UN Doc S/2018/277, paras 17-31.

members of the SADR government are also members of Polisario, but not vice versa, as all SADR government officials have to be elected from the pool of Polisario members.¹¹⁶

According to the analysis of responsibility for human rights of NSAs outlined in section 3.3, one has to assess first whether Polisario has international legal personality and second, whether it has effective control over territory and/or people. Furthermore, one should also consider the existence of any voluntary declarations regarding human rights.

Firstly, looking at whether Polisario can be seen as having international legal personality, Schoiswohl states that the right to self-determination vests on peoples and their representatives certain legal personality.¹¹⁷ Similarly, de facto regimes, regimes ‘which exercise at least some effective political authority over a territory within a state’, also derive international personality from their exercise of de facto authority.¹¹⁸ Accordingly, ‘those who act, or claim to act with government authority should be held accountable for human rights violations they inflict on the people they de facto rule, no matter whether they are a legally-recognized government’.¹¹⁹

Applying this to Polisario, it is thus relevant that it constitutes the Sahrawi people’s ‘national liberation movement’¹²⁰ and is seen as the legitimate representative of the Sahrawis in the international arena.¹²¹ This is not only laid down by the SADR Constitution,¹²² but has also been accepted by the UN. The latter has treated Polisario as the main actor representing the Sahrawi people and their right to self-determination from the very beginning onwards.¹²³ In its Resolution 34/37 the UN General Assembly stated that Polisario is ‘the representative of the

¹¹⁶ This can be seen for example by the fact that Polisario constitutes the only political party allowed, from which all SADR government officials are elected, see: Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. 115-117; Wilson, “‘For Us, Parliament Is a Tool for Liberation’: Elections as an Opportunity for a Transterritorial Sahrawi Population”, p. 320.

¹¹⁷ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p. 212.

¹¹⁸ Ibid, p. 207 & 209.

¹¹⁹ Goldstein, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps : A Commentary', p. 32.

¹²⁰ As can already be seen in its non-abbreviated name ‘Frente Popular para la liberación de Saguia el-Hamra y del Rio de Oro’ [Popular Front for the Liberation of Saguia el Hamra and Rio de Oro], see; UNSC ‘Situation concerning Western Sahara – Report of the Secretary-General’ (2019) UN Doc S/2019/282, para 2; Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. 115.

¹²¹ For instance, also by the European Union: Case C-104/16 *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973

¹²² ‘Until the complete recovery of national sovereignty, the Frente POLISARIO shall be the political framework that shall unite and mobilise politically the Sahrawis to express their aspirations and legitimate rights to self-determination and independence and to defend their national unity and complete the building of their independent Sahrawi State’, see: The Constitution of the Sahrawi Arab Democratic Republic (adopted by the 14th Congress of the Frente POLISARIO, 16-20 December 2015), Art. 32.

¹²³ UNSC Res 379 (2 November 1975) <<http://unscr.com/en/resolutions/doc/379>> accessed 29 June 2019; OSPDH ‘A parallel report by The Observatory of Sahara for Peace, Democracy and Human Rights on the implementation by the State of Algeria of the articles of International Covenant on Civil and Political Rights, submitted to the Human Rights Committee’ (Laayoune, Western Sahara, 6 June 2018) <<https://www.ecoi.net/en/document/1438763.html>> accessed 29 June 2019, para 9; Anna Theofilopoulou, 'The United Nations' Change in Approach to Resolving the Western Sahara Conflict since the Turn of the Twenty-First Century', *Global, Regional and Local Dimensions of Western Sahara's Protracted Decolonization : When a Conflict Gets Old* (New York : Palgrave Macmillan US : Palgrave Macmillan 2017), p. 37; Guindo and Bueno, 'The Role of Sahrawis and the Polisario Front in Maghreb-Sahel Regional Security', p. 177.

people of Western Sahara'¹²⁴ and it has been considered the UN's main negotiation partner representing the Sahrawi people when it comes to finding a solution to the conflict.¹²⁵ Thus, representing the Sahrawi people and exercising their right to self-determination vests the liberation movement Polisario with a certain degree of international legal personality.¹²⁶ The same can be said about its exercise of de facto authority over the Tindouf camps, which according to Schoiswohl also constitutes a basis for such legal personality.¹²⁷

Looking more closely at the existence of this effective control, the fact that Polisario is the only actor that is in control over the Tindouf camps and its inhabitants is undisputed and has officially been sanctioned by countries like Algeria.¹²⁸ Judging from Wilson's extensive ethnographic field research in the camps, it becomes clear that Polisario's degree of control over the Sahrawi refugees is comparable to that of a sovereign State over its territory.¹²⁹ Polisario decides who can enter the camps, implements and enforces its own laws, including criminal law. It also issues driving licenses and passports, controls the ration distribution, and even holds its own elections.¹³⁰ Based on this de facto rule, human rights organisations such as *Human Rights Watch* and *Amnesty International* have constantly held Polisario accountable for its lack of compliance with certain human rights obligations.¹³¹ Thus, Polisario's almost complete control over the camps can be considered as a basis for it holding certain human rights obligations in respect of the people inhabiting them.¹³²

Such extensive control by an NSA is not an exceptional situation, as liberation movements or governments in exile have quite commonly been granted full control over refugee camps.¹³³ Similarly, Polisario is not the only NSA that has unilaterally declared its commitment to certain human rights obligation.¹³⁴ In this regard it is noteworthy that the SADR constitution not only

¹²⁴ UNGA Res 34/37 'Question of Western Sahara' (21 November 1979), para 7.

¹²⁵ See for example UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2018) UN Doc S/2018/277, para 28.

¹²⁶ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p. 213f.

¹²⁷ Ibid, p. 209f.

¹²⁸ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 19.

¹²⁹ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 11.

¹³⁰ Ibid, p. 23 & 215.

¹³¹ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*; Amnesty International, *Morocco and Western Sahara*, 2017/2018).

¹³² Konstantina Isidoros, 'The View from Tindouf: Western Saharan Women and the Calculation of Autochthony', *Global, Regional and Local Dimensions of Western Sahara's Protracted Decolonization* (Palgrave Macmillan US : New York 2017), p. 300.

¹³³ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 16.

¹³⁴ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 22; Noteworthy is also that Polisario has made a unilateral declaration to apply the Geneva Conventions to the conflict with Morocco, which was accepted by the Swiss Federal Council as the first such declaration submitted by a non-state actor ever, see: Katharina Fortin, 'Unilateral Declaration by Polisario under API accepted by Swiss Federal Council' (2 September 2015) *Armed Groups and International Law* <<https://armedgroups-international.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>> accessed 29 June 2019.

refers to the UDHR and the African Charter but also has its own human rights catalogue included within it.¹³⁵ As mentioned above, the SADR is a member of the AU and has ratified the African Charter.¹³⁶ Seeing as Polisario can be described either as part or representative of the hierarchically superior SADR, these human rights commitments should be seen as binding Polisario as well. Again, it is important to recall that such ‘national’ or regional human rights commitments are not the same as international human rights obligations, which is what this paper is concerned with. Still, they may be seen as ‘voluntary commitments’ and can thus give rise to international obligations for Polisario as well.¹³⁷

Apart from the obligations arising out of Polisario’s control of the camps and voluntary commitments, Polisario can arguably be seen as responsible for respecting rules of *ius cogens*. It should be recalled that one rule that is generally accepted as falling under this category is the prohibition of torture.¹³⁸ Nevertheless, there have been multiple allegations of torture committed by Polisario, who has so far however neglected to hold those responsible accountable.¹³⁹ Seeing how Polisario or the SADR has not been able to become a contracting party to Convention against Torture or the ICCPR and the lack of any other independent human rights monitoring in the camps, there are no external protection mechanisms in place that any potential victims of torture could turn to.¹⁴⁰

4.4 The UN

Despite this lack of consensus on the exact source or scope of human rights obligations of IGOs, it still stands that in order to have any, there has to be some degree of international legal personality and that one should consider its potential for exercising effective control.¹⁴¹

¹³⁵ The Constitution of the Sahrawi Arab Democratic Republic (adopted by the 14th Congress of the Frente POLISARIO, 16-20 December 2015), preamble.

¹³⁶ African Union (African Commission on Human & People’s Rights) ‘Ratification Table: African Charter on Human and People’s Rights’ [Website] <<http://www.achpr.org/instruments/achpr/ratification/>> accessed 29 June 2019.

¹³⁷ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p. 238; UN Human Rights Council ‘Human Rights Situation in Palestine and other occupied Arab Territories’ (2008) UN Doc A/HRC/8/17, para 6; UN Secretary-General ‘Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka’ (2011) <<https://www.refworld.org/docid/4db7b23e2.html>> accessed 29 June 2019.

¹³⁸ UN Committee Against Torture ‘General Comment No. 2: Implementation of Article 2 by State Parties (24 January 2008) UN Doc CAT/C/GC/2, para 1.

¹³⁹ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 21.

¹⁴⁰ UNSC ‘Report of the Secretary-General on the situation concerning Western Sahara’ (2018) UN Doc S/2018/277, paras 11-15; UNSC ‘Report of the Secretary-General on the situation concerning Western Sahara’ (2017) UN Doc S/2017/307, para 16.

¹⁴¹ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, para 178f; Wilde, ‘Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law’, p. 255.

In the case of the UN, its international legal personality has been established by the ICJ several decades ago.¹⁴² The claim that the UN holds human rights obligations is also relatively uncontested and is often supported by relying on three main arguments. Firstly, the fact that one of the UN's primary aims is the promotion of 'universal respect for human rights and for fundamental freedoms for all'.¹⁴³ Secondly, the UN arguably derives responsibility from its constituent member States and their human rights obligations.¹⁴⁴ Thirdly, as stipulated by the ICJ, the UN by virtue of being an IGO is bound by general rules of international law, its constitution and international agreements to which it is party.¹⁴⁵ The existence of IGOs holding certain obligations under international law is supported by the ARIO. Looking at Article 6 ARIO, these obligations must also be complied with by the UN's constituent or subsidiary organs. Thus, if the UN wants to comply with its human rights obligations, so must its subsidiary agents.

When looking at human rights obligations of IGOs in the context of protection of refugees, the main relevant actor is the United Nations High Commissioner for Refugees (UNHCR). Its mandate is providing international protection to refugees¹⁴⁶ but once again there is no consensus how exactly that transfers (or does not transfer) into obligations under IHRL. Nevertheless, following the ICJ, UNHCR is part of the UN and thus bound by general rules of international law.¹⁴⁷ Furthermore, Kinchin explains that UNHCR arguably derives international legal personality from the UN itself and thus is bound by the UN's human rights obligations as well.¹⁴⁸

Next, one must consider the UN's potential of exercising effective control. In the case of UNHCR, one should thus take into account its power to administer refugee camps.¹⁴⁹ In exercising this competence, UNHCR often 'functions as a surrogate State', taking over public powers normally held by the host State, usually upon entering into a memorandum of

¹⁴² *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Reports 1980, p. 178f, para 37.

¹⁴³ UN Charter, Art. 55(c), Art. 1(3) & 56; Kinchin, 'The Implied Human Rights Obligations of UNHCR', p. 256

¹⁴⁴ *Ibid.*, p. 257.

¹⁴⁵ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Reports 1980, p. 73, para 39.

¹⁴⁶ UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 december 1950) Un Doc A/Res/428, para 1.

¹⁴⁷ Goldstein, 'Human Rights in Western Sahara and in the Tindouf Refugee Camps : A Commentary', p. 229.

¹⁴⁸ UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 december 1950) Un Doc A/Res/428, para 1; Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 300; ARIO, Art. 6.

¹⁴⁹ Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 115.

understanding with the latter.¹⁵⁰ Even in less extreme cases, UNHCR commonly functions as the lead coordination agency in conflict zones, thus having extensive influence on the situation on the ground.¹⁵¹ It has thus been held, for example by Ralph Wilde, that the more responsibility for the administration of a territory it takes on, the more ‘UNHCR is bound by that human rights law to which the [host] state is bound’.¹⁵² A situation of such extensive and effective control by an UN agency can also occur in the course of peacekeeping or other missions established by the Security Council.¹⁵³ According to the discussion above, these powers to affect the human rights situation on the ground entail the obligation to comply with certain human rights standards, more precisely, to respect, protect and fulfil the human rights of the people under its control, at least to the extent that the body’s functions allow for.¹⁵⁴ Furthermore, the UNHCR itself has also recognised that it has to comply with human rights and humanitarian law.¹⁵⁵

Looking now concretely at the case of the Tindouf camps and the UN’s role in them, there are two main bodies that must be considered. Firstly, the UNHCR and secondly, the UN mission for the referendum in Western Sahara (MINURSO).

4.4.1 UNHCR in Tindouf

According to UNHCR’s latest fact sheet, it provides international protection, assistance and services and is the ‘lead humanitarian agency for humanitarian assistance to Sahrawi refugees, which involves coordinating and leading all humanitarian actors in Tindouf’.¹⁵⁶ It has a protection mandate for the Sahrawi refugees¹⁵⁷ and it is in charge of several services that are usually considered public, thus normally provided by States.¹⁵⁸ In exercising these functions, UNHCR has considerable potential for affecting the human rights situation of the camp residents and should thus firstly, comply with human rights standards itself and secondly, ensure that the agencies it is working with do so as well. As explained above, the relevant

¹⁵⁰ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 228 & 269; UNHCR ‘Emergency Handbook’ (Version 1.4)

<<https://emergency.unhcr.org/entry/215897/working-with-a-host-government>> accessed 29 June 2019, p. 3.

¹⁵¹ Edward Newman and Joanne van Selm, *Refugees and Forced Displacement : International Security, Human Vulnerability, and the State* (United Nations University Press 2003), p. 57.

¹⁵² Wilde, ‘Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law’, p. 119; see also Kinchin, ‘The Implied Human Rights Obligations of UNHCR’, p. 255.

¹⁵³ Kinchin, ‘The Implied Human Rights Obligations of UNHCR’, p. 255; Wilde, ‘Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law’, p. 115.

¹⁵⁴ Kinchin, ‘The Implied Human Rights Obligations of UNHCR’, p. 267f; UNHCR Statute, Chapter II on functions of High Commissioner.

¹⁵⁵ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 249.

¹⁵⁶ UNHCR ‘Fact Sheet – Algeria’ (2019)

<<http://reporting.unhcr.org/sites/default/files/UNHCR%20Algeria%20Fact%20Sheet%20-%20February%202019.pdf>> accessed 29 June 2019, p. 1.

¹⁵⁷ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 5.

¹⁵⁸ UNHCR ‘Fact Sheet – Algeria’ (2019)

<<http://reporting.unhcr.org/sites/default/files/UNHCR%20Algeria%20Fact%20Sheet%20-%20February%202019.pdf>> accessed 29 June 2019, p. 2f; UNHCR, *Algeria* (Global Focus - UNHCR Operations Worldwide, 2012).

standards will be the standards applicable to the UN, those accepted by UNHCR itself and those that are applicable in Algeria,¹⁵⁹ as far as relevant for UNHCR's functions.

For example, UNHCR is supporting, both financially and logistically, the improvement of access to and quality of education, health care, infrastructure and the water system in the camps.¹⁶⁰ Thus, UNHCR should at least comply with the minimum core obligation of providing access to education, water and other services on a non-discriminatory basis.¹⁶¹ UNHCR is also promoting the self-management of the Sahrawi refugees, which can be seen by the fact that Polisario has long been in control of actually distributing the rations provided by UN agencies, including UNHCR.¹⁶² Therefore, it should ensure that Polisario then distributes the humanitarian aid it receives in a human rights compliant manner. Another concrete example of UNHCR's human rights obligations would be the requirement that educational programs must comply with Article 22 in conjunction with Article 3 of the 1951 Convention, meaning that they must be accessible to everyone present in the camps. Furthermore, UNHCR must comply with Article 7 CEDAW when it comes to implementing camp governance and consulting with decision making fora of refugees. This entails ensuring that women are included in the decision-making processes and can stand for elections and vote on an equal basis with men.¹⁶³ Lastly, UNHCR also has a permanent presence in the camps¹⁶⁴ and the actions of its officers present on the ground should thus also comply with relevant human rights standards.

What is noteworthy concerning UNHCR is that its actions are enabled by its donors, which can be both private individuals as well as States. For instance, the USA have recently donated over 6 million dollars to the UNHCR mission in Algeria, despite USA being a Moroccan ally.¹⁶⁵ Also influencing UNHCR action is Polisario, which has for instance prevented the UN agency from conducting surveys in the camps.¹⁶⁶ UNHCR is thus dependent on its donors, and together with its need for permission in order to operate within the territory of a State or the camps,

¹⁵⁹ See section 4.1 and UN Office of the High Commissioner of Human Rights 'UN Treaty Body Database' [Website] <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=3&Lang=EN> accessed 29 June 2019.

¹⁶⁰ UNHCR 'Fact Sheet – Algeria' (2019) <<http://reporting.unhcr.org/sites/default/files/UNHCR%20Algeria%20Fact%20Sheet%20-%20February%202019.pdf>> accessed 29 June 2019, p. 2f.

¹⁶¹ UN Committee on Economic, Social and Cultural Rights 'General Comment No. 13: The Right to Education (Art. 13)' (1999) UN Doc E/C.12/1999/10, para 57; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Convention)' (2003) UN Doc E/C.12/2002/11, para 37(b).

¹⁶² UNHCR 'Fact Sheet – Algeria' (2019) <<http://reporting.unhcr.org/sites/default/files/UNHCR%20Algeria%20Fact%20Sheet%20-%20February%202019.pdf>> accessed 29 June 2019, p. 2; UNHCR, *Algeria*; Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 122.

¹⁶³ Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 126-128.

¹⁶⁴ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 5.

¹⁶⁵ UNHCR, *Algeria*; Zunes and Mundy, *Western Sahara - War, Nationalism and Conflict Irresolution*, p. xxiv; HWR report Tindouf, p. 8; Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 8.

¹⁶⁶ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 12.

UNHCR's actions can be restricted from outside influences.¹⁶⁷ Still, if one finds that UNHCR does have human rights obligations, these would need to be complied with by the agency when conducting its authorized operations and using the funds made available to it. UNHCR's donor or member States will not be responsible if it does not do so in an adequate way. This is the case as acts of IGOs are not considered as State acts, but as acts of the organizations, a separate legal entity.¹⁶⁸ Instead, the acts of UNHCR could in some instances be attributed to its parent organisation, the UN.¹⁶⁹

4.4.2 MINURSO

Lastly, another UN actor relevant in the context of the Western Sahara conflict is MINURSO, a UN Security Council mission tasked with resolving the territorial conflict between Morocco and the Sahrawi people and realizing the Sahrawi's right to self-determination.¹⁷⁰ While the referendum has still not taken place at the time of writing, MINURSO is still active and monitoring the situation in the Western Sahara.¹⁷¹ These reports do also mention the general situation in the Tindouf camps and the fact that MINURSO is still cooperating with Polisario.¹⁷² Nevertheless, MINURSO is the only UN peacekeeping mission that is not equipped with a human rights mandate, because of firm Moroccan, and allegedly also Algerian, resistance to such an extension of MINURSO's functions. Its tasks are thus reduced to negotiating with relevant partners in order to finally set up a referendum.¹⁷³ Except for sporadic meetings with Polisario officials, MINURSO is not present in the Tindouf camps. While there are calls for extending MINURSO's mandate in order to enable the mission to protect Sahrawi's human rights from many parties involved,¹⁷⁴ for now its human rights obligation regarding the Sahrawi refugees must be considered to be limited to realizing their right to self-determination.¹⁷⁵

¹⁶⁷ Simeon, *The UNHCR and the Supervision of International Refugee Law*, p. 282 & 315.

¹⁶⁸ Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake', p. 401-403.

¹⁶⁹ ARIO, Art. 6; Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility*, p. 300.

¹⁷⁰ UNSC Resolution 690 (1991).

¹⁷¹ As required by: UNSC Res 690 (29 April 1991) UN Doc S/RES/690, para 6.

¹⁷² UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2017) UN Doc S/2017/307.

¹⁷³ UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2018) UN Doc S/2018/277, para 52; Thieux, 'Algerian Foreign Policy towards Western Sahara', p. 131; Amnesty International, *Morocco and Western Sahara*, p. 1.

¹⁷⁴ Including Polisario, camp residents, the AU, the UN Secretary-General and UNHCR, see: Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 6-8; UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2018) UN Doc S/2018/277, p. 15; Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 23; African Union (Peace and Security Council) 'Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues' (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII)), para 27.

¹⁷⁵ Theofilopoulou, 'The United Nations' Change in Approach to Resolving the Western Sahara Conflict since the Turn of the Twenty-First Century', p. 48; Guindo and Bueno, 'The Role of Sahrawis and the Polisario Front in Maghreb-Sahel Regional Security', p. 180.

While again, as so often with international law, there might exist a lack of remedies to hold the UN and its agencies accountable for its compliance with its human rights obligations, this does not mean that they do not have any such obligations. Similarly, it must be stressed that any potential obligation by the UN or its constituent bodies do not exclude other actors, such as the host state, from holding such obligations as well.¹⁷⁶

4.5 Summary: The Tindouf Actors and their Obligations

In conclusion, the question of who holds which human rights obligations regarding the Tindouf camps is far from straight forward and is thus illustrated in a simplified manner in table 1.

Actor	Responsibility for?
Algeria	From a State-centric approach, Algeria is responsible for protecting all human rights obligations applicable to the country. This includes customary international law and its rules of <i>ius cogens</i> status as well as treaty obligations Algeria has entered into.
Polisario	Polisario has international legal personality and based on an effective-control approach, it is responsible for the obligations arising out of its complete control over the camps, its voluntary commitments (in this case, for example the SADR constitution) and norms of <i>ius cogens</i> status.
UNHCR	UNHCR also has international legal personality and is partially responsible for obligations arising out of its operations on the ground (obligations of the host State Algeria as far as relevant for its functions), its unilateral acceptance of IHRL and int. humanitarian law obligations and UN's human rights obligations (including those stemming from <i>ius cogens</i> rules and international agreements).
Morocco	The country is partially responsible for the right to self-determination based on its influence on its realisation.
MINURSO	The UN Security Council mission is also partially responsible for the right to self-determination based on its influence on its realisation.

Table 1: The actors relevant for the Tindouf camps and their human rights obligations.

There are thus several entities that can be seen as responsible, although not all of them recognize this responsibility, at least in the case of Algeria. Still, knowing about what entities can be seen as bearing which human rights obligations is important, as it can serve as a first step to ensuring their accountability for their (non-) compliance with these obligations.

¹⁷⁶ Janmyr, *Protecting Civilians in Refugee Camps : Unable and Unwilling States, UNHCR and International Responsibility*, p. 17; Kinchin, 'The Implied Human Rights Obligations of UNHCR', p. 258 & 274.

5. DISCUSSION: WHO *SHOULD* BE RESPONSIBLE?

So far, this paper has considered the context of the Tindouf camps, the contemporary legal framework and doctrine regarding human rights obligations and applied it to the situation at hand. It followed, that from the traditional, State-centric perspective, Algeria is the bearer of the main and primary obligations. However, that approach is not very useful from the perspective of a person living in the camps that almost exclusively experiences the influence of Polisario and relies on UN provided services.¹⁷⁷ Thus, from an effective-control perspective, it is the latter two entities that can be seen as responsible.

Now that the status quo of human rights obligations concerning the Sahrawi people is laid out, what to do with it? Looking, at Algeria's approach to the Tindouf camps or Polisario's role in their administration, it is evident that the State-centric approach to human rights is not fully satisfactory for ensuring the protection of the rights of the Sahrawi refugees.¹⁷⁸ At the very least, it does not align with the lived-experience of the camps' inhabitants.¹⁷⁹ So who *should* be responsible when it comes to the Sahrawi refugees' human rights? To answer this question and in the hope of thus contributing to the contemporary discussion on human rights duty bearers in the international community, this final section will be dedicated to looking at the question of human rights obligations from both a normative and a practical perspective.

In order to do so, one should first consider what it is that IHRL is aiming to achieve to subsequently assess what would be needed to actually do so in the case at hand. It is quite undisputed that human rights were created to ensure the protection of individuals. Thus, as opposed to general international law, it is not States but individual persons that are the beneficiaries of IHRL.¹⁸⁰ While generally it is considered that this protection concerns the protection of individuals against states, it is also undisputed that human rights should apply to everyone equally. Therefore, when it comes to one's enjoyment and protection of human rights, nationality or citizenship status should not play a role.¹⁸¹ Furthermore, the aim of protecting human rights has increasingly been considered as transcending political contexts or outranking sovereignty.¹⁸² Looking more closely at the situation of refugees, the 1951 Convention clearly

¹⁷⁷ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 21.

¹⁷⁸ Situations such as this have led scholars to conclude that the current refugee rights system is inadequate. For example Ralph Wilde states, 'The international protection of refugees is in crisis because the applicable legal regime no longer meets the interests of those to whom it applies, yet the political will among states for reform is lacking'. See: Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 109.

¹⁷⁹ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 21.

¹⁸⁰ Megret, 'Nature of Obligations', p. 87.

¹⁸¹ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; ICCPR, Art. 2(2).

¹⁸² Gündoğdu, *Rightlessness in an age of rights : Hannah Arendt and the contemporary struggles of migrants*, p. 4; Margot E. Salomon, *Global responsibility for human rights : world poverty and the development of international law* (Oxford University Press 2007), p. 71.

sets out that its aim is ‘to ensure refugees the widest possible exercise of these fundamental rights and freedoms’.¹⁸³

It has been established that responsibility as well as accountability for human rights violations are closely based on the traditional rules for State responsibility.¹⁸⁴ Nevertheless, and contrary to the Westphalian view of the world, there is not always a clear line between State and NSA.¹⁸⁵ The latter can also exercise government-like functions as well as extensive and exclusive control over territories. Precluding NSAs from holding obligations regarding the protection of the rights of refugees can have serious, tangible effects for the people under its authority. A State-centric system of assigning responsibility for human rights protection is thus not adequate if its aim is the protection of individuals, especially in the case of (forced) migrants and situations of territorial conflict.¹⁸⁶ In such cases, the effective-control approach is more adequate and human rights obligations should arise by virtue of having control over people.¹⁸⁷ Thus, if one has control over their food rations or educational programs, then this control should be exercised in a human rights compliant manner. In practice, this includes at least the obligation to provide access and distribute rations on a non-discriminatory basis. This is supported by the ICJ’s stance that the existence and extent of international law obligations are dependent on the functions of an entity, not on its status of being a State or not.¹⁸⁸ Thus, if an actor chooses to take on the tasks commonly ascribed to States, even if it legally does not constitute a State, then it should also have to comply with the rules applicable to States.¹⁸⁹ These obligations may arise complimentary to the responsibility of States instead of replacing it and should not be used by States as an excuse to renounce its own responsibility.¹⁹⁰

In the case at hand, this means that Polisario should be seen as responsible for the human rights of the Sahrawi people under its control, regardless of a States’ recognition of the legitimacy of the SADR or Polisario itself as an international actor. Despite Polisario’s place in the international legal framework being contested by some, by virtue of exercising effective control and acting like a government it should be bestowed with the same responsibility ascribed to States in such a situation. Not holding Polisario responsible is likely to negatively impact the rights of the people under its control.¹⁹¹ However, and as also relevant for any other actor

¹⁸³ 1951 Convention, recital 2.

¹⁸⁴ Clapham, 'Non-State Actors', p. 558.

¹⁸⁵ Ibid, p. 556-558; Alston, *Non-state actors and human rights*, p. 40.

¹⁸⁶ Gündoğdu, *Rightlessness in an age of rights : Hannah Arendt and the contemporary struggles of migrants*, p. 3; Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 109.

¹⁸⁷ Clapham, 'Non-State Actors', p. 577.

¹⁸⁸ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p. 40.

¹⁸⁹ UN Secretary-General 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (2011) <https://www.refworld.org/docid/4db7b23e2.html>; Pegg, 'De Facto States in the International System', p. 12; Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 115.

¹⁹⁰ Clapham, 'Non-State Actors', p. 558f.

¹⁹¹ Pegg, 'De Facto States in the International System', p. 22.

potentially influencing the Sahrawi people's rights, international law rarely provides for any enforcement mechanisms and even less so for NSAs.¹⁹² Nevertheless, in order to ensure the actual protection of the Sahrawi refugees' rights, Algeria and Polisario could enter into an agreement that makes the latter accountable to the host State for respecting human rights.¹⁹³ In any event, it has been stated that Algeria should not turn a blind eye to its own responsibility and intervene 'if and when human rights violations are taking place and [ensure] that perpetrators are held responsible'. This follows also from its legal position as bearing the ultimate responsibility for the human rights of all people on its territory and the primary role accorded to States by traditional IHRL.

On a last note, to ensure that there is effective enforcement of human rights law and accountability in the Tindouf camps, either by Algeria, Polisario or UNHCR, the calls for an external, comprehensive human rights monitoring mechanism should finally be heard.¹⁹⁴ In this regard, France and the USA, as Morocco's allies on the UN Security Council, could play a crucial role in pushing for the extension of MINURSO's mandate.¹⁹⁵ In any event, the above discussion has proven that any monitoring mechanism that is established should refrain from adhering to a State-centric approach of human rights obligations only.

6. CONCLUSION

What has been seen in this paper is that human rights obligations have traditionally only been assigned to States and that NSAs have been largely neglected by the legal framework for refugee rights protection. Based on the State-centric system, regardless of the situation on the ground, host States of refugee camps will be treated as the responsible actor (section 3.2). There are however increasing approaches of how NSAs could be seen as bearing human rights obligations parallel to those of States. Two main factors when assessing this possibility is whether an entity has international legal personality and whether it is exercising effective control over a certain territory or population. If so, it will be responsible for complying with certain human rights standards, to the extent that is relevant for its functions. This was referred to as the effective-control approach (section 3.3).

¹⁹² Andrew T. Guzman, *How international law works : a rational choice theory* (Oxford University Press 2008), p. 8; Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake', p. 411.

¹⁹³ Schoiswohl, *Status and (human rights) obligations of non-recognized De Facto regimes in international law : the case of 'Somaliland' : the resurrection of Somaliland against all international "odds" : state collapse, secession, non-recognition and human rights*, p. 221; Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 122.

¹⁹⁴ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 6-8; UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2018) UN Doc S/2018/277, paras 11-15; UNSC 'Report of the Secretary-General on the situation concerning Western Sahara' (2017) UN Doc S/2017/307, para 16; Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 23; African Union (Peace and Security Council) 'Report of the Chairperson of the Commission on the Evolution of the Peace Process in Western Sahara and other related Issues' (AU Addis Ababa 2015 PSC/PR/2.(DCLXVIII), para 27.

¹⁹⁵ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 8.

The subsequent application of this legal framework to the case of the human rights of the Tindouf refugees in section 4 demonstrated that, according to the State-centric approach, Algeria is responsible for the human rights situation in the camps, despite its thorough rejection of this position. Looking at the situation from an effective-control perspective, it was held that Polisario can be considered as mainly responsible. This is based on its exercising practically unlimited control over the camps and its residents. It even requires Algerian security forces to request permission before entering the camps, despite operating on Algerian territory.¹⁹⁶ Similarly, UNHCR is responsible to the extent that its operations can influence the situation in the camps. Morocco and MINURSO on the other hand can be seen as partially responsible for the human rights of the Sahrawi refugees based on their influence on the realization of their right to self-determination. It was concluded in section 5 that in order to achieve the aims of IHRL, the State-centric approach is not sufficient in this case. Instead, Polisario should be seen as being responsible for human rights, which it must comply with when exercising its effective control. As summarised by *Human Rights Watch*, 'although Algeria remains ultimately responsible, the Polisario needs to account for how it treats the people under its administrations'.¹⁹⁷ This is reinforced by the fact that there is no end to the Western Sahara conflict in sight, but the question of human rights protection of the Sahrawi refugees should not have to be postponed until its resolution.

Not only can the discussion of this paper also be applied to different actors involved in the Tindouf case study, it can also be applied to other situations. There are for example Palestinian refugee camps located in Lebanon and Jordan, effectively controlled by the Palestinian Authority. In other scenarios, it is UNHCR that exercises de facto control over refugee camps.¹⁹⁸ Therefore, when considering the responsible actors for the human rights of refugees, the discussion should not be restricted to the obligations held by States. Instead, if it wishes to grasp the actual reality of the situation on the ground, it must go beyond the traditional, State-centric approach to IHRL and also consider which actors are exercising effective control.

¹⁹⁶ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 12.

¹⁹⁷ Human Rights Watch, *Off the Radar - Human Rights in the Tindouf Refugee Camps*, p. 5.

¹⁹⁸ Wilson, *Sovereignty in Exile - A Saharan Liberation Movement Governs*, p. 10; Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law', p. 107; United Nations, *The Question of Palestine and the United Nations*, p. 71.

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