WESTERN SAHARA DISPUTE – FROM THE POLITICAL LEGACY OF DECOLONIZATION TO AUTONOMY

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ABSTRACT

This thesis features a combination of historical, legal and geopolitical accounts of the Western Sahara dispute, which involves several conflicting parties including Morocco, Algeria, the POLISARIO, and initially, Spain and Mauritania. The thesis aims to contribute deeper insight into this ongoing dispute by studying the overall debate between the concerned parties. The main discussion of the thesis centres around the gradual fading of the legal paradigm based on the discourse of self-determination, as stipulated by the International Court of Justice in 1975 in relation to the Western Sahara case, and the emergence of 'autonomy' as an alternative political discourse for dealing with the dispute.

The thesis argues that the shift from the legal to the political approach in the case of Western Sahara presents a challenge to the international legal paradigm of self-determination. It also points to the significance of the 'facts on the ground' and the role of *realpolitik* that this type of dispute over territorial possession represents. This is evident in the fact that the United Nations, faced with a deadlock in realizing the legal decision of the International Court of Justice, decided in 2001 to gradually introduce a narrative of 'negotiated political solution' in the case of Western Sahara. The introduction of this political narrative illustrates how international law bears paradoxes from which it cannot escape. Such paradoxes stem from competing ideas of international justice, and state geopolitics that influence the applicability of international law.

Finally, the thesis argues that the use of a discourse of autonomy, as initially introduced by the United Nations and deployed by the Moroccan government in recent years, also delineates how the Western Sahara dispute has been part of the struggles for political stability and national unity in the region. These struggles partly explain the persistence of institutional denial of peoples' choice of political status in the Western Saharan territory.

KEY WORDS: WESTERN SAHARA/SELF-DETERMINATION/ UTI POSSIDETIS/ AUTONOMY/DECOLONIZATION/ TERRITORIAL BOUNDARIES DISPUTE

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LIST OF ABBREVIATIONS

ALR	Areas with Limited Restrictions
APLS	Armée pour la Libération du Peuple Sahrawi
AU	African Union
BS	Buffer Strip
CSCE	Conference on Security and Cooperation in Europe
CORAS	Conseil Royal Consultatif pour les Affaires Sahariennes
CPO	Compulsory Purchase Order
ECOSOC	Economic and Social Council
EMA	Convention on the Elimination of Mercenarism in Africa
ESISC	European Strategic Intelligence and Security Center
EU	European Union
FAR	Forces Armées Royales
FPOL	Frente POLISARIO
GA	General Assembly (UN)
GAFTA	Greater Arab Free Trade Area
GDP	Gross Domestic Product
GPRA	Gouvernement Provisoire de la République Algérienne
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Court of Justice
LAS	League of Arab States
MAD	Moroccan Dirham
MA #1	Military Agreement number one
MINURSO	United Nations Mission for the organization of a Referendum in the Western Sahara
OCRS	Organisation Commune des Régions Sahariènnes
OHCHR	Office of the High Commissioner for Human Rights

LIST OF ABBREVIATIONS (cont.)

OIC	Organization of Islamic Conference
OUA	Organization of African Unity
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RMA	Royal Moroccan Army
POLISARIO	Frente Popular de Liberación de Sagguíat el Hamra y Río de Oro
SADR	Sahrawi Arab Democratic Republic
SPLA	Popular Sahrawi Liberation Army
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
USSR	Union of Soviet Socialist Republics
WGIP	Working Group on Indigenous Peoples
WW II	World War II

CHAPTER I
INTRODUCTION

The beginning of my school days in Morocco during the seventies coincided with my introduction to the topic of Western Sahara ('Moroccan Sahara' as has been called in Morocco). My interest in such topic has been gradually growing since an early age. This goes back to the time when I was shown how to draw the map of my country. I could never get it completely right because the map kept growing as did my curiosity as to why the territory kept extending. At that time and until lately, Western Sahara was a "political taboo". No Moroccan citizen was supposed to talk about it, and those few who did speak, they did it in a governmental or anti-governmental ways. In other words, just what Western Sahara is has never been explained to me, rather, I have been told what others have been hoping it to be like. The extension of the boundary lines of Morocco was talked about throughout various discourses in which territorial integrity, self-determination and decolonization were the major ones.

Self-determination as a process of decolonization is a miraculous and mysterious apparatus – miraculous because it can bring justice to those who have been wronged and mysterious because it is based upon uncertainties and inconsistencies, or even confusion. This research aims to contribute to the breakup of a puzzle related to these qualities of self-determination, indeed, as so far as it involves the Western Sahara Dispute[1].

The advisory opinion of the International Court of Justice (ICJ) on Western Sahara case, issued in 1975, stands out as one of the major international jurisprudential decisions on the meaning of the right to self-determination. The decision has entrenched its importance as an innovation in the explanation of

[1] This research uses the word 'dispute' in accordance with the Permanent Court of International Justice (PCIJ) definition of the word as stated in the *Mavrommatis* case. The Court defined "dispute" as "a disagreement on point of law or fact, a conflict of legal views of interests between two persons". The research uses the "Western Sahara dispute" and "Western Sahara case" interchangeably.

decolonization and self-determination. It could be remembered for its legal innovation through its insight into the clash of the political and legal perception of the contested conceptions of state territorial integrity and those impinging peoples' right to self-determination.

The Western Sahara dispute remains unresolved, with different arguments about the legal meaning of the ICJ decision and political maneuvering over a process to settle the status of the territory.

The territory now known as Western Sahara was under Spanish colonization in 1884-1885.[2] In the mid-1970s, under pressure from Morocco and Mauritania, Spain was forced to decolonize the region and decided to hold a referendum for Western Saharans[3] so that they could decide about integration with Morocco and Mauritania or the establishment of an independent state. Morocco and Mauritania contested the Spanish plan claiming that it would be a Spanish maneuver to establish an aligned dependent state. They have considered that Western Sahara has formed part of their territory based upon the contestation of their 'historic rights'.

Morocco called upon the U.N. General Assembly to refer the question to the International Court of Justice (ICJ), which concluded in its Advisory Opinion of 16 October 1975:

"The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as

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[2] During the first decade of the 20th century, after an agreement among the European colonial powers at the Berlin Conference in late 1884 to early 1885 on the division of spheres of influence in Africa, Spain seized control of the Western Sahara and declared it to be a Spanish protectorate in a series of wars against the local tribes reminiscent of similar European colonial adventures of the period, in the Maghreb, sub-Saharan Africa, and elsewhere.

[3] The terms "Saharan" and "Sahrawi" are used to refer the same meaning. They both refer to the member(s) of Western Sahara populations/peoples.

might affect the application of General Assembly Resolution 1514 (XV) of 14 December 1960 in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the people of the Territory" (ICJ [4]Western Sahara, 1975).

Right after the ICJ Advisory Opinion and on 6 November 1975, Morocco launched a "Green March" (*Almassira Al Khadra*) of approximately 350,000 unarmed civilians to the Western Sahara to annex the Territory still under the Spanish occupation. Subsequently, and after the Madrid Accords in 1976, Spain agreed to withdraw and a shared Moroccan and Mauritanian administration was declared. The Popular Front for the Liberation of Sagguiat Al Hamra and Rio del Oro (POLISARIO), which was founded in 1974 and seeking independence, militarily resisted the Moroccan and Mauritanian presence in the territory. With the support of Algeria,[5] the POLISARIO established its Headquarters in Tindouf,[6] in Southwest Algeria, and founded the Sahrawi Arab Democratic Republic (SADR) in 1976 and declared it the Sahrawi state in exile.

During the armed conflict, Mauritania decided to sign a Peace Treaty with the POLISARIO and abandoned its territorial claim over Western Sahara. Morocco took over Mauritania's previously contested part in 1981. On the other hand, the U.N. arranged a cease-fire between Morocco and POLISARIO, and proposed a settlement plan in 1991. U.N Security Council Resolution 690 (April 29, 1991) established the United Nations Mission for the Organization of a Referendum in the Western Sahara (MINURSO).[7] It called for a referendum to offer Sahrawi people a choice between independence and integration with Morocco. Morocco and the POLISARIO have

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4 Official translation.

5 Many have referred to Polisario as "Algeria-backed POLISARIO Front". This is the case of BBC News report on 13 March 2008 under the section reserved for *Regions and Territories.*

6 In the 1970s, about 160,000 Sahrawis are in Tindouf, Algeria and in Mauritania. In 1963, Morocco took over the now Algerian province of Tindouf. After armed operations, Morocco and Algeria agreed on a demilitarized zone and Morocco recognized the Algerian border in exchange for joint mineral exploitation in Tindouf.

7 The UN established a settlement plan that went into effect in April 1991 when the Security Council approved the Secretary-General's report proposing the organization of a referendum on self-determination for the people of Western Sahara to enable them to choose between independence and integration with Morocco. The plan called for the creation of the United Nations Mission for the Referendum in Western Sahara (MINURSO), consisting of civilian, military, and police components to carry out all tasks leading to the referendum.

strongly differed over how to identify an electorate for the referendum, with each one seeking to ensure an electoral list that would support their interests. In this deadlock, the Security Council asked the parties to consider alternative solutions including "limited autonomy". In 2007, Morocco and POLISARIO submitted two proposals addressing alternative political solutions, on which negotiations are currently taking place under the UN supervision aimed at finding a mutually acceptable solution to the impasse. Algeria and Mauritania were also present and consulted separately during the talks. During the previous rounds of discussions, the parties[8] continued to express strong differences on the fundamental questions at stake.[9]

Over the years, the Western Sahara conflict has resulted in severe human rights abuses, most notably the displacement of tens of thousands of the Sahrawi[10] population (or peoples) from the territory, the expulsion of tens of thousands of Moroccan civilians from Algeria by the Algerian government, [11] and numerous casualties of war and repression (OHCHR, 2006).

The Western Sahara dispute has been on the UN agenda for over 35 years, the complexities surrounding the case of Western Sahara forced the UN to persuade the parties to consider alternative agreement based upon political solutions to the conflict by introducing the possibility of a limited autonomy status of Western Sahara. By officially presenting its project of autonomy for Western Sahara in April 2007, Morocco seems to be considering a new approach, different from its initial stand. The Popular Front for the Liberation of Sagguiat Al Hamra and Rio del Oro (POLISARIO) has also submitted a proposal that refers to referendum with the possibility for territorial independence or integration with some strategic guarantees into Morocco, which marks the POLISARIO initial position (except for the part in which the POLISARIO proposed some guarantees to Morocco).

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[8] The word *"Realpolitik"* in this research refers to politics or diplomacy based primarily on practical considerations rather that theoretical and ethical objectives. It can be regarded as related to the philosophy of political realism but remains different in the sense that even though it can be described as "realist" foreign policy it does not focus on realism paradigm that include a range of theories regarding international relations.

[9] This is a very brief historical overview of the Western Sahara conflict. Chapter 2 of this thesis represents a detailed historical narration of the conflict.

[10] The terms "Saharan" and "Sahrawi" are used to refer the same meaning. They both refer to the member(s) of Western Sahara population/peoples.

[11] The displacement of Moroccan citizens who were residing in Algeria was ordered by the Former Algerian President Boumediane.

Yet, it could be maintained that the power imbalance between the concerned states and the Sahrawi population shaped the evolution of the dispute and eclipsed the specific nature of the territory. An overview of the territory and its populations would help in understanding to what extent the diversity of the place and peoples has been treated by the various parties and other state machinery as one 'thing'. Such overview will also help us in understanding the complex character of 'domesticating' such diversity into various discourses of international law and politics as this thesis will be discussing in the following chapters.

1.1 Territory and its populations

Western Sahara forms a part of the North African Sahara, which stretches from the Red Sea to the Atlantic Ocean with an approximate land area of seven hundred thousand square kilometers (700,000 sq.km). The territorial delimitation of the African Sahara has been conducted through various criteria such as geological, morphological, climatologic, hydrographical, botanic-geographical, physico-geographical and anthropological studies. However, these criteria lack precision due to the fact that some of their elements created striking similarities between the Oriental, Central and Western Sahara (Benabdellah 1977, 1). Nonetheless, the Western part of the Sahara is mostly identified with what was previously called "the Spanish Sahara", which comprised the Sagguiat El Hamra and Rio de Oro. The Sagguiat El Hamra is estimated as approximately 82,000 square kilometers, and the Rio de Oro is about 190,000 square kilometers. Morocco estimates its national territory to be about 740,000 square kilometers. The international community counts it to be about 466,550 square kilometers. The difference represents the contested part of the Western Sahara land namely the Sagguiat El Hamra and Rio de Oro. This land is mainly covered with desert and is considered rich in fish, phosphates (and probably oil)[12] that one can

[12] Oil has not been discovered yet, even though there is much talk about the possible oil reserves in Western Sahara. The quest for oil in Western Saharan waters has attracted much attention since Morocco announced it had granted reconnaissance licenses to Total and Kerr McGee in 2001 (*Europa Press* 28 July 2005) (*L'Economiste'*2 August 2005). In his autobiography, King Hassan II explicitly denied that the phosphate reserves of the Western Sahara were a reason for Morocco taking over the territory. Indeed, he argued that investment requirements would outstrip revenues (Hassan II 1978).

believe *a priori* that the natural resources of the land, as well as its geopolitical position, have been the main interest in the area in question.

The existence of natural resources was balanced by the commerce between populations in the north of Morocco, Mauritania and Sudan. The commercial caravans have traversed the river of Oued Noun, which was a zone of annual fairs, and the Sagguiat, which was a land of cultures.

Sagguiat El Hamra constitutes a large river that stretches over a distance of 400 kilometers to reach the Atlantic Ocean. However the river has remained dry for years, which points to the weakness of the traditional system of water management and the hardiness of the dry climatic condition in the region.

Originally, the populations in Western Sahara were a mixture of Arabs, Berbers and Black African. This mixture still marks the region until today. The Berbers reached the Sahara in successive stages, escaping the atrocities of wars or chased out by the invaders including the Arabs in the North and the East. They came to Western Sahara before the Arabs with whom they later formed mixed Arabo-Berber groups. Among the Berbers in the Western Sahara, the Imraguens, who are the black Berbers, have been into fishery. They were obligated to pay a Horma, which is a sort of fee to the tribe of Ouled Dlim to be able to obtain the right to fishing. They had been traveling from the Villa Cisneros (Dakhla) to Nouakchott.

The Znaga are Arabo-Berber tribes who are mostly semi-nomads, had been breeding cattle and those families remain close to the nearest oasis. Not warriors as other tribes, they had been living under the protection of the Baidane to whom they pay an annual Horma.

The Baidane are white Arabs who are mostly the descendants of the Hilaliens and Bani Souleim. They had nomad-warrior status that awarded them a superior social hierarchy. Nowadays, the social organisation does not allow them to protect other tribes, but they still keep high social status.

The Tekna are the Arab descendants of the Almoravides Dynasty. With their twelve tribes, they have occupied approximately half of the Western Sahara territory. They owned agricultural lands, oases, palm and olive trees, goats and camels. Camels have long been the principal element in the livestock of the Sahara. The Tekna are limited in the north by the Atlas Mountains, in the south by Sagguiat El Hamra, in

the west by the Atlantic Ocean, and in the east by the Oued (river) Tamanart. This geographic area represents a transitional zone between the Mediterranean region in the north and the desert in the south.

The Harratine are the emancipated African slaves. They formed the artisan class and were known of their hard work and their dedication in trying to change their social status. Some of them have succeeded financially, but they still retain a low social status.

The Black slaves were living around the Draa Valley. They were exploited by the Hilaliens and Bani Souleim. Despite the fact that the blacks were liberated and emancipated, they remain socially marginalized, no matter the wealth, the intellectual level or the prestige of the position at work that they can establish. It is considered that the social hierarchization of the tribes is strict and rigid. It still marks the daily social interaction between various groups at different levels of social life (Boughdadi 2007, 103).

The approximately 260,000 people of the Western Sahara territory (Figure 1) remain profoundly shaped by Islam. The ancestral traditions of the Sahrawis are characterized by the Maleki religious faith (Benabdallah 1977, 4). Malekism is considered to be the principal rite in Morocco and the religious basis of the King in his status of *Amir Al Mouminine* (Commander of the Faithful). Malekism is also the main rite in Mauritania; however it's the Kharejism that constitutes the main religious rite in Algeria. These similarities in rites may set a base for a religious and political allegiance between populations in Western Sahara and the King of Morocco. Such allegiance may also justify an Islamic territorial sovereignty of the Kingdom over the territories which gave allegiance to the King. This thesis will expound on how Morocco claimed Western Sahara based upon the concept of Islamic allegiance, and how this claim was evaluated by the International Court of Justice within the framework of modern international law.

Also, rites differences may justify Algeria's rejection of the Islamic allegiance as to regulate territorial disputes related to Western Sahara. As this thesis will discuss later, Algeria, by taking part of the ICJ proceedings in Western Sahara case (as interested party), relied on a secular conception of territorial boundary delimitations.

In Western Sahara, the Zouaya who are the descendants of Kharijits and of those who came from Andalusia have assured the application of Muslim law (Chariaa), and became well respected for their religious knowledge. Accordingly, they often served as conflict resolution mediators between conflicting tribes. In case of an external threat, they often succeeded in grouping the various tribes to fight the invaders. They are spiritually allied to the Kharijits in Algeria and may oppose the basis of the Maleki allegiance to the Sultan of Morocco.

It is important to say that this diversity of peoples/populations is not, however specific to the Western Sahara territory; it is characteristic to the entire region of the Maghreb. In Morocco, the populations can be divided into three major groups: The Arabs and the Berbers in addition to the sub-Saharan blacks mainly the Harratine and Gnawa. As for the Arabs, most of their diaspora originated from the Hadramaut (in Yemen) to settle in various part of the world including the Maghreb. They soon married and mixed with the local populations mainly the Berbers[13] to form today's population, which is almost entirely Arab-Berber. The Berbers in Morocco can be divided into three main groups with three main languages: the Riffians in the north who speak Tarrifit (though many speak Arabic, Spanish and French), the Chlouh and Amazigh in the Atlas Mountains and the region of Souss, who speak Tachelhit and Tamazight respectively.

Today's presence of the Berbers in Morocco, Algeria, Mauritania, Libya and Tunisia alter the idea of an Arab World that comprises only Arabs. The Berbers are ethnically, though not politically, dominant part of the populations in the Maghreb region and are thought to form the majority in Algeria[14].

Berber groups live all over North Africa, from the Atlantic in the West to Egypt in the East, and today, it is considered that the Berber Touareg are still roaming in the Sahara desert. The Berbers have never experienced a unified political identity, which makes a review of the "history of the Berbers" somewhat problematic. There have been many strong Berber-led and Berber-populated kingdoms and cultures -

[13] The name "Berber" is considered by locals as another one of many peccadilloes of the Romans who along with the Greeks referred to every people they could not understand as 'Berber' whether they were in the East or the West.

[14] This is rather an estimated figure by some researchers; though no official figures are available because the Algerian government forbids census based on ethnic, religious and linguistic criteria.

often warring among themselves and against the colonizers - existing in parallel in various regions of North Africa and Spain, but never a unified Berber empire. Once the Berbers were included in the Arab States by the accession of states such as Morocco and Algeria into the League of Arab States, they have been framed by the governments as cultural minorities. This reality comes within the thinking in the Arab World on how to contain cultural diversity in the Arab World.

According to Hourani (1947), the Arab world is limited to the states formed from the Ottoman Empire, which were predominantly Sunni orthodox Muslim, and linguistically and culturally Arab. These states are Egypt, Palestine, Jordan, Lebanon, Syria and Iraq. Hourani (1947) mentioned that other groups in the region which are not Arab Sunni Muslims are considered minorities. Hourani's classification of groups in the Arab region (Hourani, 1947: 1–3) is shown in the following table[15]:

Table 1: Minorities in the Arab World

Sunni Muslims, non-Arab speaker	Arab speakers non-Muslims, non-Sunni	Neither Arab speakers nor Sunni Muslim
Kurdish	Heterodox Muslims (Shi'a, Alawi, Isma'ili and Druze)	Persian
Turkoman	Christians (Greek Orthodox, Syrian Orthodox, Coptic Orthodox, Assyrian, Roman catholic, Maronite, Greek Catholic, Coptic Catholic, Syrian Catholic, Chaldean Catholic, Protestants, Anglican and Presbyterian)	Kurdish speakers
Caucasian (Chechen and Circassian)	Jews and semi-Judaic sects (Rabbinite, Karaite and Samaritan)	Syriac speakers

[15] I borrowed this table and the analysis on minorities in the Arab World from a paper that I wrote on "Regenerating the State in the Arab World: the Role of the European Union in Democracy Building". The table is based on the classification of groups in the Arab World as given by Albert Hourani (1947).

Table 1: Minorities in the Arab World (Cont.)

Sunni Muslims, non-Arab speaker	Arab speakers non-Muslims, non-Sunni	Neither Arab speakers nor Sunni Muslim
	Other religions (Yazidi, Mandean, Shabak, Baha'i)	Armenian speakers
		Hebrew speakers
		Jewish of various European languages (Yiddish, Spanish, Italian…)

Source: Albert Habib Hourani (1947)

The accession of other states to the League of Arab States has led to the emergence of other groups in the political landscape of the Arab region: the Moorish in Mauritania, the sub-Saharan African in parts of Sudan, the Ibadis with Indian and African influence in Oman…and the Berbers in North Africa (excluding Egypt).

The Berbers are considered to form a majority in numbers in Algeria and constitute a solid part of the history in Morocco, Tunisia and Libya. They are considered as minorities not because of their numbers in these countries (no official number are available), but because how these communities are imagined in these states. They are considered as minorities because they are not originally Arabs and not entirely Muslim Sunni. More crucial, these groups had no abilities to communicate orally or in writing with other Berbers group (who spoke different languages) and with Arabs, but they understood each other's ideographs, because they share the sacred texts of Islam, which existed in classical Arabic only. According to Anderson (1983, 13), classical written Arabic language functioned to create communities out of signs, not sounds and distinct to the imagined communities of modern nations that had "national print-languages" and a different idea of admission to membership (Anderson 1983, 46).

This realty meant that sacred texts of Islam in which communities were imagined "cosmically central and linked to superterrestrial order of power" (Anderson 1983, 13); This is the Islamic *Ummah* that communities across the Arab World,

including the Berbers in North Africa, imagined themselves as. This reality comes in line with the background of the Monarchy in Morocco which basically sits on the premise of an Arabic and Islamic Sunni Maleki rite. Such premises support the idea of the allegiance to the Sunni Maleki Sultan because he is the Descendent of the Prophet Mohamed, so was officially declared by the authorities and confirmed by the *Majliss of Oulamas* – a religious Advisory Committee that forms the basis of the Ministry of Religion in Morocco (and the members are directly appointed by the King). The idea of non-allegiance to the Sultan (the King) would be explained by the Moroccan authorities, not as the cultural minority character of the group and their specific belief, but as a threat to the 'sacred unity' *(Al Wahda al Aaqaidia)*.

The Artile 19 of the Constitutions of Morocco (1962, 1970, 1972, 1992 and 1996) states:

> "The King, "Amir Al-Muminin" (Commander of the Faithful), shall be the Supreme Representative of the Nation and the Symbol of the unity thereof. He shall be the guarantor of the perpetuation and the continuity of the State. As Defender of the Faith, He shall ensure the respect for the Constitution. He shall be the Protector of the rights and liberties of the citizens, social groups and organisations. The King shall be the guarantor of the independence of the Nation and the territorial integrity of the Kingdom within all its rightfull boundaries".

This Article 19 gives material for thoughts on how unity in Morocco was imagined and also how the Article comes against the background of the Monarchy - under King Hassan II- being challenged by a faction in the Military (mostly Berbers). The national unity was also challenged by the Rifians in the North calling for an independent Rif, in addition to the past challenges of the Southern territories (Bled Siba) to the Central Administration (Bled Makhzen) after the independence of Morocco.

King Hassan II survived two coup-d'etats in 1971and 1972 but they were clear indication that the Muslim and Arab unified Morocco, as imagined, was not that unified around the Islamic symbol of the regime.

In Algeria, the confrontation between Arab and Berber identities is sharper. After the independence of Algeria and since 1963, tensions between the Kabyle leaders and the central government developed. It was the beginning of the endless Berber fight for the making of the Tamazight the official language in Algeria and the safeguarding of the Berber identity. The Algerian government long retaliated by banning Berber poetry recitals as organized by students in the Kabylie region, north of Algeria. The clash between the Berber and Arab identities intensified when the Kabylie populations called for the repudiation of the central government and started to organize themselves around an Islamic religious brotherhood against a socialist central government. These were the first steps of the violent confrontations between the government under the Front de Liberation Nationale (FLN) and the Front Islamic du Salut (FIS) based mainly upon Kabylie Berber members, and has a military wing called Group Islamique Armé (GIA). The GIA was established with the aim to overthrow the Algerian Government and replace it with an Islamic-based state.

In the 1991 general elections, the FIS won legitimately the majority of the votes but the results of the elections were unlawfully dismissed by the government. This situation plunged the country into a ten year period of a violent civil war between the FIS and their supporters on one side, and the government on the other. Even after the Civil Harmony Act and the Reconciliation Charter as declared by the government, which provided an amnesty for most crimes committed during the civil war, the situation remains very tense. The government banned the FIS and tracked down their members in the Kabyle region with the claim that they were or host members of Al Qaida. In reality, and despite the crackdown on radical Islamist movement in Algeria since 1992, and the pushing of the idea of a 'national reconciliation' in the 1999 law, the marginalization of the Islamists Salafist groups, which formed the base of the FIS, led to the re-emergence of a violent organized radical Islamism based in Algeria. The Salafist movements that aims for the establishment of an Islamic state represent today's anti-state rhetoric of Algeria. These Salafist movements are: the Al Qaida in

the Islamic Maghreb (AQMI) and the Da'wa Al Salafia, both inspired by the Wahhabism in Saudi Arabia.

Salafism is the political movement that set its base on the religious movement of 'Salafia'. 'Salafia'or 'Salafi' comes from the Arabic word 'Salaf' which can be translated as 'predecessor' or 'ancestor'. Religiously, Salafia means a very strict interpretation of the scripture by copying what the prophet (Salaf Essalih) and his successor's way of living, and rejects any 'innovation' because they consider it as foreign to Islam. Politically, Salafism means the movement that is based on the goal of establishing an Islamic Ummah based on the strict Salafi interpretation of the Qoran and rejects any modern style of state such as socialism, capitalism and any Western models.

Radical Islamists found in Algeria a terrain in which religion was not contained under a state framework like it is in the case of Morocco, where the King is the Commander of the Faithful *(Amir al Mouminin)*. The Islamic Sunni Maleki was set in Morocco to establish 'the religious unity' (al wahda al aqidia) of the country, moderate in the interpretation of the precepts of Islam and open to Western models.

The struggle of Morocco and Algeria in establishing unity under the modern construct of nationalism on one side, and the religious differences between to two countries on the other side, set the background of the following analysis of the Western Sahara issue. The analysis of the dispute sheds light on the understanding of the dispute taking into account of what the dispute represented for the regimes in Morocco and Algeria with regard to their struggle for political stability and the search for national unity and the competitive and hostile relationship involved; making Algeria's hosting of the POLISARIO a very negative fact for Morocco.

1.2 Aim and arguments of the thesis

This research represents an analysis of the right to self-determination that involves the territory of Western Sahara. It aims to contribute to the understanding of the current deadlock by studying the parties' arguments, the various discourses and the overall debate on the matter. Because self-determination has a dualistic character - both political and legal- the Western Sahara dispute cannot be analyzed only through the legal paradigm and judicial process of international law.

This thesis has the following arguments that I will try to justify:

1. The current debates on territorial autonomous status for Western Sahara that officially started in 2001 by the UN involvement can be seen as a new discourse in the long drawn-out conflict over Western Sahara territory. The Western Sahara dispute is related to the overall ill-defined and inconsistent International law of peoples' right to self-determination, which poses problems in specific situations. However, the dispute is about the application of self-determination in the context of decolonization which legal principles and goals are rather clear. The International Court of Justice clearly framed the dispute within the track of decolonization. Nonetheless, this dispute replicates the differences between international bodies, mainly within the UN on the reception and the application of the ICJ decision. Currently, the debate over the Western Sahara illustrates the gradual fading of the legal paradigm based upon the rule of 'the free and genuine expression of peoples' and the emergence of autonomy as political discourse based upon states' diplomatic maneuvers.

2. The Western Sahara dispute represents grounds for *realpolitik*[16] and is approached divisively among member states and organs of the UN- the General Assembly and Security Council. *Realpolitik* scores the nebulous position of the United Nations in relation to the dispute. It could in part explain the current low level of violence associated with the dispute but it sadly stands as the reason behind the continuous deadlock in the conflict and the continued uncertain status of thousands of people. The Western Sahara conflict is not just a vague legal dispute and the platform of nebulous *realpolitik*. Most importantly, the dispute involves real peoples and the status of these real peoples along with heated debates on various competing discourses: legal ties, *uti-possidetis, terra nullius,* national integrity and autonomy. The longer the dispute goes justly unresolved within an international transparent framework, the longer these real peoples' status remains in question.

[16] See infra. footnote 7

1.3 Methodology and limitations of the thesis

This research uses a qualitative documentary research methodology. It relies on data collected from the fields of history, International Relations and law. The information collected for this research includes the following sources: bilateral and multilateral treaties, accords and conventions, international (interstates) correspondences, intrastate administrative documents, speeches, books, magazines and articles both international and domestic, resolutions and reports of the United Nations, documents collected from Internet sources, newspapers articles, documented press conferences and interviews, pleadings, arguments, oral statements of Western Sahara case as documented by the ICJ in 4 volumes and the texts of the two proposals recently submitted by Morocco and POLISARIO. Most of these documents are in French and Arabic.

During my field research, I used interviews to map out the parties' readings of the 1975 ICJ decision in Western Sahara case and their views on the recent proposal of autonomy. The interviews were conducted in Sweden and Morocco for the sake of the author's understanding of some aspects of the dispute. This stage was considered necessary as preliminary informative research. The interviews that were conducted in Morocco allowed me to have the various views of people from civil society working on human rights issues and those of governmental representatives who are working to promote Morocco's position. In Sweden, I met and discussed with people who were politically involved in supporting POLISARIO's position by opposing any annexation of Western Sahara by Morocco. I also collected random opinions of people without any specific involvement in the issue. All the interviews were semi-structured and focused on three major points: the interviewees' general feelings about the Western Sahara dispute, the overall understanding of the historical origins of the dispute and their understandings of the outcome of the International Court's decision in the Western Sahara case.

This preliminary stage of the research allowed me to realize that there are so many different feelings involved among people regarding the perception of the dispute. The interviews helped me to realize that there are conflicting versions in the understanding of the origins of the dispute, as well as the outcome of the ICJ decision in the Western Sahara case. Also, this stage of the research allowed me to decide on

the appropriate methodology for this research. During this preliminary stage of the research, I came to realize that an ethnographic research based on interviews won't lead me to extract the deep-rooted information regarding the history of the dispute and the analysis of the ICJ decision in the case. Also, because of the high sensitivity of the dispute in Morocco, it is difficult to openly extract views and information from the interviewees, and the few answers I received from them were repeated and for the most part identical. In addition, it is almost impossible to get access to the members of the POLISARIO whether those living (secretly) in Morocco or those based in Tindouf (Algeria).

Accordingly, after conducting this preliminary stage of the research, I realized that documentary research best suited the objectives of this thesis and my travels to Morocco and Sweden allowed me to collect various documents and books that were not available in Thailand. All collected documents were classified chronologically and into two sections: legal and extra-legal documents. Each section was divided into two sub-sections in which legal documents were categorized by documents related to the 1975 Western Sahara case, and those related to other cases to be used in the comparative analysis. The extra-legal documents were classified by documents related to frontiers and boundaries of Western Sahara, and documents related to the various discussions, negotiations and agreements in relation to the dispute that occurred at the diplomatic level after the 1975 ICJ advisory opinion.

After the document research, I started by putting together the story of the dispute for further analysis. The data used was mainly extra-legal documents, collected texts of the various treaties, accords, maps, photos and various inter-states and intra-states correspondence that were concluded in relation with the Territory.

Considering that a part of this research is legal, the analysis relied on collected legal documents and mainly the pleadings, arguments and oral statements of the 1975 Western Sahara case. In terms of comparative legal analysis, I used other case law such as the texts of the ICJ Advisory-opinions in South West Africa. I also used text of decisions of the former Permanent Court of International Justice (PCIJ) in Eastern Greenland case and former Permanent Court of Arbitration (PCA) in Island Palmas, both under the League of Nations.

The political analysis used the second sub-section of the collected extra-legal documents related to the various discussions, negotiations, agreements and proposals that occurred after the Advisory opinion on Western Sahara. To allow the understanding of the various discourses, the overall analysis took into account four criteria: time and place of the event, persons involved and language used.

It is crucial to mention that this research has limitations; the analysis included in this research is not aimed to finding solutions to the dispute, nor does it intend to provide recommendations on how to reconcile the various positions of the parties in the dispute. Even though one inevitably speaks the language of right and wrong, this research does not address any discussions of moral wrongdoings nor do I wish to take sides.

This is not to say, however, that what follows is neutral with regards to the position between the rule of international law and anti-legal stances. Even though I offer fundamental criticism of some elements of international law, at least in some of its forms, the framework of arguments I utilize is clearly closer to the rule of international law than to any competing position.

In addition, as part of a Human Rights programme, it was wished that this thesis could focus on the human rights violations that this dispute engendered. The severe human rights violations that the dispute has resulted in include most notably the displacement of thousands of Sahrawi civilians from their lands, the expulsion of thousands of Moroccan civilians from Algeria by the Algerian government, the documented inhuman maltreatment of the Sahrawi civilians in the Tindouf refugee camps in Algeria by the members of POLISARIO and the documented harassment, arrests and torture of Sahrawis and their sympathizers in the Moroccan controlled territories of Western Sahara by the Moroccan authorities. Until the mid 1990s, international organizations have documented far less extensively the human rights violations related to the Western Sahara dispute. After the mid 1990s, international organizations such as Amnesty International, Human Rights Watch, Freedom House, World Organization against Torture, Reporters without Borders, the International Committee of Red Cross and the UN High Commissioner for Human Rights started to document more extensively the human rights violations related to the dispute. Cases of disappearances, violations of freedom of movement, freedom of expression and

assembly, torture, arbitrary detentions, forced labour, cases of prisoners of war and summary executions of captured soldiers etc, have been documented by various organizations that collected direct testimonies from the victims and/or their families. Other non-governmental organizations have been tracking and reporting on human rights violations in the Western Sahara; documented human right violations through testimonies appear in the reports of France-Liberté, the US Committee for Refugees and Immigrants, the Canadian Lawyers Association, the Moroccan Association for Human Rights, the Norwegian Refugee Council, the Moroccan Organization of Human Rights, the Association for International Human Rights, the Committee for the Bringing Together of Sahraoui Families, the Truth About the POLISARIO Prisons in the South of Algeria, the Association of Parents of Sahraoui Victims of Repression within the Camps of Tindouf, the Sahrawi Association of Victims of Grave Human Rights Violations Committed by the Moroccan State, the International Bureau for the Respect of Human Rights in Western Sahara and many others.

Since the 1990s, various organizations gradually started documenting human rights violations that the Western Sahara dispute resulted in, and currently many reports extensively address the issue of human rights violations related to the dispute. Individuals and organizations urged the UN to monitor human rights in the Territory. The most recent UN Secretary-General Ban Ki-Moon report on Western Sahara (6 April 2010) which informed the drafting of the new UN Security Council resolution, acknowledges human rights violations related to the dispute, but failed to offer or recommend a mechanism to monitor and address them.

Addressing the impact of this on-going conflict on the human rights of the populations/peoples, as crucial as it is to research and analyze, remain beyond the limits of what this thesis can contribute to. Many organizations extensively address the issue of human rights violations in the dispute and I believe that I won't be able to add much to their extensive work at this point. Instead, this thesis focuses on the overall understanding of the dispute and how Western Sahara has been negotiated by the various parties involved. In other words, this research is about the dispute rather than the impact of the dispute on the human rights of the populations/peoples.

Considering that human rights studies are as much about the studies of human rights violations as the human rights themselves, this thesis also focuses on the

analysis of the international law of the human right of peoples' right to self-determination. This right is the only right that appears in both building blocks of the International Bill of Human Rights; the International Covenant on Civil and Political Rights (ICCPR) and the International Convenant on Economic, Social and Cultural Rights (ICESCR). I hope that this thesis contributes to the spectrum of human rights research on the understanding of peoples' right to self-determination and its related discourses, as far as it involves the on-going Western Sahara conflict.

1.4 Structure of the thesis

After presenting the thesis design in the introduction in chapter 1, chapter 2 represents the 'storytelling' of the dispute which tracks the historical developments and the changing context of the dispute as well as the evolution of the dispute before it reached the United Nations. This chapter demonstrates that the conflict over the territory of Western Sahara is not decades, but centuries old. It is specifically part of the colonial history of Morocco, Mauritania and Algeria, and it is closely linked to the history of colonialist 'deals' of the dismemberment of Africa and Asia in general. In chapter 3, the research uses a legal analysis in its strict sense of the Western Sahara case law at the International Court of Justice (ICJ). This chapter identifies the legal discourses used by the parties and the Court and discusses the outcome of the ICJ Advisory Opinion on Western Sahara case. This chapter exhibits the fact that if the Court's decision was clear in putting Western Sahara in the track of decolonization, the legal framework on which the Court has based its decision remains questionable. Chapter 4 analyzes how Western Sahara was negotiated in international and diplomatic relations and the emergence of autonomy as a political compromise. The main finding in this chapter is that peoples' right to self-determination remains partly defined and States have no interest in precisely defining it, and prefer to leave it flexible, so that it can suit States' interests from one case to another. At some point, the idea of autonomy seems to fill this gap. Finally, chapter 5 concludes the findings of the thesis based on the arguments and findings of the previous chapters and proposes a re-definition of the Western Sahara dispute.

CHAPTER II
STORYTELLING OF WESTERN SAHARA DISPUTE

> "His Moroccan Majesty engages to perpetually concede to his Catholic Majesty, the territory in the Ocean cost, near Santa Cruz (the small) that is sufficient for the establishment of a fishery like the one Spain had previously possessed"[17] (Treaty of Tetuan, 1860).

These lines were penned in 26 April 1860 Treaty of Tetuan that symbolizes the Moroccan defeat in the 1844 Battle of Isly. The defeat represents one of the nightmares in the history of Morocco. Since 1476, the Santa Cruz de Mar - currently the city of Agadir- was previously controlled by the Spanish Government and it was not a very long distance from the Canary Islands that were Spanish controlled territories as well. The Santa Cruz de Mar (Agadir) was occupied by the Spaniards in 1476, and in which a rich Spanish aristocrat - Diego Herrera - established a large fishery. The territory that was near Santa Cruz (the small), currently the city of Agadir, and to which the Tetuan Treaty referred as "the territory in the ocean cost, near Santa Cruz (the small) that is sufficient to the establishment of a fishery like the one Spain has previously possessed" is Santa Cruz de la Mar Pequeña (currently Ifni)[18].

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[17] Author's translation.

[18] Ifni had a total area of 1,502 km² (580 sq mi), and an estimated population of 51,517 in 1964. The main industry was fishing. Spain's presence in the area can be traced to a settlement called *Santa Cruz de la Mar Pequeña*, founded in 1476, which importance was derived from its position as a center for the trans-Saharan slave trade, and captives were shipped to sugar plantations on the Canary Islands. The Spanish were expelled from the area in 1524 by the Berbers. It was not until the mid-nineteenth century that Spain became interested in its lost medieval fortress - *Santa Cruz de la Mar Pequeña* - in order to claim the southern part of Morocco, and to occupy the Western Sahara. Because Ifni was an enclave, it was later absorbed by the bigger state: Morocco. But because *Saqquiat El Hamra and Rio del Oro* were territorially quite large and could not be considered as enclaves, they were put by the UN on the track of decolonization under the frame work of external right to self-determination for their people.

Ifni was a Spanish province on the Atlantic coast of Morocco (and Western Sahara), south of Agadir and across from the Canary Islands. the exact location of Santa Cruz de la Mar Pequeña was unknown, and it was noy until the mid-nineteenth century when France and Spain laid claims over the Maghreb, that Spain became interested in its lost medieval fortress (Cruz de la Mar Pequeña) in order to claim the southern part of Morocco. Ifni was considered the most likely area. The territory and its main town - Sidi Ifni - were ceded to Spain by Morocco officially in 1860, but there was little Spanish presence until 1934, when the Governor-General of Spanish Sahara established his residence in Ifni. During Franco's dictatorship, the colony was declared and made a province (not an overseas colony) to stop the United Nations putting it in the track of decolonization. Even though Ifni was an enclave that was later absorbed by the larger state (Morocco) in 1969, it was considered as part of the Spanish Sahara sharing the same status. The occupation of Ifni allowed Spain that was interested in the Southern territories (bellow Santa Cruz de Mar) to expand under the framework of *'Terra Nulluis'* in the other Southern territories: Saqquit El Hamra and Rio De Oro, which form the now contested territories of Western Sahara. This occupation was made possible because of the fact that international law allowed possession through *Terra Nullius*.

The legal devices that were developed mostly in the 19th century by the European international legal doctrine (at the time of Spanish colonization of Western Sahara) to systematize colonial expansions were: (a) terra nullius or (b) cession through agreement/s with local populations. This means that depending of the status of the territory, European powers would proceed with their expansion through either effective occupation, or through agreement with local populations. It seems simple but it was complicated by two factors: the definition of *terra nullius* notwithstanding the long-established of local people, and the real status in the international legal system of these local people – indigenous populations. Western Sahara was not uninhabited like (every party agreed upon this point at the ICJ). An early (at the time of the Spanish colonization) unilateral assertion of territorial sovereignty over Western Sahara during the 19th century could not be considered as conquest, as this implied a state of war between two equal international persons. Also, the Spanish acquisition of the Western Sahara could not be considered as the outcome of the territorial cession because the

local populations and indigenous peoples were not considered as having the international legal personality that gave them title of sovereignty over the territory, and therefore they it cannot be sustained that they ceded sovereignty of the territory to the Spanish.

Terra nullius was used as a device to justify control and jurisdiction of areas, like Western Sahara, which were inhabited by local populations and/or indigenous people who were not considered as equals to states. The international law at the time of Spanish colonization of Western Sahara was based on the idea of the standards of civilization, by which an entity could enter into the realm of international society. Such standards were nearly exclusively European, and Spain did very much use the standard in dealing with Western Sahara (whether it said so or not). The attempt to differentiate the acquisitions of territories through agreements with local populations and the occupation of *terra nullius* during the 19th Century had been the object of jurisprudential debates, and those territories inhabited by local populations were considered as *terra nullius*. Despite the new approach of the ICJ in the Western Sahara case, as this thesis will be discussing later, one cannot reverse the reality of the Spanish colonization of the Western Sahara during the 19th century.

Spain colonized the Western Sahara not within the framework of settlements through agreement with local populations (as Spain maintained during the ICJ proceedings) because such framework did not exist in the international law of that period of time. It did not exist because international law did not consider local populations as entities of international law, and accordingly did not change the character of Western Sahara as *terra nullius*. The territory was retrospectively considered *terra nullius*, literally a land without sovereign authorities.

As mentioned in a Spanish correspondence regarding the reception of the Treaty with Morocco, below this point of Agadir (Santa Cruz de Mar), the southern part of the country offered a great advantage for the Spaniards in their pursuit of commerce with the neighboring Canaries, and would represent a good port of refuge for vessels.

At that time, the Spanish newspapers commented about the event with pride and joy to see the nation - Spain - concluding an “honorable” treaty and the distinguished position that Spain has among the Powers of Europe. The newspapers

reported that Spain exhibited a record of triumph in two regular battles and twenty three minor actions - no other state in the world had ever had such success. The writer of the 1860 correspondence on the reception of the Treaty of Tetuan[19] reported that the Spanish newspapers at that time were not permitted ways other than praising the Spanish government's actions. Questions were also posed on the Moroccan version of the situation post-war. The only correspondences that could reach out to Spain at that time were some English and American reports that had started gradually to give another version of the bloody character of the war.

Up to this point, it is clear that there were prominent interests for Spain in the "Southern Part of the country", which offered economic and security advantages in relation to the Canary Islands in the Atlantic Ocean. The version of the story in which the Spanish interests were targeted towards the phosphate reserves in the region in the South remains at this point irrelevant because the first reserve of the phosphate was not discovered until after 1958 with the independence of Morocco[20].

The conflict of Western Sahara is paradoxically simple and difficult. It is simple because its object is concrete and simple to determine. The object of the conflict is the territory of two previously Spanish colonized provinces: The Saquiat El Hamra and Rio de Oro and the status of the population that has been living there leading a nomadic lifestyle. The Territory constitutes about 266,000 square kilometers of desert that is rich in phosphate and coastlines are abundant with fish. This simplistic presentation masks the complexities of a conflict, the ingredients of which brought grief and passion. The origins of the conflict were translated into Spanish passion and pride with the victory of Isly, and transplanted into the art of that period, most remarkably in the paintings of Salvador Dali (Figure 3).

The pride even reached the Philippines where the Spanish colonizers were establishing their colonial base. The "Rendicion D Tetuan" came to be in the façade of the San Joaquin Church in Iloilo in the Philippines (Figure 4). Although mostly with

[19] The original text of the correspondence as published by the New York Times on 26 April 1860 is included as Annex 6. Part of the Treaty of Tetuan is included as Annex 8.

[20] This statement comes in contradiction with a Benabdallah Abdelaziz (1977, 41) statement on the matter. He mentions that the phosphate reserves of Boukraa in Sakiat El Hamra were the main interests of Spain in the Western Sahara. In my opinion, the Spanish interests in the Western Sahara were accentuated by the discovery of the phosphate reserves in the region, but they were not the main cause for the Spanish colonization of the territory.

Chinese faces (because the façade was built by Chinese workers in Philippines), one could not miss the Arabic figures of defeated Moroccan soldiers in their traditional armory. The symbols of the heady victory for Catholic Spain that is still engraved on the San Joaquin Church represented another bitter defeat of the Muslims in Morocco and North Africa in general. The façade of the church has also been used to transmit a message to any resistance movement in the Philippines against the Spanish occupation. The message was that any resistance against the colonizers in the Philippines would only know defeat as it was for the Moroccans during the battle of Isly.

Passion was also blooming during the days of the "Green March" starting 6 to 9 November 1975. 350,000 Moroccans with the nation's flag and the Qoran in hand, walked to take back the Territory and efface the Spanish humiliation. Coup de grace and touch of genius it was considered in Morocco; the march succeeded in getting the southern territories back to the nation of Morocco and gathering much needed nationalistic sentiments around a King whose rule was threatened from the inside and the outside.

The passion of the conflict is out-weighted by the great sorrow of the many victims that were counted or uncounted, known or anonymous, tortured or killed, displaced or arrested. The sorrow of this conflict gives us material for reflection about the frontiers created by colonization, the nature of power in a state of Islam and the continuous clash between tribal Bedouins on one side and state machinery on the other.

The history of the Western Sahara dispute is a history of the "Maures". It remains equivocal that the use of the word "Sahrawi" or "Saharan" that appears in many documents related to the dispute, sometimes relates to the nature of the region "Sahara", or as a name of a war, or used to contest the ethnic unity of the Maures (Claude Le Borgne 1983). The community of the Maures was the product of a bundling of three ethnicities in the order of their arrival and establishment in the Territory: the sub-Saharians or blacks, the Berbers and the Arabs.

During the nineteenth century, Western Sahara and its Maures experienced a political sovereignty that was unknown in the West. The type of sovereignty that organized the relational situation between the Territory and the Maures was specific to the *Umma* in Islam. The *Umma* encloses the community of the Faithful and has some structures of a state in its Western arrangement. In Western Sahara this unknown

Islamic sovereignty, the nature of the nomadic style of the Maures and the desert made the Territory and its populations resistant to any static administrative enterprise. It is this situation in which Western colonialism would erupt through its mathematical conceptions of power and frontiers (Claude Le Borgne 1983).

On 18 March 1845 colonial infiltration and direct interference with the nature of the Territory started with the Treaty of Lalla Maghnia. The Treaty was concluded between colonial France that was occupying Algeria and militarily-weakened Morocco under the Sultan Abderrahman. This treaty came to establish boundaries between Morocco and Algeria and somehow described the territorial merger between these two countries. Article 4 of the Treaty reads :

> *"Dans le Sahara (désert), il n'y a pas de limite territoriale à établir entre les deux pays, puisque la terre ne se laboure pas et qu'elle sert seulement de pacage aux Arabes des deux Empires qui viennent y camper pour y trouver les pâturages et les eaux qui leur sont nécessaires".* [In the Sahara (desert), there is no delimitation to be established between the two countries, because the land cannot be labored and serves only to pasture for the Arabs of the two empires who come to camp in it or find pasture and the waters that are necessary for them] (Treaty of Lalla Maghnia 1845, article 4)[21].

In contrast to the French, the Spanish interests in the Western Sahara were not concerned with lands that could be labored but rather the latter's interests were over the fishery reserves and in the strategic position that the Territory presented with regard to the 'Spanish' Canary Islands. The absence of delimitation of the Territory in Lalla Maghnia Treaty, and the opportunity of having Western Sahara without a stated "owner" (which is different from the situation of a uninhabited land), presented an opportunity for the Spanish to possess the Territory under the doctrine of *Terra*

[21] Author's translation; see the complete original of Treaty Lalla Maghnia in Annex 7.

Nullius[22] (land belonging to nobody). Spain was officially declared the occupying power of Western Sahara in the final Act of the Berlin Conference of 1884-1885[23].

Being between two colonial powers with different and specific interests, the militarily-weakened Morocco saw the Western Sahara occupied by Spain. Fictively, Spain occupied Western Sahara (Saquiat El Hamra and Rio de Oro) during the nineteenth century but it was not until 1930 that Spain had effective control over the Territory (Maazouzi 1976, 14). Since the effective Spanish occupation of Western Sahara, France and Spain needed to neutralize any new colonial advances from other European states. The main advance at the time was by England and its interest in Gibraltar. Also, the French and Spanish colonial ambitions and the risk of the military confrontation forced the two colonial powers to agree on a delimitation of zones of occupation in the Territory in the 18 March 1845 Treaty on delimitation[24]. Accordingly, the intense diplomatic relations between France and Spain that started in 1886 became the main tool of settling or resolving any competing colonial interests especially with regard to the Western Sahara Territory. France, driven by its colonial interests in large parts of Morocco, pressured Spain to agree upon delimitations and zones of influence. Spain wanted to avoid going beyond its opposition to England's occupation of Gibraltar and conditioned its agreement of delimitation and zones of influence with the consent of England. In this regard, France concluded a secret Agreement with England in 8 April 1904, by which France recognized exclusive rights for England to occupy Egypt, in exchange of England's consent to French occupation of Morocco except the northern part (Maazouzi 1976, 64-66). The 1904 Agreement imposed that the northern part of Morocco be reserved for Spain under certain conditions related to free navigation via Gibraltar, non-development or fortification of

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[22] Terra Nullius is a Latin expression deriving from Roman law meaning "land belonging to no one", "nobody's land" applying the general principle of res nullius to real estate, in terms of private ownership and/or as territory under public law. In private law, it means that land owned by no one belongs to the state.

[23] The Conference of Berlin was held on November 1884 through February 1885. This conference was called for by Portugal and organized by Otto Von Bismarck who was the First Chancellor of Germany. The Conference was attended by representatives of Great Britain, France, Spain, Germany, Russia, USA, Portugal, Italy, Denmark, Sweden, Belgium, the Netherlands, Austria-Hungry, Belgium and Turkey. The purpose of the conference was to regulate the European Colonization in Africa.

[24] I included the original text of the Treaty in the annexes (Figure7).

the military capacities in that zone and the proclamation of international status for the city of Tangier. It was a 'trade' by which everything was said in few sentences (El Ouali 2008, 80-82). The 1904 Agreement contained two declarations, a convention and five secret articles. These secret articles were annexed to the first Declaration and mentioned the hypothesis of "changing the political state" of Morocco and Egypt. The establishment of protectorate and the "introduction of reforms...leading to assimilate the legislation to the one of other civilized countries" (cited in El Ouali 2008) that would be discussed by the three powers were also mentioned. In this case, Spain would receive "a certain quantity of the Moroccan territories adjacent to Melilla, Ceuta and other presides".

Up to this point, it is to realize that since 1900 that due to the rivalry between the colonial powers, they have extended to their interests in occupying Morocco because of the economic and strategic possibilities that Morocco offered. Occupying Morocco at that time meant controlling the Detroit of Gibraltar and for France, it was occupying Tunisia and Algeria and an indispensable extension to the Atlantic Ocean.

Diplomatically, France traded with other colonial partners through various protocols and agreements targeting its occupation of Morocco and the ultimate goal of controlling the Maghreb region[25]. Regarding Morocco, France traded with England, Italy and Spain agreeing on the occupation of Libya by Italy, Egypt by England and securing a piece of Morocco to Spain, notably the Northern part and the 'Southern territories'.

Morocco reacted by using the European powers' conflicting interests for its benefit. Morocco relied on Germany, which since the nineteenth century opposed the French domination of Morocco. Having Germany on its side, Morocco succeeded in delaying the French and Spanish colonization and forced the colonial powers to meet in 1906 in Algeciras. In the conference of Algeciras, it was proclaimed that the conference guaranteed the territorial integrity *de jure* of Morocco, but at the same time it allowed foreign control of the economy, finance and administration and internal security. This meant that the conference allowed colonization indirectly by putting France and Spain as the 'Big Brothers' of weakened Morocco.

[25] A person that I spoke to has caricatured the Maghreb as the "big belly" of France.

Morocco's diplomatic efforts failed after Germany recognized in 1911 the French and Spanish ambitions in Morocco. After signing the Treaty of 4 November 1911, Germany gave the 'green light' to French colonization of Morocco after trading with France to secure some economic advantages in Morocco and agreeing on German interests in a part of the Congo. Once the German obstacle had been diplomatically eluded, France acquired free action in Morocco and forced the Sultan Moulay Abdelhafid to sign the Treaty of Protectorate on 30 March 1912. On 27 November 1912, France signed an Accord with Spain by which it gave its consent to a Spanish protectorate over the zones mentioned in the 1904 Accord, namely: a part of Mediterranean Morocco with Ceuta and Melilia, the Western Sahara with the fixation of the boundaries with France and the region of Ifni which included Tarfaya. Subsequently, Tangier became an international zone as called for by England, and Morocco has tasted the special flavour of various kinds of colonization, specifically:

1. The North was declared a Spanish protectorate zone with Tetuan as capital and an ongoing direct domination in Ceuta and Melilia. In addition, the establishment of international status for the city of Tangier.

2. The East was established as a French protectorate of borders zones that have been militarily controlled.

3. The West was a French protectorate with Rabat as capital.

4. The South and precisely Saquiat Al Hamra and Rio de Oro have seen various systems: Spanish protectorate attached to the capital Tetuan, autonomous region within the Spanish sovereignty and Spanish province with a local representative Assembly called "Djemaa".

5. Zones of Ifni and Terfaya at the north of Sagguiat Al Hamra occupied by Spain as the outcome of the 1912 agreement between Spain and France.

The specific characteristic of the colonization of Morocco relied on the various systems of colonization that the country had to face. I mention here that processes of decolonization related to these territories had its own specificity. With some differences, the colonization of Morocco can at some point be comparable to the Philippines. In the case of Morocco, the country was divided among the European powers and then after colonization, there was an effort to consolidate the zones into a single country. In the Philippines, there was no single state because the Philippines

was made up of sultanates, as it were. After the consolidation of the south and central regions, including Manila, it was only then that it was declared that the various sultanates as composing one country, which was then to be called Filipinas.

As far as the Western Sahara is concerned, the story of its colonization by Spain was characterized by 'trades of interests' that have been negotiated and agreed upon during private meetings and documented in bipartite, tripartite and multipartite accords and treaties. Secrecy was also paramount in the process of negotiating the colonial interests. Such secrecy took the form of annexes to some agreements, protocols and declarations. International law as an extension of the Treaty of Westphalia allowed such ways. It was marked by the relations between states-war, private and secret diplomatic relations, an extended role of embassies and the rights of innocent passage [26]. '*Raison d'état*' (By reason of State) replaced religion in determining alliances between European nations with primary loyalty to the State.

The focus on the concept of State in its European configuration is the reason behind the fact that I did not yet mention Mauritania. This is not due to omission but rather to the reality that the Mauritania as a state did not exist until 1960, after a French-Spanish operation in 1958 forced them into creating the Islamic Republic of Mauritania. This is the reason, as we will realize in the next chapter that justifies the ICJ reference to Mauritania as "entity" in the Western Sahara case.

The Spanish colonization of Western Sahara has been part of the history of colonization of Morocco, Algeria, Mauritania, Tunisia and Congo, just to mention a few. The colonization of Western Sahara emerged specifically after France and Spain proceeded with the fixation of their administrative boundaries in the agreement of 3 October 1904 and in the overall processes of boundary delimitations after the independence of Morocco and Algeria, and the establishment of Mauritania as independent state.

Besides the role of the resistance forces in pre-independence Morocco, the independence of Morocco has been mainly negotiated with France. On 2 March 1956,

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[26] The right to innocent passage is a term of international maritime law referring to a ship's right to enter and pass through a coastal state's territorial waters so long as it is not prejudicial to the peace, good order or security of the coastal state passage. In the modern international law, the right of innocent passage has been codified in the *United Nations Convention on the Law of the Sea (UNCLOS)* of 10 December 1982,

the government of France solemnly confirmed the recognition of "the independence of Morocco as well as its will to respect the integrity of the territory of Morocco guaranteed by international treaties". The proclamation of the independence of Morocco exposed the problem of frontier delimitations as prescribed in international treaties. After years of divided rule, after independence, it was now up to Morocco to consolidate its territory into one nation and actually see itself as composed of one people.

On 2 August 1956, the Embassy of France in Rabat submitted a note to the Ministry of Foreign Affairs Morocco related to a project of law establishing a common organization of the Sahraoui territories (OCRS) (*Organisation Commune des Régions Sahariènnes*). In indirect response to the French note, King Mohamed V declared in a speech given in the Southern province of M'hamid El Gizlane on 25 February 1958:

> "We proclaim solemnly that we will continue our action for the return of our Sahara, in the frame of the respect for our historic rights, and in conformity with the will of its inhabitants…"[27] (King Mohamed V, Speech 25 February 1958).

Since 1957, the Moroccan Army conducted its actions against the Spanish Army in the Western Sahara and succeeded in controlling all Western Sahara, meaning Saquiat El Hamra and Rio de Oro. At the same time the declared intention of Morocco was to negotiate territorial boundaries with Algeria after its independence. King Hassan II has inherited the process that was designated by his father, and the former continued within the same strategy for frontier negotiations with Algeria. After attempts at finding a middle ground, Morocco signed an agreement with the Provisional Government of the Republic of Algeria (GPRA) on 6 July 1961 which stipulated:

> "*Le government français, considérant le Sahara comme une entité distincte, invoque le droit des riverains à une exploitation commune de ses richesses. C'est alors que le government provisoire algérien fait appel à nous, pour défender sa souveraineté sur le Sahara*

[27] Author's translation

algérien menacé. Deux ministres d'Etat marocians, Allal El Fassi, chargé des Affaires islamiques, et le Dr. Khatib chargé des Affaires africaines, font en notre nom deux propositions au G.P.R.A.

a) Ou bien une fédération maroco-algérienne sera créée, en sorte que l'armée algérienne et l'armée marocaine puissent défender chacune sa zone saharienne;

b) Ou bien une commission maroco-algérienne sera chargée de régler les problèmes frontaliers, "dans un esprit de fraternité maghrébine". (Accord entre le Government de sa Majesté le Roi du Maroc et le G.P.R.A, 6 Juillet 1961)

[The French government, considering the Sahara as a distinct entity, invokes the right of the population for a common exploitation of its richness. Hence the provisory Algerian government appeals to us to defend its sovereignty in the threatened Algerian Sahara. Two Moroccan State ministers, Allal El Fassi in charge of the Islamic Affairs, and the Dr. Khatib in charge of African Affairs, make in our name two propositions to the G.P.R.A.

a) Whether a Morocco-Algerian federation will be in created so that the Algerian army and the Moroccan army could defend each one's Saharan zone.

b) Whether a Morocco-Algerian commission will be in charge to solve the frontiers problems, "in the spirit of Maghrebian brotherhood"[28]. (Accord between the Government of the King of Morocco and the G.P.R.A, 6 July 1961).

King Hassan II wrote that the second proposition was accepted by the two parties and signed by King Hassan II himself for Morocco and President Ferhat Abbas with the formal agreement of Ben Bella for Algeria (Hassan II 1976, 89).

In their various discussions, Ben Bella responded to Hassan II by saying:

[28] Author's translation

> "I would like to ask your Majesty to allow me the time to put in place the Algerian institutions, become Algerian Head of State, and take in hand the opposition party, and then around the month of September-October, I would have the plenitude and the quality that will allow me to open with you the file of frontiers, evidently Algerians would not be purely and simply the inheritors of France concerning the frontiers of Algeria"[29] (Hassan II 1976, 91).

After the independence of Algeria, the Moroccan government pushed its Algerian counterpart to enter into frontier negotiations. On 18 September 1962, Ferhat Abbas was elected President of the Republic of Algeria and the on 20 September of the same year Ben Bella was chosen by the Algerian Assembly as President of the Council. September 1963 marked the establishment of the political regime of Algeria and the election of Ben Bella as the President of the Republic. On 29-30 October 1963, the Bamako conference gathered four Heads of States, King Hailé Selassié (Ethopia), King Hassan II (Morocco), President Ben Bella (Algeria), and President Modibo Keita (Mali). The conference was aimed at finding solutions to the issue of frontiers between Morocco and Algeria, determine zones of influence, establish a ceasefire and a special commission of mediation. This special commission was effectively established in Addis Ababa in 18 November 1963 and was composed of seven African countries: Ethiopia, Cote d'Ivoire, Mali, Nigeria, Senegal, Sudan and Tanganyika (currently Tanzania). During this conference, Algeria engaged in opening negotiations with Morocco based upon concrete propositions that would be formulated by the mediating commission of the Organization of African Unity (OAU). Such propositions were never established and instead member states of the Organization of African Unity (OAU), the predecessor of the African Union (AU), pledged themselves to keep the colonial boundaries existing at the time of independence as an approach for territorial conflict resolution.

From 1963 until 1967, and precisely at the time of the Commission's work, there were intense military activities on the frontier between Morocco and Algeria. Finally, the Algerian government declared that the Accord of 1961 signed by the

[29] Authors' translation

GPRA did not obligate Algeria because only the National Council of the Republic of Algeria was supposed to take that kind of decision as included in the Accord. In addition, the government of Algeria declared that the attributions of the GPRA were limited exclusively to the safeguard of the national territory and to not amputate it through any engagement. Clearly, the Accord of the 1961 regarding the negotiations related to the frontiers in the Saharans territories were repudiated by Algeria.

Since 1956, after independence, the Moroccan army violently intervened to claim Western Sahara as part of Morocco. In 1957, the Moroccan "Army of Liberation" succeeded in reversing the power balance in the Sahara against the Spanish troops and started controlling the Western Saharan territory. However, France saw in the Moroccan forces' control of the Territory a threat to its colonial possessions in the South and the East. Consequently, the French forces in "Operation Ecouvillon", reinforced with an extended number of soldiers and in combination with the Spanish forces, came to re-establish the Spanish presence in Western Sahara in 1958, draw the boundaries and zones of Spanish and French influence and establish Mauritania as an independent territory. So at this point, the French forces were acting in concert with Spain. In 1960, the Republic Islamic of Mauritania was created as an independent state, and was not recognized by Morocco until 9 years later. It is in the seventies that the slow process of the decolonization of Western Sahara by Spain pressured Morocco to reconcile with its 'partner-enemies'. During the 14 September 1970 Nouadhibou Summit, Moroccan King Hassan II, the Mauritanian President Mokhtar Ould Daddah and the Algerian President Houari Boumediane decided to establish a common front against the Spanish colonization of Western Sahara. In exchange for the establishment of such front, Morocco abandoned its territorial "rights" - though contested - in Mauritania and Algeria. According to Claude leBorgne (2008), these unilateral concessions from the Moroccan side was, during the development of the events, the cause of Morocco's "anger" to let some its territorial "rights" go unclaimed, and referred to Morocco's good conscience towards Algeria and Mauritania. The 'anger' refers to the fact that in the subsequent development of the events, both Algeria and Mauritania to whom Morocco made unilateral territorial concessions with the aim of forming a common front against Spain, opposed Morocco's claim of Western Sahara.

The Nouadhibou Summit set the first piece of the Western Sahara case, which is: the parties in the case, in other words, the common front (Morocco, Mauritania and Algeria) versus Spain. We will see in the chapter 3 that the case was not conducted according to this scenario, and the pieces have changed their stand. As far as things are at this point, this is indeed how Morocco imagined the case would be conducted, and this is why Morocco furthered diplomatic activities with Mauritania and Algeria before submitting the case to the UN General Assembly. Morocco, putting the last touches in securing the case, passed a secret Accord with Mauritania in 1974. The Accord draws boundaries between Morocco and Mauritania which polarized the Western Sahara, with the north of the territory within the sovereignty of Morocco and the South within the sovereignty of Mauritania. Consequently, Morocco has abandoned the argument of "ethnic unity" from Draa to Senegal under the narrative of the "Greater Morocco" and set the case ready for ICJ resolution.

Morocco called upon the U.N. General Assembly to refer the question to the International Court of Justice (ICJ). The ICJ concluded in its Advisory Opinion of 16 October 1975 that:

> "The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) of 14 December 1960 in the decolonization of Western Sahara and, in particular, of the principle

of self-determination through the free and genuine expression of the will of the people of the Territory"[30] (ICJ Western Sahara, 1975).

King Hassan II, flagging the recognition by the Court of the ties of allegiance between the Sultan of Morocco and certain tribes living in Western Sahara, and to counter the threat of the 'independentist' demonstrations especially from the POLISARIO, decided to organize his "Green March". King Hassan II successfully utilized the value that the international scene has offered to the "politic of mass"[31] at that period of time (LeBorgne 2008). He announced the "Green March" on 16 October 1976, which was realized from 6 to 9 November 1975 with approximately 350, 000 marchers, and triggered intense diplomatic activities. He also used the political context of a dying Francisco Franco[32] and his declining regime in Spain to close a deal in the 14 November 1975 Madrid Accords signed by Spain, Morocco and Mauritania. The official text of the Madrid Accords[33] stipulated that Spain would withdraw from the territory before 28 February 1976. In addition, the Accords announced the establishment of a three-party administration of the territory until a definitive solution based upon the choice of the population as represented by the "Djemaa" is reached. However, the real deal behind the scene was the repartition of the exploitation of the Territory's phosphate split between Morocco (65%) and Spain

[30] Official translation

[31] The use of the expression 'politics of mass' (or masses) refers essentially to the inclusion of the masses in the political processes. An example of politics of mass is the Ghandhi Salt March to free India from the British colonialism. The 61- year-old Mahatma Ghandhi armed with nothing marched to the sea with his followers, mostly young. It was an attempt to break the British salt laws and liberate India. The Salt March started from Ahmadabad to the remote seaside village of Dandi, about 320 km. It is considered as one of the greatest nonviolent battle against colonialism. I used this example to explain the expression of 'politics of mass' only. This is to say, however, that despite the fact that the Salt March and the Green March are different in relation to their characters and legitimacy, the two marches are indeed similar strategic political reactions that involved the masses. They were both symbolized as fighting European colonialism and both used some kind of symbolic attachment to the land: salt and sand, and were both framed as non violent/peaceful marches.

[32] Francisco Franco was officially declared dead on 20 November 1975, two weeks after the "Green March" started and one week after the Madrid Accords.

[33] See the published version of the Madrid Accords in Annexes (Annex 11).

> (35%) (LeBorgne 2008) and the division of the territory between Morocco and Mauritania. Such division was officially established in the bipartite Accords of 14 April 1976. The International community was divided in rejecting or accepting the Madrid Accords and the UN considered that the Accords do not change the status of the Territory as non-self-governing. The POLISARIO and Algeria have stalwartly denounced the Accords.

On the ground, the Moroccan army reacted to Saquiat al Hamra after the signing of the Accords. The POLISARIO supported by units from the Algerian Army militarily reacted during a battle that took place in Amgala[34]. The POLISARIO and units of the Algerian Army were ejected from the zone by the Moroccan Army that started supporting the Mauritanian forces to control the Southern part of the Territory (Rio de Oro). On 26 February 1976, Spain withdrew its last soldier, the Djmaa of Laayoune declared its backing of the division of the Territory between Morocco and Mauritania, and on 28 February the POLISARIO established the Sahraoui Arab Democratic Republic (RASD) based in Tindouf, Algeria. The scene was therefore set for the start of a long war. It is crucial to take a pause here and reflect on the role of Algeria. It is necessary to mention that the past border issues between Algeria and Morocco created an atmosphere of hostility between the two states and the intervention of Algeria in the 1975 case as an 'interested party' but with the so-called "no involvement in the dispute", was very much questioned.

The POLISARIO, with a new strategy, started this time with the 'weakest link' in the conflict. It attacked the Mauritanian forces which were more "vulnerable"[35] than the Moroccan's. The POLISARIO was supported by Algeria under the government of Boumediane, which evidently denounced the Madrid Accords. Algeria denounced the Accords because it did not take part in it and that Mokhtar Ould Daddah of Mauritania went to the Madrid meeting without consulting with Algeria. It

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[34] Amgala is a situated in Western Sahara and is currently to the east of the Berm (wall). It is placed in the peace agreement as part of the territory on the POLISARIO's side. (Military Agreement # I as arranged by MINURSO. see figure later in this chapter).

[35] I consider Mauritania was vulnerable because of its ambiguous position of the friend-enemy, the fragility of its economy and especially of its weak army in numbers of soldiers and its infrastructure

was said that the government of Boumediane contributed to the destitution of Mokhtar Ould Daddah in July 1978 and forced Mauritania to sign a Peace Agreement with the POLISARIO on 5 August 1979, just after POLISARIO's strong attack against Tichle (Mauritania) on 12 July 1979. By signing the Peace Agreement with the POLISARIO, Mauritania withdrew its territorial contestation on Western Sahara and left the southern part of the Territory (Rio de Oro). Mauritania's forced new position of "neutrality" has been considered by Morocco as a 'coup' against the alliance that was already established between the two countries, a 'flip-flop' in Mauritanian diplomacy and further complicated in the relations between Morocco and Algeria. Immediately, Morocco moved its Royal Armed Forces (*Forces Armées Royales: FAR*) into the South in Rio de Oro and took over what was previously considered as the Mauritania part of Western Sahara (Rio de Oro). The POLISARIO intensified its attacks and succeeded in controlling Rio de Oro and even targeting the northern part of Western Sahara (Sagguiat Al Hamra). From 1979 until 1980, the POLISARIO using the effect of surprise succeeded in outweighing the FAR and began controlling the southern part of the territory. However, the beginning of 1980 saw a reorganized FAR rationalizing its actions. The Army established a perimeter of defense and started building the Berm[36] of Western Sahara; an approximately 2700 km long wall made of earth, rock and sand. The wall is five meters high defensive structure, with Moroccan garrisons regularly spaced every five kilometers along its length. The wall was built in six stages from 1981 to 1987 and is protected by bunkers, barbed wire fences, landmines and an electronic detection system. It has allowed the Moroccan troops to secure the control of a big part of the Territory and all the POLISARIO's military attempts to infiltrate beyond the wall have not succeeded. The Berm set a clear line between Morocco and the POLISARIO controlled territories, and established a forced stabilization that provided an opportunity to reactivate diplomatic activities.

Diplomatic activities were firstly reactivated, within the Organization of African Unity (OAU) the RASD was admitted as a 'future' member state with 26/50 favorable votes during the Addis-Ababa meeting on 23 February 1982. The admission

[36] As described by MINURSO, the term berm meaning defensive wall is commonly employed, in UN documents, to designate the mined sand wall, which cuts through the entire length of the Territory. The term is occasionally expanded to 'the defensive berm' (MINURSO 2007).

of RASD to the OAU has triggered a strong reaction from Morocco, which withdrew its membership from the organization on 12 November 1984. Currently Morocco is the only African country that is not a member of the AU.

Secondly, the UN initiated a ceasefire between Morocco and POLISARIO, and proposed a settlement plan in 1991. UN Security Council Resolution 690 (April 29, 1991) established the United Nations Mission for the Organization of a Referendum in the Western Sahara (MINURSO)[37]. Initially, the ceasefire as deployed by MINURSO was meant to "buy time" for the conduct of a referendum. MINURSO's main purpose is to reassure each party that the other party is not changing the status quo, nor is it building up and preparing for offensive operations. In 1991, the first one hundred UN military observers were deployed by MINURSO to Western Sahara. Between December 1997 and January 1998, MINURSO established and signed Military Agreement number 1 (MA #1) (Figure 5)[38] between the Royal Moroccan Army and the POLISARIO. The agreement established the obligations of each party to the conflict and outlined the operational framework of peacekeeping efforts. Military Agreement # 1 concerns only the activities on military movement and has no provision for civilian movement. The Agreement forms the only basic legal instrument for the UN to monitor the ceasefire, but in case of violations to the agreement, MINURSO has only a reporting role. In case of a violation to the agreement, MINURSO will issue a "violation notice" to the violator and then report to the UN Headquarters, including to the UN Security Council**.**

MINURSO's Military Agreement #1 divided the disputed territory of Western Sahara into 5 parts[39]:

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[37] The UN established a settlement plan that went into effect in April 1991 when the Security Council approved the Secretary-General's report proposing the organization of a referendum on self-determination for the people of Western Sahara to enable them to choose between independence and integration with Morocco. The plan called for the creation of the United Nations Mission for the Referendum in Western Sahara (MINURSO), consisting of civilian, military, and police components to carry out all tasks leading to the referendum.

[38] See Figure 5 in the annexes.

[39] "Each one of the five parts has specific restrictions as to the two parties' military activities:

- **Buffer Strip:** No entry of RMA and FPOL personnel and equipment, by ground or air. No firing of weapons in or over the area. This is prohibited at all times and any infraction counts as a violation of the cease-fire.
- **Restricted Areas:** No firing of weapons and/or military training exercises, with the exception of physical training activities of unarmed personnel. No tactical reinforcements, no redeployment or

1. One part of 5 km wide Buffer Strip (BS) to the South and East side of the Berm;

2. Two parts of 30 km each wide Restricted Areas (RA) along the Berm. The Buffer Strip is included in the Restricted Area on the POLISARIO side and the Berm is included in the Restricted Area on the RMA side;

3. Two Areas with Limited Restrictions (ALR), which are the two remaining vast stretches of land of Western Sahara on both sides respectively.

Since the establishment of MINURSO and the ceasefire agreement, the following nine years witnessed a sharp divergence between Morocco and the POLISARIO on the definition and criteria of establishing an electorate for the referendum[40]. The divergences have limited MINURSO's peacekeeping mission to only after the UN tacitly dropped MINURSO's Settlement Plan. The impasse marked the dispute after the rejection of the Baker Plan that initiated to broker a compromise centered on the notion of autonomy[41]. The period between 2003 to 2006 marked such an evident deadlock that led Kofi Annan to suggest referring the issue to the parties concerned and leave the UN 'out of it'. At the same time, there were whispers in the UN 'corridors' that Morocco was preparing a 'serious' proposal for autonomy of the Territory. Kofi Annan's suggestion gained weak support and Morocco finally submitted its proposal for autonomy on 11 April 2007. The POLISARIO also deposited its proposal, which comprises the POLISARIO's initial stand for a

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movement of troops, headquarters/units, stores, equipment, ammunition, weapons, no entry of military aircrafts and no improvements of defence infrastructures. Some exceptions apply and some activities are allowed following prior notification to or approval by MINURSO (Note: these are restrictions in brief, for detailed information please read the MA#1 in full).

- **Areas with Limited Restrictions:** All normal military activities can be carried out with the exception of the reinforcement of existing minefields, the laying of mines, the concentration of forces, the construction of new headquarters, barracks and ammunition storage facilities. MINURSO needs to be informed if the parties intend to conduct military exercises, including the firing of weapons of a calibre above 9 mm" (MINURSO 2007)

[40] In 2000, MINURSO came to an electorate of 86,386 but it was contested by Morocco insisting for the establishment of an electorate that was not less than 131,038 (ICG 2007).

[41] James Bakers' "Draft Framework Agreement on the Status of Western Sahara" in its first attempt, provided for the territory to be administered for an initial 4 year period by an executive elected by voters eligible from the previously dropped electorate for the referendum. The second attempt presented in 2003 suggested a detailed frame for self-government of the Territory for 5 years pending the referendum. But the fact that the second proposal included the possibility of independence as one of the outcomes of the referendum planned after 5 years has meant the plan was rejected by Morocco.

referendum of self-determination with independence as a possible outcome. With two proposals on the table and in the spirit of overcoming the deadlock, the UN arranged for negotiations among the concerned parties with the presence of Algeria as interested party and Mauritania. Even with five UN Secretary-General Representatives and Special Envoys, and after four sessions of negotiating the proposals, the deadlock still persists.

2.1 Conclusion 1

In concluding this chapter, it necessary to mention that one of my preoccupation was to get the story ‘together’; to make sense of certain events and link them to future reactions and positions. The conflict over the Territory of Western Sahara is not decades, but centuries old. It is part of the colonial history of Morocco, Mauritania and Algeria, and it is closely linked to the history of colonialist ‘deals’ of the dismemberment of Africa and Asia. The colonization of Western Sahara was negotiated among the colonial powers. Secrecy and privacy were paramount in these negotiations, and the current status of the Territory was also negotiated among the newly independent states-parties in the conflict and with the former colonial power of the Territory, namely Spain. The dispute over Western Sahara went through war and a peaceful march, legal process and the construction of divisive, defensive sand wall, peacekeeping and the threat of armed conflict in case the negotiations over the proposals fail. The Western Sahara dispute reflects the history of boundary disputes with Algeria. It has multifaceted angles to analyze and remains a legal reference for lawyers in the study of the right of self determination and decolonization, and their respective legal discourses.

CHAPTER III
WESTERN SAHARA DISPUTE IN INTERNATIONAL LAW

> Frontiers are indeed the razor's edge on which hang suspended the modern issues of war and peace.
>
> Lord Curzon Kedleston

After discussions with various persons in Morocco, I realized that Western Sahara is more often discussed through the three dimensions relational perspectives of the frontiers, the monarch and a "hostile" Algerian nationalism. It can be said that in Morocco, the Western Sahara dispute is not really known as a 'case law'[42], and most of the few persons that hardly discussed it as such seemed unknowledgeable of its decision, and would rather try to force the decision in favor of the Moroccan case. The only person who seemed more of a 'connoisseur' of the topic rushed to say that the decision is so ambiguous that Morocco and POLISARIO have both interpreted it to fit their political stands. This led me to closely examine the case law of the dispute and see to what extent the decision is ambiguous, if it is at all.

Many books on international law (i.e. Crawford 2001, Franck 1976, Leite and Olsso 2006, Rosas 2001) that mentioned Western Sahara have placed it in the context of peoples' right to self-determination. This right in itself creates a world of reality that depends on our reading of the texts of international law. It is up to our conviction in the reading of these texts that this right becomes a reality and consequently, our understanding of the Court decision becomes clearer.

As a case of self-determination, Western Sahara is also a case of frontiers dispute. In international law, the right of self-determination as a political right cannot be discussed without a clear identification of territorial boundaries (Lalonde 2002) and the role of colonization in how the world maps were drawn. This is what is known as

[42] This research uses the term 'case law' to refer to the proceedings and the advisory opinion of the International Court of Justice. The law here refers to international public law.

uti possidetis that refers that newly independent states should presumptively inherit the colonial administrative boundaries that they held at the time of their independence.

Before discussing the parties' arguments and the Court's advisory opinion, it is necessary to draw on how self-determination and *uti possidetis* as part of international law were debated. This will help us in understanding the in-and-outs of the Western Sahara case.

3.1 Faces of The Right To Self-Determination

The history of self-determination is closely linked to the development of international law. International law was substantially a set of arrangements between states and their rulers to regulate their conduct (Vattel 1758 cited in Crawford 2001, 11). In its classical period, international law originated from the regulations of resort to war, and allowed the power states to resolve conflict through power politics (Crawford 2001, 11). Classical international law did not guarantee the right of states to exist because it made no attempt to determine when states could resort to war. Also, it did not guarantee non-states to exist nor establish independent states. Classical international law was prescribed on how international relations were to be conducted in time of peace and war (laws of war), but there is no law against war (Crawford 2001, 12).

In this period, the right to self-determination did not fit into the classical framework of international law. In other words, self-determination aspired to something that classical international law did not seek to constitute - to reconstruct states - and such constitution was left to power politics (Crawford 2001, 12). Classical international law left self-determination to power politics among those who want to claim it and the powerful states, and generally, classical international law supported the framework of colonization conducted by powerful states. This international law was the outcome of the system of states prescribed by the Westphalia system of peace and political sovereignty of states.

It was not until after the First World War that self-determination started to be gradually included in the rhetoric of international relations. In 1918, Woodrow Wilson used the term 'self-determination' in the context of settlements after World War I. This came after new state boundaries were sketched to try to value territorial

boundaries of cultural minorities. The complicated minority patterns rendered the boundaries of new states disorganized. Mandates were established from former German and Ottoman colonies, and even though processes of decolonization had taken form, as in areas in the Middle East, colonialism was generally supported by international law. Tacking the doctrinal meaning of the right of self-determination, the first configuration of the right is:

Self-determination = colonial settlements after WWI

For example, the dispute involving the Åland Islands[43] under the League of Nations saw the people of the Islands relying on self-determination. The Ålanders desired to break away from Finland to become part of Sweden by claiming the right to self-determination. They ended having autonomous status within the sovereignty of Finland precisely because the right of self-determination has been seen by the League of Nations within the framework of colonial settlements, and not a free choice of people to decide to break out from state boundaries. This means that international law does not support secession; and any discussion on secession in the case of Western Sahara as to analyze the degree and scope of the applicability of peoples' right to self-determination remains irrelevant.

Self-determination ≠ breakaway from one state to become part of another

[43] The Åland islands located in the Baltic were subject to a dispute between Finland and Sweden. Prior to 1809, the Åland Islands were located in the Swedish realm. However, in the Treaty of Fredrikshamn on 17 September 1809, Sweden had to give up all control of the Islands, along with Finland, to Russia. The Grand Duchy of Finland was formed of the ceded areas including Åland. In December 1917, fearing the effects of the Russian Revolution, the Finnish Parliament proclaimed that Finland was a sovereign State, calling on the principles of national self-determination. At the same period of time, Ålanders had organized for their own self-determination. By this time, above 90 percent of the islands' inhabitants considered themselves Swedish, in contrast to Mainland Finland, where less than 15 percent were Swedish-speaking. Ålanders sought to break away from Finland and become part of Sweden, relying on the principle of self-determination. After having two Committees' opinions on the matter, the League of Nations denied the right to self-determination to the Ålanders, but stated that they were entitled to respect for their language and their identity. The result was that the Åland Islands remained part of Finland but they were granted a "special autonomy statute".

The end of the Second World War has led to the creation of a new system based on the Charter of the United Nations and a superpowers balance between USA and USSR. During this post-1945 period, the right of peoples to self-determination was largely seen in the context of the decolonization process, referring to the right of peoples under colonial occupation to achieve statehood and independence (Tomuschat 1993, 1).

The international legal driving force behind self-determination began in 1960 with the UN Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples[44]. At this point, the second configuration of the right of self-determination was:

Self-determination = decolonization of overseas colonies

Six years later, self-determination appeared in both the 1966 UN Covenants on Human Rights, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Common Article 1 of both Covenants state that:

1. All 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.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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[44] The Article 1 (2) of the UN Charter only refers to the "principle of equal rights and self-determination of peoples". Reference to the "right" of peoples exists in other instruments: Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, which was the outcome of the UN General Assembly Resolution 1514 (XV) of 14 December 1960
Friendly Relations Declarations in 1970, which is an Annex to the UN General Assembly Resolution 2625 (XXV) of 24 October 1970
The 1975 Helsinki Final Act that was adopted by the Conference on Security and Cooperation in Europe (CSCE) on 1 August 1975
Two Advisory opinions of the International Court of Justice, one regarding the legal consequences for states of continued presence of South Africa in Namibia (1970). The other one is related to the Western Sahara issue (1975)

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Brownlie (1990, 513) treats the right of self-determination as "probably" a peremptory norm. Arguably it is, in its anti-colonialist form, but surely not when it puts on all its possible faces. This means that originally, self-determination was interpreted as the right for ‘colonies only’; this argument was based upon the doctrinal most common steps as follows:

a) The right of self-determination was not recognized in international law prior to the development of a right of colonies to self-determination;

b) When the right of self-determination was included in international law, it was formulated in a manner to deny the right to any people other than colonial peoples;

c) The right of self-determination was closely linked to the rule of *uti possidetis* (inheritance of colonial administrative boundaries) which reinforces the principle of territorial integrity for newly independent states by prohibiting the exercise of self-determination by groups within the state;

d) The interpretation of self-determination as limited to colonial peoples is consistent with the post World War II international law framework of decolonization.

The right of self-determination differs from the other rights of the Covenants because it is not formulated as the right of “every human being”, of “everyone” or of “all persons”, but rather “the right of all the peoples”. Nowak (2005, 14) argues that the right does involve a “human right” but rather a “collective right of peoples”. He considers that transition from individual to collective rights runs back through “three generations of human rights”, which considers the right of self-determination as “solidarity right” of “the third generation” (Nowak 2005, 14).

As a matter of ordinary legal treaty interpretation, and as Crawford (2001, 27) points out; Common Article 1 is not only narrowly confined or applied to cases of colonialism. Paragraphs 1 and 2 do not say that “some people” have the right of self-determination, nor can the term “peoples” be limited to those of colonial territories. The text says that “all peoples” have the right of self-determination, and then in

another paragraph of the same article, it refers to the term “peoples” and says that it includes those of colonial territories. Accordingly, one may assume that the term is being used in its general connotation and sense. Crawford (2001, 27) points out that any remaining doubt is removed by paragraph 2, which refers to the permanent sovereignty over natural resources. He explains that it has never been stated that the principle of permanent sovereignty over natural resources is limited to peoples in colonial territories only. Practically, it can be said that whatever else the term “people” may mean; it means the colonial categories of trust territories and non-self-governing territories established by the United Nations Charter.

Trust territories covered by the chapter XII of the UN Charter were primarily under the mandate system of the League of Nations. These territories, were taken from Germany and the Ottoman Empire, and administered as mandated territories by one of the victorious states after the First World War, under conditions that were agreed with the League of Nations. In its meeting of August 1920, the Council of the League of Nations decided that

> “draft mandates adopted by the Allied and Associated Powers would not be definitive until they had been considered and approved by the League ... the legal title held by the mandatory Power must be a double one: one conferred by the Principal Powers and the other conferred by the League of Nations” (cited in Wright 1930).

The Principal Allied Powers agreed on the allocation of certain mandates to which the Council of the League confirmed on 17 December 1920. Mandates of German South-West Africa were allocated to the Union of South Africa, German Samoa to New Zealand, Nauru to His Britannic Majesty, other German possessions in the Pacific south of the equator to the Commonwealth of Australia, and the German possessions in the North of equator to Japan. The deal of the Powers Allies within the Council was not challenged by the League Assembly (Keith 1922, 71).

Under the mandate of the UN, many mandated territories had become independent. Examples of these territories are Iraq, Jordan, Lebanon, Syria and East

Timor. The remaining territories, except Palestine, were brought under the UN trusteeship system. Additional territory could be placed under the trusteeship system and that was the case of the Italian colonized part of Somaliland, today's Somalia.

Post Cold War, the debate over the Article on the meaning of self-determination introduced the major schools of its interpretation. Two well-known authors, Thomas Franck and Rosalyn Higgins, developed interesting approaches on the matter. The focus on their approach is justified by its current impact in the debate over self-determination.

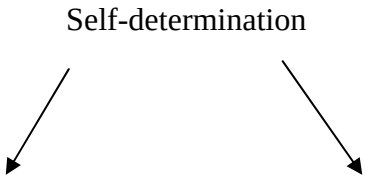
Thomas Franck (1996) considers that in cases of decolonization, the strict application of self-determination brings not only liberation to oppressed peoples, but also helps in preventing wars. Nonetheless, he suggests that the discourse of fairness of international law should apply to deconstruct the existing colonial model of self-determination under *uti possideti* (Franck 1996, pp 144-145).

In commentary on Franck's "Postmodern Tribalism", Higgins declares her approach to international law as "process" and not "just rules". Accordingly, she does not view international law as the impartial application of rules, but conceives international law as the entire decision-making process and just not the reference to the trend of past decisions, which are considered as rules. Higgins's argument is that judges do not find rules, but essentially determine what relevant rule is. She concludes that policy factors should be taken into account systematically and explicitly by the decision-maker. She states that if law as rules requires the application of outdated and inappropriate norms, then law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve (Higgins 1991, 34). Accordingly, Higgins (1993, 30) considers that her process approach is appropriate to cases where an ambiguous rule is to be interpreted or no rule covers the situation at hand. Her treatment of self-determination indicates that she sees the process approach as applicable where a more expansive interpretation of a clear rule is contemplated.

According to Higgins, the Human Rights Committee considers, following a chain of reasoning with rules and categories, that the right of self-determination gives three possibilities to the population of a territory still subject to colonialism, alien domination or occupation and the right to choose external status. These

possibilities are independent statehood, free association or integration with an independent state, or any other political status freely determined by that population (external self-determination). Under any other circumstances, the right requires only that the population of a state be given the continuing opportunity to choose their system of government within the state in order that they can determine their economic, social and cultural development (internal self-determination).

Summarizing Higgins's argument, self-determination in international law has two different meanings; on one hand, external self-determination concerns territories under colonization (colonies), and gives the peoples of these territories the right to choose sovereignty. On the other hand, internal self-determination gives populations of a state the right to democratic governance.



External (decolonization)	≠	Internal (democratic/self-governance)
International arrangement	≠	In-state arrangement

Both 'peoples' of trust territories and non-self-governing territories are accepted as categories of colonies in the sense of being depended on and subordinated to a geographically separate state. External self-determination was at the core of many disputes over the future of these territories and peoples. These disputes had legal aspects or were sought to be resolved though legal processes (Crawford 2001, 7).

Regarding these trust and non-self governing territories, it is necessary to mention that the UN Charter made no mention of self-determination for the peoples of these territories. However, the subsequent development of international law gave these territories a right of self-determination in its external aspect. Currently, all trust territories have now exercised their right of self-determination, and most non-self-governing territories have also achieved self-determination, except most notably Western Sahara.

Non-self-governing territories are regulated under the Chapter XI of the Charter. The Charter defines these territories as “territories whose people have not yet attained a full measure of self-government”. Initially, these non-self-governing territories were identified by the States that were responsible over them or those States that colonized the territories. Some states voluntarily listed certain parts of the territories they colonized as non-self-governing. France, The United Kingdom, The United States, Denmark, Belgium, New Zealand, France and Australia were among the states that volunteered to list some of their territories. Spain and Portugal refused to declare any of their colonies as non-self-governing, which led the General Assembly of the UN to specify criteria for non-self-governing territories. The criteria of listing territories as non-self-governing were based upon the notion of ‘overseas colonies’. The General Assembly of the UN identified territories as non-self-governing, and among these territories, South Rhodesia, certain French overseas occupied territories, as well as certain overseas territories occupied by Portugal and Spain. Western Sahara was among those territories that were identified by the General Assembly. Subsequently, once these territories were listed as non-self-governing territories, they were put on the track of decolonization and their peoples were declared to have the right of self-determination in the sense that they could choose between independence from the colonial state, integration with it or any other status.

Regarding Western Sahara, Spain ended its colonial role and ceased to be a direct player in the dispute. The territory of Western Sahara has not been administered as part of the colony of Morocco and accordingly, decolonization resulted in separately defined areas. Western Sahara has been listed at the UN as a non-self-governing territory of Spain and was clearly put on the decolonization track with Western Sahara people’s right to external-self-determination (independence, integration with Morocco, or any other agreed arrangement).

In general, the shift to decolonization was one of the great innovations of international law over the last sixty years. It was confirmed in 1960 in the UN General Assembly and the model that everyone had in mind was an overseas colony like Kenya. The solution for such model was full formal independence, which brings about the question related to boundaries delineation.

3.2 State Boundary Fixation: From No Rule To Default Rule

The Western Sahara dispute reflects what Georges Scelle called the *"obsession du territoire"* [Obsession of the territory] (Scelle 1958 cited in Ratner 1996, 590). The dispute is at the heart of the debate on how the world map lines should be drawn – through sketches that are now regarded as illegitimate or through the General Rakto Mladic's solution where "borders are drawn with blood" (Ratner 1996, 590). Legally speaking, the debate centers on the rule of *uti possidetis.*

The modern formulation of *uti possidetis* is traditionally associated with the decolonization in Central and South America during the nineteenth century (Lalonde 2002). *Uti possidetis* is inherited from Roman law and was considered by some scholars as a principle of international law that was used to formalize territorial situations by ensuring that states emerging from decolonization inherit the colonial administrative boundaries that they held at the time of their independence. It was the doctrine accepted during the Conference of Head of States and Governments of the Organization of African Unity (OAU) that was held in Cairo on 2 July 1964. On that date, Morocco, Mauritania and Algeria were already members of the OAU.

Originally, the new republics in Central and South America agreed, in some cases following their independence, to adopt as international boundaries the former colonial Spanish administrative lines. This was also the case when member states of the Organization of African Unity (OAU), the predecessor of the African Union (AU), pledged themselves to keep the colonial boundaries existing at the time of independence. In the 1986 case of *Burkina Faso v. Mali*, the International Court of Justice saw the OAU Resolution as further evidence of the role of *uti possidetis* in the process of decolonization. The ICJ's 1986 Advisory Opinion in the Mali-Burkina Faso case describes the applicability of *uti possidetis* stating that

> "The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing

> international frontiers in the event of State succession derives from a general rule of international law, whether or not the rule is expressed in the formula of *uti possidetis*." (ICJ 1986).

The debate on *uti possidetis* necessitates pointing out that a distinction was made between 'boundaries' or 'frontiers'. 'Boundaries' have been usually defined as "lines or alignments described in words in a treaty, shown on map, or marked on the ground by physical indicators" (Lalonde 2002). 'Frontier' refers to the zone where one state ends and another one begins, and where zone limits have not been precisely fixed (Lalonde 2002). However, Brownlie (1979) has called attention to the fact that there is no fixed usage of the terms.

In this research, I consider that 'frontiers' or 'boundaries' that outline a state are politically-imagined delineations that became psychologically constructed and entrenched in the populations' minds, and forcefully imposed upon the foundation of power struggle. Even though some specific usages are to be distinguished, this thesis uses the terms 'boundaries' and 'frontiers' interchangeably without including any territorial jurisdiction that a state has within foreign territories. Accordingly, embassies, consulates and others diplomatic representations will not be concerned, nor do I include maritime boundaries and frontiers because of the specific legal framework that regulates them.

A precise distinction should be made when referring to internal and international boundaries. International boundaries constitute the boundaries established between two sovereign independent states and include boundaries between colonies or territories belonging to two different metropolitan states. Internal or administrative boundaries constitute the lines that divide units that form part of the same state. They also refer to the manner by which a metropolitan state has unilaterally established to divide colonial territories.

The origins of *uti possidetis* can be traced back to Roman civil law. It was used as a temporary solution to litigations over property. In case of parties' litigation over the ownership of a real property, the Roman edict issued by the praetor or administrator of justice would grant a provisional possession to the party who had the

material possession of the land during the litigation (presumptive ownership)[45]. The possession of the land must not have been obtained clandestinely (*clam*), by violence (*vi*), or in a form revocable by the other party (*precario*) (Buckland 1963 cited in Ratner 1996, 593). The praetor would announce to the parties:

> "I forbid force to be done by either of you whereby one of you is prevented from enjoying the land as he now does, not *clam vi aut precario*" (Buckland 1963 cited in Ratner 1996, 593).
>
> Accordingly, *uti possidetis* prescribed a provisional solution rather than the permanent disposition of the propriety. It shifted the burden of proof during the proceedings to the party who is not in material possession of the land, which represents an advantage for the possessor who became the defendant (Ratner 1996, 593). The edit explained in brief that *uti possidetis, ita possideatis*: "as you possess, so may you possess" (Moore 1913 cited in Ratner 1996, 593).

The Roman rule of *uti possidetis* was transported to international law to comprise states' sovereignty. Moore (1913) observed that the essence of *uti possidetis* in international law had been altered in two ways. First, in international law the scope of *uti possidetis* was changed from private land disputes to claims of state's territorial sovereignty. Second, and more importantly, the status of the rule was shifted from a provisional to permanent one. Possession in international law became the cornerstone of the international law for territorial disputes. This shift represents a complete reversal from the Roman concept of *uti possidetis*. Such reversal excluded even provisional possession to a party who acquired the land by violence (*vi*) (Ratner 1996, 593). De La Pradelle (1928 cited in Ratner 1996, 593) observed that in such situation, it would have been suggested a return to the *status quo ante bellum* (as things were before the war). The reference to the Roman origins of the *uti possidetis* in this thesis

[45] It is necessary to mention that possession only creates a disputable claim of ownership and not actual or real ownership over the property. It is included in the bundle of rights under Civil (Property) Law – right to possess *(uti possidendi),* to use *(jus utendi),* right to the fruits *(jus fruendi),* right to consume (jus abutendi), right to dispose (jus disponendi) and right to recover (jus vindicandi).

is deemed to understand its evolution and its subsequent interpretation as a rule of modern international law.

In international law, the principle of *uti possidetis* was established to determine the frontiers of newly independent states; first, it started to be applied to newly independent states in Latin America before it was adopted by states in Africa. These frontiers had to follow the boundaries inherited from the colonial territories from which they emerged. The practice of *uti possidetis* began as juxtaposed to peoples' right to self-determination in Latin America. During the nineteenth century, the Creoles' struggle for their independence from the Spanish began. According Ratner (1996, 593), the Creoles adopted the policy of *uti possidetis* which served two purposes: to prevent Spain and other Western powers from declaring *terra nullius* in South America and legitimize their occupation, and to prevent territorial disputes between the new states of the former Spanish colonies.

> "To the Creole leadership, adoption of a policy of *uti possidetis* served two purposes: to ensure that no land in South America remained *terra nullius* upon independence, open to possible claim by Spain or other non-American powers; and to prevent conflicts among the new states of the former empire by adopting a set of extant boundaries. Consistent with the law at the time, it incidentally ensured that all lands occupied only by indigenous peoples would be part of the new state." (Ratner 1996, 593-594).

The leaders of the new republics did not take time to start codifying the *uti possidetis* into domestic law and treaties (Ratner 1996, 594). This was the case of the Venezuelan Constitution after the 1830 separation from Gran Columbia.

Uti possidetis in Latin America received a remarkable acceptance among the new republics, and Latin American states agreed to include the possibility that upon reciprocal agreement, boundaries might differ from those of the *uti possidetis* lines. This is the case of the Definitive Treaty of Peace and Friendship established by Bolivia and Peru in 8 November 1831. In Article XVI, the Treaty states:

> "without detriment to the two States, such cessions may be reciprocally made, as may be necessary for an exact and natural demarcation; which shall be formed by the rivers, lakes, or mountains; it being understood that neither Bolivia nor Peru will refuse to make such transfers as may conduce to this object, on condition of their mutually giving such competent indemnifications, or compensations, as may be satisfactory to both Parties" (Definitive Treaty of Peace and Friendship, Bolivia-Peru 1831).

It was further agreed in the Article XVII of the Treaty that:

> "Until the fulfillment of the preceding Article, the existing Boundaries shall be recognized and respected" (Definitive Treaty of Peace and Friendship 1831, Article XVII).

It is crucial to mention, in line with Sorel and Mehdi (1994) observations that *uti possidetis* could not resolve the issue of boundaries when demarcation was unclear due to the ignorance of the local geography, nor does it address the political tensions between some new republics. Escobar (1995) remarks that this situation has led to warfare, but also contributed to peace resolutions through treaties and other arrangements.

Some scholars raised the issue related to the exact meaning of *uti possidetis* in Latin America. From the scholastic debate, two terms have emerged: *uti possidetis juris* (legal possession) and *uti possidetis facto (*factual possession). The controversy stemmed from what could be considered as locating boundaries – through the Spanish legal documents or the effective possession of the territory. Positions differed in cases in which treaties did not specify how *uti possidetis* should be interpreted. Nevertheless, it was advanced that the *uti possidetis juris* became the principal rule, giving primary importance to the evidence from legal documents, but without excluding the possibility in which *uti possidetis facto* could also be applied. In this regard, Ratner (1996, 594) explained:

> "[S]tates and scholars seemed to have different views on the meaning of *uti possidetis* as of a particular date, leading to the use of two new terms, *uti possidetis juris* and *uti possidetis facto*. The former view held that only the Spanish legal documents were dispositive for locating borders, effective possession being irrelevant; while the latter argued that the lands actually held by each state at independence would determine the border."

The absence of a clear definition of *uti possidetis* formed the ground for competing arguments regarding *uti possidetis juris* and *uti possidetis facto* in the 1933 Honduras-Guatemala case; Honduras was arguing for *uti possidetis juris* and Guatemala held on *uti possidetis facto*.

Also, *uti possidetis* was very much accepted in the case of Brazil which lines extended beyond the documented boundaries in Spain and Portugal treaties. De la Pradelle (1928 cited in Ratner 1996, 595) pointed out that the Brazilian formula "is exactly contrary to what was intended".

Drawing upon the doctrinal debate on the origins of *uti possidetis* was necessary because the applicability of *uti possidetis* that was originally adopted in Latin America inspired newly independent states in Africa to adopt as well. Discussing how *uti possitesis* was adopted in Africa will provide the specific understanding of the African approach to *uti possidetis* from one side, and set the framework on how to analyze the African approach of *uti possidetis* as it was applied to the Western Sahara conflict from another side. In Africa colonial lines divided tribal groups and sometimes bring together tribal groups that have histories of animosity. The history shows that the boundaries of Mauritania or the Western Sahara or Morocco neither represent the territories of single particular cultural groupings nor even exactly the territories of cultural groupings that had formed some kind of federation or alliance before the colonial period. Later in this chapter, I will discuss the parties' argument in the ICJ in Western Sahara case; these arguments were based on the doctrinal debate on *uti possidetis* related to the two approaches of corrective justice and consent-based.

As much as one can welcome the decolonization of African countries, the inheritance of some sensitive problems has to be taken into account when analyzing

today's territorial disputes in the African continent. Among these problems, there is the creation of frontiers as defined lines by colonial powers. Before the arrival of the Europeans, the notion of frontiers as defined lines was hardly known in Africa (Ratner 1996, 595). Yakemtchouk (1970) mentioned that frontiers in Africa were zones through which tribes and clans crossed from a region to another, and boundary lines depended on who paid tribute. The arrival of the European colonialists during the eighteenth century did not lead immediately to drawing lines. Each colonial state made territorial claims that led to the recognition by colonial states of zones of influence (Ratner 1996, 595). These zones of influence became defined allocations through specific delimitations based upon experience rather than specific knowledge of the local inhabitants or geography (Touval 1972). The colonial European powers drew lines and boundaries to reduce armed conflicts among themselves. Herbst (1989) considered that in that sense alone they were rational.

After independence, the ambitions of the new African states were to prevent what has been called "black imperialism". They have been faced with two approaches: either the reconstruction of boundaries to rectify past injustices (corrective justice approach) or the acceptance of inherited colonial lines (consent-based approach). During the Cairo meeting in 1964, member states of the Organization of African Unity (OAU), including Algeria, Morocco and Mauritania, agreed to keep the colonial boundaries that existed at the time of independence. Clearly, they adopted the consent-based approach in delineating their territories.

However, the acceptance of the *uti possidetis* should not induce us to overlook the objective of the practice at the time. *Uti possidetis* was asserted as a default rule of international law. "It does not bar post-independence changes in borders carried out by agreement" (Ratner 1996, 600). The practice of mutual agreement on boundary changes already exists in the practice of Latin America. Notably, the ICJ case concerning the arbitral award made by the King of Spain regarding the determination of the frontiers between Honduras and Nicaragua (Honduras *v.* Nicaragua 1960) reflects the existence of such practice. Furthermore, in the Conference on Security and Cooperation in Europe in the 1975 Helsinki Final Act, it did not rule out the peaceful and mutually agreed upon boundary adjustments in Europe.

From this standpoint and within the framework of *uti possidetis*, Mauritania and Morocco did not negotiate any boundary adjustments related to Western Sahara. Accordingly, they needed not only to demonstrate that they had 'legal ties' with the population of Western Sahara, but also mainly to establish that these ties were of such nature as to affect the exercise of self-determination, as stated in the 1960 UN Declaration on the Granting of Independence to Colonial Peoples (GA Resolution 1514 XV). This means that to avoid the applicability of the consent-based approach in delineating the territory of Western Sahara, Morocco and Mauritania needed to prove that the Western Sahara territory was not outside the newly independent state boundaries as inherited from the colonial powers, so that the right to self-determination does not accrue. Nevertheless the understanding of what can be considered as 'inherited' may pose the problem of what Morocco and Mauritania could consider as part of their territory.

As I mentioned in the beginning of this chapter, my curiosity led me to examine the ICJ advisory opinion for the sake of exposing its doctrinal clarity or ambiguity, as the case may be. For that reason, I needed to closely examine the case as it was discussed at the ICJ. This will also help to scrutinize the clarity or ambiguity of both the Advisory opinion of the ICJ as posed by those who doubted its clarity and the international law to which the dispute falls. The legal process of the Western Sahara case as it has been discussed and judged during the 1975 ICJ case referred mainly to the pending questions related to the narratives of decolonization through the right of self-determination (consent based-approach) and state territorial integrity (corrective justice approach) that formed the grounds of the parties' competing arguments.

3.3 Competing Legal Discourses

By referring the Western Sahara case to the International Court of Justice, the United Nations General Assembly requested specifically the Court to look at two particular questions:

(A) Was Western Sahara at the time of the Spanish colonization a terra nullius meaning a territory belonging to no one?

(B) What were the legal ties between Western Sahara and the Kingdom of Morocco and the Mauritanian entity?

On question one all sides argued that the Western Sahara had not been *terra nullius*.

Spain said that it gained colonial authority as a result of agreement with local rulers. It did not base any claim on terra nullius. The decision did not comment on the basis for Spain's authority, except indirectly in rejecting any claim based on terra nullius.

Morocco argued that the local rulers in Western Sahara had owed allegiance to Morocco, with the result that the area had legally been a part of Morocco. Spain had taken over a part of Morocco, in violation of the basic principle of the territorial integrity of states. It had exploited the weakness of the Moroccan state in the period, and illegally taken the area. The argument was that the Western Sahara was not in the category of a non-self-governing territory: instead it was properly a part of Morocco.

The ICJ held that the ties between the WS and Morocco at the time of the Spanish colonial assertion were not sufficient to establish that Western Sahara had been a part of Morocco. The Western Sahara had legally become a colony of Spain and was a non-self-governing territory under the UN Charter. Spain's role was ending in compliance with the new principles of decolonization. Those principles said there should be an act of self-determination by the people of the Western Sahara.

In summary, it was necessary for Morocco to dispute the characterization of the Western Sahara as a Spanish colony, for that placed the Western Sahara in the category of a non-self-governing territory and under the decolonization rules of the 1960 General Assembly resolution. That would mean that a free vote was required and the Western Sahara could choose independence.

Morocco could loose if the Western Sahara was *terra nullius*, for that would uphold Spain's takeover of the area as a colony. Morocco could win if the local leaders in the Western Sahara had already aligned with Morocco before Spain became active (resulting in the Western Sahara being a part of Morocco and protected therefore from valid colonial acquisition by the doctrine of the territorial integrity of states). To win, Morocco had to get a ruling (a) against *terra nullius*, and (b) supporting strong legal ties between Western Sahara and Morocco before Spain came on the scene. It succeeded on (A) and lost on (B).

Morocco argued that the local rulers in Western Sahara had owed allegiance to Morocco, with the result that the area had legally been a part of Morocco. Morocco's claim sustained that Spain had taken over a part of Morocco, in violation of the basic principle of the territorial integrity of states. Accordingly, Morocco argued that Western Sahara was not in the category of a non-self-governing territory, but properly a part of Morocco.

The ICJ held that the ties between the Western Sahara and Morocco at the time of the Spanish colonial assertion were not sufficient to establish that Western Sahara had been a part of Morocco. The Western Sahara had become a colony of Spain and was a non-self-governing territory under the UN Charter. Spain's role was ending in compliance with the new principles of decolonization, which frame the territory within the right of self-determination by the people of the Western Sahara.

The parties that appeared to the Court were Morocco, Spain, Mauritania, Algeria and Zaire (currently the Democratic Republic of Congo; hereinafter *Zaire*). The presence of these African states before the International Court of Justice came with 'disenchantment with the Court' after its Advisory opinion on South West Africa case in 1966. In that earlier case, Ethiopia and Liberia submitted a case against South Africa that regarded the self-determination of people of Namibia as the continued mandate of what was then called South West Africa (as mandatory). This decision had been met with outrage by many developing countries especially in Africa (Elias 1983, 347) and marked the winds of change in judicial approaches to self-determination that started with the 1971 Namibia Advisory opinion of the ICJ.

In the Court, there was a categorization of the parties; on one side, Spain, Morocco and Mauritania were represented in the case as 'concerned' parties. On another side, Algeria and Zaire were present as 'interested' parties. Mohamed Bedjaoui representing Algeria mentioned that:

> "*L'Algérie a déclaré, continue de déclarer et déclarera toujours que dans cette affaire elle n'a aucune reventication à faire valoir, ce qui lui a toujours conféré une situation particulière qu'elle tient de son bon voisinage, de ses relations fratérnelles avec le Maroc et*

> *la Mauritanie et de la géopolitique de cette même région. Cette situation particulière a été exprimée par l'Assemblée génerale de façon spécifique, dans la résolution 2229 precitée par l'emploi de l'expression 'partie interessée'"* (Sahara occidentale 1975, 59).
>
> [Algeria declared, continues to declare and will always declare that in this case she does not have any claim to assert, which conferred a particular situation to her that she takes from her good neighborhood, from her fraternal relations with Morocco and Algeria and from the geopolitics of the same region. This particular situation was expressed by the general assembly in specific manner, in Resolution 2229, that was foregone by the use of the expression 'interested party'][46] (Western Sahara 1975, 59).

Referring to the use of the word 'parties' in the conflict, the Uppsala Project distinguishes between the primary parties in the conflict, secondary supporting non-warring parties and secondary warring parties. The Uppsala Project defines "primary parties" as:

> "the parties that have formed the incompatibility, secondary supporting party as the party that gives a primary party support that somehow affects the development of the conflict" (Uppsala Project 2008)".
>
> The project explains that
>
> "The support given can be of several types, for instance financial, military (short of regular troops), logistics etc. Anything relating to text interaction between states (profits from trade etc.) is not considered as support in the conflict, even if the consequences of that interaction may be to the benefit of the warring party that is on the receiving end. We are only considering support that is

[46] Author's translation

> actively given to strengthen the party in the particular conflict and not support which unintentionally happens to strengthen the warring party. Support may come from neighboring states or organizations of states, opposition organizations (or diasporas) in other states that have ethnic or ideological affinities with the group in question, or, some other organization within or outside the state in question" (Uppsala Project 2008).

Algeria has long supported the POLISARIO[47]. The Headquarters of the Sahrawi Arab Democratic Republic (SADR) are based in Tindouf, Algeria. The POLISARIO's position on self-determination with the possibility of territorial independence is the longstanding position of Algeria. According to the International Crisis Group (ICG) (2007, 12), the emphasis of the UN and international community has led to obscure the fact that Algeria's position has mainly rested on the principle of *uti possedetis.* ICG (2007, 12) believes that the emphasis on self-determination represents only one aspect of the dispute and accordingly only Morocco and the POLISARIO[48] are 'concerned' parties. However, from the perspective of the rule of *uti possidetis*, the dispute has three concerned parties indeed, with the inclusion of Algeria that has long articulated the principle of stability of frontiers inherited from colonial powers.

In addition, and contrary to Bedjaoui's statement, the history shows that relations between Algeria and Morocco were tense and we saw in chapter 2 that there were border issues between the two countries which led to wars. By hosting the POLISARIO, Algeria is playing out some hostility towards Morocco. Many scholars and experts have addressed Algeria's rivalry with Morocco as constant competition for influence in the Maghreb region. Western Sahara dispute has been seen as a geopolitical dispute between Morocco and Algeria (Zoubir and Gambier 2004, pp. 49-

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[47] In the interview conducted for the European Strategic Intelligence and Security Center, Lahbib Ayoub who is a co-founder of the POLISARIO and military commander has explained how Algeria chose Mohamed Abdelaziz as the head of the POLISARIO and how the Algerian government has been supporting the POLISARIO. He stated: "we could not refuse them (Algerian Government) anything: they were giving us everything or almost everything".

[48] It is necessary to mention that because of the fact that Mauritania abandoned its claim on the territory, this paper considers that Mauritania is no longer party in the dispute.

77). It is difficult to sustain that relations between Morocco and Algeria were 'fraternal' and based upon good neighbors, nor can I uphold Bedjaoui's statement that Algeria had no claim in the dispute. The use of the term 'interested' party, as it was maintained by Algeria and the Court, remains within and falls into the dogma of hidden politics within the legal processes of the case.

Whether 'concerned' or 'interested' party, the interventions from the representatives of the State parties during the case took on various narratives, in which *terra nullius*, legal ties and self-determination were the major ones.

3.3.1 *Terra Nullius v. Terra Nullius*

The first question that the Court needed to answer was whether or not the Western Sahara territory was at the time of Spanish colonization a territory belonging to nobody *(terra nullius).*

Terra nullius as a term originated in the practice of Roman private law on territorial acquisition. In private law, "occupation" was effected through two necessary elements: the intention to take possession of the land *(animus occupandi)* and the effective display of activities over that land, generally cultivating it *(corpus possesionis).* In the Roman law, possession constituted a just title to acquire ownership over a land belonging to nobody. This practice was transported to international territorial acquisitions of lands belonging to no one *(terra nullius)*[49].

Terra nullius may appear to be straightforward in meaning, but the discussion over its meaning and scope during the pleadings of Western Sahara case made it one of the narratives of classic international law that remain controversial.

[49] The law of the doctrine of the 17th and 18th century related to territorial acquisition went through three stages. First, between 14th and 16th century: during this period sovereign rights over a territory were acquired after victory in wars. Second, the period of discoveries in which title to territory was granted through acts of symbolic annexation. Third, the Final Act of the Berlin Conference of 1886 embodied the requisite of effective occupation. Milano (2006, 83) points out that the reality is that some classical studies as Goebel's and Ago's reveal that this doctrine has been dominated by the medieval conception of divine legitimacy. However, the development of the modern State and the end of religious unity in Europe brought growing pressure to the exclusive claims advanced by Spain and Portugal in some parts of the world.

Mohamed Bedjaoui (1975, pp. 455-456)[50] representing Algeria argued that Western Sahara was not *terra nullius* because the discourse was used during the nineteenth century international law by Europeans so as to justify their 'civilizing' missions. He pointed out that at that time any territory not belonging to a 'civilized' state was considered as *terra nullius* and had nothing to do with the fact that the territory does not belong to anybody. He concluded that the European 'civilizing' missions under the discourse of *terra nullius* simply replaced the use of the religious factor under Christianity to justify colonialism, as it had been the case in ancient Rome. Such discourse applied only to any territory belonging to a non-European State and any territory belonging to a State that was not recognized by Europeans to have the fundamental acceptance of the European concept of State.

Bayona-Ba-Meya from Zaire (today's Congo) shared the same opinion as Bedjaoui and maintained that *terra nullius* was not applied to Western Sahara because the Moroccan and Mauritanian ancestors were born there and created their own civilization. He added that the European concept of *terra nullius* does not apply to Africa, especially in a case in which two or three parties are African.

Morocco and Mauritania disagreed with Bedjaoui's views of *terra nullius* as to relate to non-European territories and those not belonging to states recognized by Europeans as to adopt the fundamental European concept of state. Morocco's argument was that Western Sahara was not *terra nullius* at the time of Spanish colonization because the Sultanate of Morocco which was a recognized state at that time received the allegiance of the tribes in Western Sahara. This allegiance and the fact that Morocco was recognized as a state by Europeans supposedly translated to the fact that Morocco had sovereignty over the Territory.

Mauritania argued that the Territory was not *terra nullius* because it was inhabited by tribes having a political organization and authority. This organization and authority was evidenced by the fact that Spain entered into agreement with these tribes.

From a Spanish perspective, the local rulers had sovereignty of the territory and accordingly the power to cede it. Spain considered that their occupation

[50] Interestingly Mohamed Bedjaoui will become the President of ICJ during the East Timor case in which the discourses were different than those of Western Sahara case in 1974 but the case still concerned with another case of peoples' right to self-determination.

of the Territory was obtained from an actual act of cession by the local rulers and that the territory was not *terra nullius*. The position of Spain at the ICJ came within the new tendencies in late 19th Century of the international legal doctrine in relation to local populations. Due to moral and political constraints and a new international legal commitments and trends against the consideration of lands with established local populations as 'lands belonging to no one', such consideration became gradually offensive an historically unjustified. Spain was aware of the fact that the international legal system was going towards a *corrigendum* of the concept of *terra nullius.* Spain predicted that *terra nullius* would be restrictively interpreted by the Court and that the argument of transfer of sovereignty through agreement with local populations could positively be regarded by the Court. The Spanish arguments at the ICJ were strategic by shifting from the framework of *terra nullius* to the transfer of sovereignty through agreements with local populations.

It can be said here that the various parties held the same conclusion (Western Sahara was not *terra nullius* at the time of colonization), and in the absence of a clear definition of *terra nullius* in international law, it meant different things to various parties. In separate opinions, Judges Gros, Petrén and Dillard[51] considered that since none of the parties in the case relied on the argument that Western Sahara was *terra nullius* at the time of colonization, the inclusion of the issue in the ICJ proceedings was irrelevant. As regards the relevance of the question, the Court needed to establish the status of the tribes that inhabited Western Sahara and evaluate their entitlement as 'peoples' so as to exercise the right of self-determination. We will see later in this chapter how the Court did not consider that Western Sahara was *terra nullius* and how this position explained the Court's consideration of the population in Western Sahara as 'peoples.'

3.3.2 *Legal ties v. self-determination*

Regarding the second question: "What were the legal ties between Western Sahara and the Kingdom of Morocco and the Mauritanian entity?" the Court had to frame its decision upon two constructed narratives that were polarizing the parties' arguments. On one hand, the dominant narrative was based upon "the free and genuine

[51] These were separate opinions of Judge Gros, Petrén and Dillard.

expression of the will of the peoples of the Territory", basically the narrative of self-determination. On the other, the Court needed to evaluate the counter-narrative of 'legal ties'. The latter was considered as a counter-narrative because the phrase 'legal ties' was not an international law term. The Court needed to evaluate if 'legal ties' could be considered of such nature as to have an effect on the application of Resolution 1514 (XV), particularly the principle of self-determination through "the genuine expression of the will of the people of the Territory".

Bearing in mind these two narratives, the arguments of the parties in the Western Sahara case can be divided into two groups. One group held on to the dominant narrative of self-determination. From one side, Spain and Algeria clung to the argument that the population of Western Sahara has the right to self-determination to be exercised through a referendum on independence; regardless of any pre-colonial claims related to what could be considered as 'legal ties'.

From another side, Morocco and Mauritania claimed the wrong-taking of the Territory by Spain based upon the pre-colonial situation. They argued that the historical and cultural patterns in Western Sahara justified the establishment of the pre-colonial situation based upon the specific ties between the population in the Territory from one side, and Morocco and Mauritania from the other side. These arguments cleaved the counter-narrative of 'legal ties'. In this regard, Attorney Dupuy who was representing Morocco articulated that:

> *"Mais, rappelons-le, le problème ne concerne pas la souveraineté espagnole actuelle, que nous mettons en question. Le problème porte sur les liens juridiques qui existaient au moment de la colonisation espagnole, c'est-a-dire durant la période ou la fin du XIXe siècle se manifestent des tentatives, plus diplomatiques d'ailleurs que matérielles, de pénétration espagnole au Sahara occidentale" (Sahara Occidentale 1975, pp. 288-289).*
>
> [But we remind that the problem does not concern the actual Spanish sovereignty that we are questioning. The problem concerns the legal ties that existed at the time of the Spanish colonization,

> which is the period at the end of XIXth Century when diplomatic, rather than material attempts of Spanish penetration in Western Sahara][52] (Western Sahara 1975, pp. 288-289).

The narrative of 'legal ties' formed the basis of Morocco and Mauritania's framework for their corrective justice-interpretation on how self-determination can be relevant (Knop 2002, 158). Accordingly, Morocco claimed that in cases where an internationally recognised state was 'dismembered', as was the case of Morocco by the Spanish colonization of Western Sahara, the principle of territorial integrity out-weights the consent-based approach to self-determination that rests on the free choice of the people. In his Argument, Bennouna, who was representing Morocco, expressly maintained that:

> *"L'opposition entre 'droit des peoples à disposer d'eux-même' et 'intégrité territoriale' est une opposition le plus souvent de théoricien. Le théoricien, ici, arrive à être un home de fiction et parfois un home d'irréalisme, car le droit des peoples à disposer d'eux-même doit s'apprécier par rapport à la réalité qu'il est appelé à régir. C'est pour cela que le problème revient à definer effectivement ce qu'est un peuple. Et c'est pour cela que cette question est une question qui reste éminemment politique et c'est une question qui relève, dans son état actuel du droit positif, de l'organe politique responsable de la décolonisation, qui est l'Assemblée générale des Nations Unies*". (Sahara Occidentale 1975, p. 181).

> [The difference between 'peoples' right to self-determination' and 'territorial integrity' is mostly a theoretical difference. Here, the theorist is a person of fiction and sometimes of unrealism, because peoples' right to self-determination must be appreciated in relation to the reality that it called to include. *That is why the problem*

[52] Author's translation

> *concerns the effective definition of people.* And for this reason, the question remains eminently political and is a question that concerns, in its actual state the positive law of the political organ that is responsible for decolonisation, which is the General Assembly of the United Nations][53] (Western Sahara 1975, p. 181).

According to this text, Morocco wanted to restrict the definition of the word 'peoples' and aimed to structure the case within the framework of a corrective justice approach. This way, the Court would address the past injustice done to the Moroccan territory by the Spanish colonization, nothing more (including self-determination).

The Moroccan representatives to the Court argued that the right to self-determination is not applicable to sovereign and independent states. It is not applicable to any integral part of their territories or to a fraction of the people or nation. The Moroccan arguments narrowed the case to the decolonization of Western Sahara under Spanish domination to the contestation under 'historic rights' of Morocco and that any other matter must be directed towards this objective only, including any interpretation of self-determination. By introducing the Western Sahara case to the General Assembly of the United Nations to decide on the sort of case, the Moroccan representatives were hoping for a political interpretation of self-determination rather than 'legal'. In other words, they were aiming for a decision that refers the term 'peoples', a key word of peoples' right to self-determination, to its limited meaning of 'the populations of overseas colonies' including all those within what it claimed to be the boundaries of Morocco.. The Moroccan representatives tried to avoid having the word 'peoples' interpreted within any liberal concept of the word, as to acquire separately for the populations of the Territory the status of 'peoples' with the right to self-determination. They also informed indirectly that any interpretation that refers to the population of Western Sahara as 'peoples' would not be considered by Morocco as 'realistic'. We will see in chapter 4 how the discourse of realism will be mentioned again not only by Morocco but also by the United Nations Security Council for the sake to finding a political solution to the dispute. Morocco and Mauritania cited the

[53] Author's translation

Declaration on the Independence of Colonial Peoples, which details that "All peoples have the right to self-determination (paragraph 2), but also that "any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations (paragraph 6). However, Morocco (and Mauritania) needed first to prove that the national unity and the territorial integrity of Morocco comprised the territory of Western Sahara through established 'legal ties'.

The Mauritanian arguments were directed towards the same direction of the narrative of corrective-justice making historic 'legal ties' to the Territory as the main discourse. Nonetheless, the representatives of Mauritania relied instead on a contextual and postmodern interpretation of self-determination. Jean Salomon, on behalf of Mauritania, explained that self-determination is:

> "*un ensemble de règles complexes qui fait une place importante à l'intégrité territorial, le poids d'un facteur ou d'un autre dépend de toute une série d'éléments sociologiques, économiques, politiques, historiques. Ces facteurs ne sont pas morts. Ils vivent et, comme dans un kaléidoscope, leur mélange peut être bouleversé à chaque instant*" (Western Sahara 1975, p 312).
>
> [a group of complex rules that has an important place for territorial integrity; the weight of a factor or another depends upon a whole series of sociological, economic, political, historic elements. These factors are not dead. They live and, as in a Kaleidoscope, their mixture can be overturned at any time][54] (Western Sahara 1975, p 312).

From this citation, Mauritania argued that the right of self-determination depends on complex factors that take into account territorial integrity and the context of the territory in question. The Mauritanian position regarding the rights to self-determination shows that Mauritania did not want to fully engage on a clear position

[54] Author's translation

and be categorical with regard to the perception of the right. Spicing up their position with ambiguity, the Mauritanian arguments were less uncompromising than the Moroccan ones. This explains the fact that Mauritania knew that any positive reaction of the Court with regard to the Moroccan categorical arguments will also necessarily be beneficial to Mauritania's case. Also, Mauritania was a newly established state, yet with non-secured borders. It was addressed as 'entity' because at the time of the Spanish colonization of Western Sahara, Mauritania was under a tribal system and not yet established as a state. The context in which Mauritania was making its case of Western Sahara was very different to the Moroccan one. Mauritania argued with the counter narrative of 'legal ties' and 'historic rights'. At the same time, it moved away from the consideration of the notion of 'state' in considering the status of the Territory. Instead, it combined the notion of territorial integrity with other factors related to socio-economic, political and historic considerations for the interpretation of the right of self-determination.

What we can state from these various arguments is that on one side, the right of self-determination was considered as a defined right that confers the right to peoples to choose between integration and independence regardless of the pre-colonial situation of the state (Spain and Algeria).

On another side, the right of self-determination was interpreted as non-applicable to sovereign states in terms of parts of their territories. "Self-determination" does apply to sovereign states. It gives them sovereignty over their territories. Parts of sovereign states do not have a right of self-determination.

Accordingly, Mauritania and Morocco needed to establish that the nature of 'legal ties' has an effect that requires the return of their territory regardless the will of the Western Saharan populations. In other words, the only way for Mauritania and Morocco to win the case of Western Sahara was to establish that the Territory was within their inherited colonial boundaries at the time of their respective independence (ties to the Territory). This requirement also goes back to legal history related to stable boundaries. In the 1962 Temple of Préah Vihéar case, the Court reiterated the purpose of stable boundary. The Court stated:

> "…when two countries established, one primary object is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of continuously available process be called into question, and its rectification claimed, whenever inaccuracy by reference to a clause, in the parent treaty is discovered. Such process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far being from stable, would be completely precarious."[55] (ICJ Reports 1962, p. 34)

Salomon, who was representing Mauritania, stressed two remarks related to the application of *uti possidetis*:

> "*Deux remarques doivent être faites à propos de ce principe de l'intangibilité des frontières ou de l'Uti Possidetis. En premier lieu, la Mauritanie ne met pas en cause à proprement parler les frontières du Sahara dite espagnole. Les frontières de ce territoire non autonome ont été établies par des traits internationaux entre la France et l'Espagne. Pour une large part, ces traits ont en même temps fixé les frontières de la Mauritanie. La question n'est pas là.*
>
> *En second lieu, le principe de l'Uti possidetis africaine ne concerne que les Etats qui ont accédé à l'indépendance. Il n'interdit pas les remembrements avant cette accession à l'indépendance. Le respect des frontières ne signifie pas la reconnaissance nécessaire de l'altérité de la population enfermée dans celles-ci tant que le territoire n'a pas accédé à l'indépendance…*" (Sahara Occidentale 1975, 335).
>
> [Two remarks must be made regarding this principle of the intangibility of the frontiers or the uti possidetis. Firstly, Mauritania

[55] Official translation

> does not question the frontiers of the Sahara called Spanish. The frontiers of this non-autonomous territory were established by international treaties between France and Spain. In a large part, these treaties fixed the frontiers of Mauritania. The question is not here.
>
> Secondly, the African principle of uti possidetis concerns only the states that accessed their independence. It does not prohibit lands before the access to independence. The respect of frontiers does not mean the necessary recognition of otherness of the population enclosed within these lands as long as the territory did not access independence…][56](Western Sahara 1975, 335).

According to the Mauritanian arguments on *uti possidetis*, Mauritania has firstly considered *uti possidetis* as a principle of international law that applies to the Mauritanian frontiers as well, but claimed that the principle of *uti possidetis* applies only to states that became independent and does not concern territories or populations that did not reach their independence. In other words, Mauritania claimed that *uti possidetis* does not concern the territory of Western Sahara because this territory was not independent.

Mauritania was careful in adopting the *uti possidetis* into its arguments in the case. Mauritania needed to establish that *uti possidetis* is not applicable to Western Sahara so that it can justify its annexation to its national territory.

Morocco has basically sustained that *uti possidetis* only applies to newly independent states and not to Morocco which was an independent state for centuries. Morocco claimed that *uti possidetis* is based upon artificial boundaries that do not reverse the ties of allegiance that the population of Western Sahara gave to the Sultan of Morocco, which justifies territorial sovereignty in Islam.

The bottom line is that neither Morocco nor Mauritania could justify that the Territory of Western Sahara was within their national boundaries as inherited from the colonial administrative boundaries (*uti possidetis*). They based their approaches

[56] Author's translation

upon other considerations than the modern international law that the ICJ applied to the dispute. Morocco's approach of Islamic allegiance can in fact justify its sovereignty over a number of countries in Africa including Mauritania. The narrative of 'legal ties' obtained through 'allegiance' is unknown in international law and does not reverse the consideration of populations as 'peoples'. Even though the definition of the word 'peoples' is not available in international law, it is agreed that the population of non-self-governing territories are considered as 'peoples', no matter what other considerations there are, be they societal factors related to history, culture, economy or politics. Western Sahara has been considered as non-self-governing territory and accordingly its population would be identified as 'peoples' with the right to self-determination. At this juncture, it is critical to examine how the Court reacted to and subsequently decided on the merits of the Western Sahara case, particularly, the status of the population of Western Sahara and the implications of such status on the application of their right of self-determination.

3.4 The Advisory Opinion of The Court

The 1975 ICJ Advisory opinion on Western Sahara case is as follows:

Regarding question 1: "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a Territory Belonging to No One (terra nullius)?"

The Court stated:

> "For the purposes of the Advisory Opinion, the 'time of colonization by Spain' may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, 'occupation' was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius***.**

> According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius:* in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows *(a)* that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; *(b)* that Spain did not proceed upon the basis that it was establishing its sovereignty over *terra nullius:* thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.
>
> The Court therefore gives a negative answer to Question I. In accordance with the terms of the request for advisory opinion, "if the answer to the first question is in the negative", the Court is to reply to Question II"[57].

From this text, the Court considered that the international law of the late 19th Century regarded local tribes of Western Sahara as the occupants of their territory, and therefore Western Sahara was not *terra nullius.* The Court logically should have stated that these tribes were the sovereigns of the Territory, but the Court did not mention it and therefore, the Court left in doubt whether the tribes were sovereign or not, applying international legal doctrine. In other words, the Court left open the possible interpretation that these tribes did not have sovereignty of the territory in the classical international law sense. The Court refused to commit any categorical statement related to the tribes' autonomy to enter into agreements with Spain that they therefore, and in fact, were sovereigns over their own territory. The Court, in effect, considered that the capacity of the local tribes in entering into agreements is sufficient

[57] Official translation

indication of the political and social organization of these tribes, which suppressed any doubt that the territory was not *terra nullius*.

The Court clearly considered these local tribes as 'peoples' and closed any debate on the legal status of the inhabitants of Western Sahara, no matter the nomadic lifestyle that characterized them. This part of the Court Advisory opinion set the inhabitants of Western Sahara within the framework of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, which was the outcome of the UN General Assembly Resolution 1514 (XV) of 14 December 1960. This means that as 'peoples' of a non-self-governing territory, the inhabitants of Western Sahara can no longer have their right to decolonization delayed for reasons related to non viability. Unless the Court acknowledges the existence of some kind of legal tie between these tribes and Kingdom of Morocco from one side, and the Mauritanian entity from the other side, the peoples of Western Sahara have the right to self-determination and choice between integration and independence.

Regarding the second question: "What Were the Legal Ties of This Territory with the Kingdom of Morocco and the Mauritanian Entity?", the Court stated:

> "The information before the Court discloses that, while there existed among them many ties of a racial, linguistic, religious, cultural and economic nature, the emirates and many of the tribes in the entity were independent in relation to one another; they had no common institutions or organs. The Mauritanian entity therefore did not have the character of a personality or corporate entity distinct from the several emirates or tribes which comprised it. *The Court concludes that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty or of allegiance of tribes, or of simple inclusion in the same legal entity.* Nevertheless, the General Assembly does not appear to have so framed Question II as to confine the question exclusively to those legal ties which imply territorial sovereignty, which would be to disregard the possible relevance of other legal ties to the decolonization process. The

> Court considers that, in the relevant period, the nomadic peoples of the Shinguitti country possessed rights, including some rights relating to the lands through which they migrated. These rights constituted legal ties between Western Sahara and the Mauritanian entity. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region"[58].

Regarding Morocco's territorial claim, the Court explained that

> "Morocco (paragraphs 90-129 of the Advisory Opinion) presented its claim to legal ties with Western Sahara as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory and an uninterrupted exercise of authority. In the view of the Court, however, what must be of decisive importance in determining its answer to Question II must be evidence directly relating to *effective display of authority* in Western Sahara at the time of its colonization by Spain and in the period immediately preceding. Morocco requests that the Court should take account of the special structure of the Moroccan State. That State was founded on the common religious bond of Islam and on the allegiance of various tribes to the Sultan, through their caids or sheiks, rather than on the notion of territory. It consisted partly of what was called the Bled Makhzen, areas actually subject to the Sultan and partly of what was called the Bled Siba, areas in which the tribes were not submissive to him; at the relevant period, the areas immediately to the north of Western Sahara lay within the Bled Siba"[59].

As evidence of its display of sovereignty in Western Sahara, Morocco invoked alleged acts of internal display of Moroccan authority, consisting principally

[58] Official translation
[59] Official translation

of evidence said to show the allegiance of Saharan caids to the Sultan, including dahirs and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and acts of military resistance to foreign penetration of the territory. Morocco also relied on certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of Western Sahara, including:

(a) Certain treaties concluded with Spain, the United States and Great Britain and Spain between 1767 and 1861, provisions of which dealt *inter alia* with the safety of persons shipwrecked on the coast of Wad Noun or its vicinity,

(b) Certain bilateral treaties of the late nineteenth and early twentieth centuries whereby Great Britain, Spain, France and Germany were said to have recognized that Moroccan sovereignty extended as far south as Cape Bojador or the boundary of the Rio de Oro**.**

After having considered this evidence and the observations of the other States which took part in the proceedings, the Court found that neither the internal nor the international acts relied upon by Morocco indicate the existence at the relevant period of either the existence or the international recognition of legal ties of territorial sovereignty between Western Sahara and the Moroccan state. Even taking account of the specific structure of that state, they do not show that Morocco displayed any effective and exclusive State activity in Western Sahara. The Court also found that the legal ties claimed by Morocco do, however, provide indications that a legal tie of allegiance existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory, through Tekna caids of the Noun region. The Court recognised that the Sultan displayed, and was recognized by other states to possess, some authority or influence with respect to those tribes (only).

Some authors[60] strongly criticized the Court decision. Roussellier (2007) argued that Court has relied mainly on two precedents in defining state territorial sovereignty: the Eastern Greenland case (1933) under the Permanent Court of International Justice (PCIJ) and the Island of Palmas case (1928) under the Permanent Court of Arbitration.

[60] There are many authors who criticized the decision from the framework of sovereignty. Among these authors, Jacques Roussellier (2007) published his work in this matter.

The PCIJ defined sovereignty as the continuous display of authority which involved two conditions: the intention to act as sovereign *(animus occupandi)* and some actual exercise or display of such authority *(animus corpus).* These two conditions are complemented by the proven records of international treaties independently from the internal display of authority *per se*.

As in the PCIJ in Eastern Greenland case, the Permanent Court of Arbitration (PCA) in the Island Palmas case (1928) defined territorial sovereignty mainly in relation to the claim of other states contained in international treaties. In Island Palmas case, the PCA has adopted the principle that a "territorial title is to be determined by the legal regime that is contemporary with its creations and together with rules regulating the exercise of sovereign authority as they evolve" (Roussellier 2007, 60). The principle was also applied by the ICJ in the *Minquies and Ecrehos* in 1953.

Jacques Roussellier (2007, pp 60-63) mentioned that the ICJ did not strictly adhere to the PCIJ's approach in Eastern Greenland nor did it rely on the relativism of the PCA in Island of Palmas in waiving, to a certain degree, the assessment of the evidence of effective and continuous display of State's exercise of authority. He compared the links to the suzerainty between the natives of the Island of Palmas and the Netherlands to the ties of allegiance between some tribes in Western Sahara and the Moroccan Sultan (Roussellier 2007, 70). He lastly pointed out that the ICJ extended the burden set by the PCIJ by combining the burden of evidence of territorial sovereignty related to the external evidence through international treaties and the absence of States' counter-claim, and the internal evidence of continuous exercise of state authority.

These arguments are in fact based on earlier ideas of the analyses of 'sovereignty' which did not take into account the contextual change that occurred during the period in which the Western Sahara case was submitted to the General Assembly. The context in which the General Assembly received the case was marked by the place of decolonization at that time and a modern international law of decolonization based on borders fixation as inherited from colonial administrative boundaries. Western Sahara was framed as another case of decolonization because the Court found that the territory was not part of Morocco. The Court has interpreted the

arguments within the new aspirations of the General Assembly. The Court retained the dominant narrative of self-determination as the will of the peoples and found unnecessary to consider that this should be reversed by the Moroccan and Mauritanian accounts based on wrongful taking of territory or other cultural and historical considerations. Just like in the case of Namibia, the formal UN answer coming from the Court was that Western Sahara was within the framework of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples – a right to choose independence. Namibia, a former German colony, had been administered by South Africa, first officially and then de facto after the UN cancelled its official role. Namibia is quite large, so is Western Sahara, and apparently could not be absorbed into South Africa. Like Western Sahara, Namibia is not densely populated and its local population was without a history of a national state organization. Like the POLISARIO for Western Sahara, the People's Liberation Army of Namibia has (militarily) fought for independence. Like Western Sahara for Morocco, Namibia was not inside the colonial boundaries of South Africa. Like Western Sahara, the ICJ placed Namibia on the track of decolonization and the UN arranged a peace plan for the region. But unlike Morocco, South Africa ended its administration of Namibia in 1989.

The case of Namibia is an example on how the UN at that period in time saw cases related to territorial dispute. With the idea that people were so primitive or nomadic that they had no claim to territory or under *terra nullius*, any area is open to any state takeover, the ICJ rejected these approaches. The ICJ is in line in part with the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. The penultimate paragraph of the ICJ Advisory Opinion in Western Sahara was to the effect that:

> "The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood

> by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory"[61].

The Court contextualized the case in the interpretation of late 19th century international law and retained the narrative of "self-determination through the free genuine expression of the will of the peoples of the Territory" as the dominant UN narrative at that period of time to become the dominant narrative of the case. Clearly, the counter-narrative of "historic and immemorial rights" was rejected by the Court. This explains the large number of the General Assembly resolutions that repeatedly called for the application of the right of self-determination through the free and genuine expression of the will of the peoples of Western Sahara[62].

3.5 Conclusion 2

The analysis of the debate on self-determination and *uti possidetis* that this chapter includes leads me to state that:

1. From the overall doctrinal debate on people's right to self-determination, it seems that the discourse of self-determination has different meanings depending on the territorial situation as defined by the modern international law of boundaries fixation. Despite the fact that self-determination meant different things, its scope and principles has been filtered and made clear through the framework of the modern international law of *uti-possidetis*. In other words, once the territory is outside the territorial boundaries of a state as inherited from colonial administrative

[61] Official translation

[62] See a listing of the UNGA resolutions regarding Western Sahara in the annex 11.

delimitations, the populations of this territory are considered by international law as ‘people’ with the right to choose independence (external self-determination). The choice of the peoples takes the form of an international arrangement (referendum) with the possibility for them to choose independence, integration with the existing state or any other status. In any other situation in which the concerned territory is inside the state according to *uti possidetis*, self-determination can be arranged, but only in its internal meaning; in the form of some kind of self-government only.

2. Because Western Sahara was not *terra nullius* and considering the colonial administrative delimitations between Spain and France, the territory was judged by the Court as independent; outside the national territory of Morocco and Mauritania as per the rule of *uti possidetis*. This consideration places Western Sahara in the 1960 UN Declaration on the Granting of Independence to Colonial Peoples (GA Resolution 1514 XV), with the right of Sahrawi people to the right of *external* self-determination. The Court legal framework gave a crystal clear application of the modern international law related to decolonization. Once the Court decided that Western Sahara was not *terra nullius*, as agreed by all the parties in the case, it paid no attention to the pre-colonial situation of Western Sahara to decide on the legal ties of the territory vis-à-vis Morocco and Mauritania. Accordingly, the Court did not refer to or mention the Treaty of Tetuan or any other conventions or documents related to any territorial situation that Western Sahara had before the Spanish colonization. The Court took into consideration the rule of *uti possidetis* to decide that Western Sahara had territorial ties to neither Morocco nor Mauritania.

3. The International Court of Justice in the Western Sahara case affirmed that peoples’ right to self-determination, related to cases of decolonization, gives precedence to the present-day aspirations of the people.

4. The ICJ decision became the governing and definitive decolonization decision cited by all scholars. The decision became a legal reference with an impressive legal value that overshadowed other famous cases on self-determination such as Namibia case, which is in the same line of the ICJ framework as the Western Sahara case. The decision backfired on Morocco that brought the case to the ICJ with the hope that the ending of the Spanish colonization of the territory would lead in the revival of some past relationship between Morocco and Western Sahara based on

allegiance. This scenario did not happen as wished by Morocco, and the Green March came against this background, which made the Green March a defiant maneuver to the ICJ.

During the seventies and until the mid-nineties, the media in Morocco were all state controlled with almost no chance for Moroccans to know the outcome of the ICJ decision neutrally. The entire case of Western Sahara was managed by an elite appointed by the regime. Basically, it was this elite that diffused how they imagined the nation of Morocco was like to be after the Western Sahara decision. They also decided how to 'manage' the information regarding the ICJ decision and the steps ahead to not only keep face but also avoid a public uprising against the regime that survived the coup-d'état in 1970. The authorities announced that Morocco won the ICJ case because the Court recognized the existence of ties of allegiance between Western Sahara (not *some* tribes only) and the Sultan of Morocco. King Hassan II ordered the Green March to "take back" what belongs to Morocco. In a few words, the Moroccan government publicly communicated a false reading of the ICJ decision and based the announcement of the Green March on incorrect information regarding the outcome of ICJ decision.

When I spoke to a few Moroccans who participated in or witnessed the Green March, I realized that they did not know that the March was in defiance of the International Court of Justice decision on Western Sahara, just as I did myself, and until today most Moroccans still believe that the March was legitimate. For the Moroccan government, the March was a desperate measure to keep face for the regime at that time. Perhaps if the Moroccan regime knew that the Court would go in unpredictable directions, and against what Morocco was hoping it to look at, it would not see it as necessary to submit the case for the international legal proceedings of the ICJ. Were there any other ways for the Moroccan regime to 'get out' of its self-entrapment? Under international law, the way was closed, but in the world of politics the logic of the international lawyer does not seem to work all the time. The self-centered character of the most powerful states in the world, are responsible of the application of the international law: the permanent members of UN Security Council seemed to give a possibility for Morocco to go against the international law that the UN Security Council is supposed to protect. This is the role of *Realpolitik* in the Western Sahara case and the emergence of the discourse of autonomy in its internal arrangements is what the following chapter will analyze.

CHAPTER IV
THE SEARCH FOR A POLITICAL COMPROMISE AND THE EMERGENCE OF AUTONOMY

The analysis of the legal process in the previous chapter showed that the International Court of Justice did not establish a link between the allegiance of certain tribes in Western Sahara and the ties to the territory of Western Sahara, Morocco and the Mauritanian entity. The Court rejected arguments based upon the Islamic particularity of territorial sovereignty and retained a post World War II version of international law based upon the rule of *uti possidetis* and the consent-based approach of the free and genuine choice of the population of Western Sahara. The ICJ decision was subsequently treated by Morocco, and to a less degree by Mauritania, as not more than an Advisory opinion *sticto sensu* rather than a decision that has an internationally binding effect.

The Court decision recognized the allegiance of *some* tribes to the Sultan of Morocco. It also recognized the existence of rights, including some rights relating to the land, which constituted legal ties between Mauritania and the territory of Western Sahara. Finally the Court mentioned that no legal ties existed of such a nature as might affect the application of General Assembly Resolution 1514 (XV) in the decolonization of Western Sahara and, the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

From this decision, and even though the decision was clear, every party found or tried to find some kind of argument in its interest. For example, Morocco retaining the fact that ICJ recognized the existence of ties of allegiance between *some* tribes and the Sultan of Morocco, tried to use the decision as a justification for the "Green March" (*Al Massira al Khadra*) to "recuperate" the territory. The POLISARIO found the decision as a confirmation for the Sahrawis' right to self-determination through a free and genuine choice of independence or integration. Mauritania's main objective, as we will discuss in this chapter, was to secure its own territory from

Morocco. Mauritania deemed the decision as legal protection for and international recognition of Mauritania's national territorial boundaries. Spain viewed the decision as a tool to further negotiate its strategic interests with Morocco and Mauritania.

This chapter discusses how the Western Sahara case was shifted from being a case which has been 'managed' by the UN General Assembly, to be primarily treated by the politics of the Security Council. This part of the thesis reveals the role of *Realpolitik* and the flurry of diplomatic activities in shifting the case from the legal to the political paradigm. This shift has been sustained and justified through the use of new narratives. The dispute became negotiated by the use of secrecy among power-states in the same manner as was the case during the nineteenth century, but this time the approach and the actors are somehow different. My argument in this chapter is that the power-states' competing interests in dealing with such a case is a major hurdle standing against the desire of the application of international law. Neither the machinery of the UN General Assembly, nor the position of regional organization, namely the OAU, can reverse the facts on the ground without the will of the permanent members of the UN Security Council. This chapter argues that self-determination is considered as a right that many states, especially the permanent members of the Security Council, do not want to clearly define. This is due to the fact that the members of the Council have need of a 'fuzzy conception' of the right in international law that provides them with the possibility of case-to-case contextual interpretations. Such interpretations relate to many political narratives that aim to adjust state political interests to the international law of self-determination. In the case of Western Sahara dispute, narratives have been mainly related to international and regional security (mercenarism and terrorism) and the realism of the fact on the ground on which conflict management approaches are based on. The notion of 'autonomy' emerges as a compromise that fits such approaches with a limitation of state sovereignty but without reversing the supremacy of the state. It is essential, however, to point out that 'autonomy' is based on the premise that Western Sahara is part of Morocco. 'Autonomy' relates to a domestic arrangement, rather than an international one, and accordingly it cannot be prescribed for cases of decolonization as in the case of Western Sahara.

4.1 Shifting The Case Within The Un - From The General Assembly To Security Council

In 6 November 1975, King Hassan acting as the Commander of the Faithful *(Amir Al Mouminine)* ordered the Green March[63]:

> "Tomorrow you will cross the frontiers. Tomorrow you will start your March. Tomorrow you will trample on a land that is yours. You will touch sands that are yours. Tomorrow you will embrace a ground that is an integral part of your dear country…."[64] (King Hassan II speech, 5 November 1975).

According to Morocco, the logic behind the 'pacific' March was to eradicate artificial frontiers beyond the UN legalism (Laraoui 1976, pp 71-72) and absorb the POLISARIO that was considered by Morocco as the product of such artificial boundaries (as established under the rule of *uti possidetis*). In addition to the March, Morocco needed to construct political discourses that would isolate the POLISARIO from the international political sphere. The constructed discourses that have been used by Morocco reflect the political intentions of Morocco to draw upon the 'common concerns' of international and regional state security as way of making the point against the POLISARIO. If the discourse of "mercenarism" was meant to draw common danger with the rest of the General Assembly, especially the African states, the narrative of 'terrorism' showed the intentions of Morocco to link the security concerns of Western Sahara to the members of the Security Council after the September 11th attacks. The two discourses address the two notions of state territorial integrity which constituted the basis of the Westphalia agreement of 1648 and state security that re-emerged as a key notion of international politics after the September 11th attacks.

Following the announcement of the March by King Hassan II, a flurry of diplomatic activities were exhibited. In its first official involvement in the Western

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[63] The green colour represents the religion of Islam and Peace and it is these aspects that King Hassan II wanted to give to the March.

[64] Author's translation.

Sahara case, the UN Security Council (UNSC) requested Kurt Waldheim who was the UN Secretary-General to intensify consultations between the concerned (Morocco, Mauritania, Spain and the POLISARIO) and the interested party (Algeria). The Security Council ordered Kurt Waldheim to report on the results of these consultations "in order to enable the Council to adopt any further appropriate measures that may be necessary" (UNSC 1975, resolution 379).

The Moroccan King Hassan II strategized to intervene in Western Sahara before a vote on the independence of the Territory as ordered by the General Assembly could take place (Le Monde Diplomatique 2006). On 6 November, the March set off and so did intense diplomatic activities. The Algerian government considered that the map of North Africa had been redrawn without the consent of Algeria and as Jacob Mundy (2006) put it, "a champ of national liberation movement, Boumediane could not let this affront stand unchecked". This period marked the peak of the Cold War and its conflicts; tension and competition between the United States and the Soviet Union and their respective allies. Shehadi (1993, 31) pointed out that the UN was allowed to "tinker on the margins" of Western Sahara because it is related to the broader US-USSR confrontation.

Daniel Patrick Moynihan, the United States' representatives at the UN during 1975, wrote in his memoirs (1978):

> "China altogether backed Fretilin in Timor, and lost. In Spanish Sahara, Russia just as completely backed Algeria and its front, known as the POLISARIO, and lost. In both instances, the United States wished things to turn out as they did, and worked to bring this about. The Department of States desired that the United Nations proved utterly ineffective in whatever measures it undertook. This task was given to me, and I carried it forward with no inconsiderable success" (Cited in Mundy 2006).

Moynihan was clear in stating the desire of the US that the UN be ineffective, particularly in cases that involve territorial disputes and in which the right of self-determination is sought. At this stage, there was an Advisory opinion of the ICJ,

the General Assembly and the Security Council resolutions confirmed the Advisory opinion and the US had a wish and an active plan that the UN would "prove utterly ineffective". The US views cases of self-determination as issues of peace and security and accordingly wanted to keep control of such issues, especially cases that could become involved in the broader US-USSR confrontation. With the Soviet backing of Algeria and its support to the POLISARIO, King Hassan II used the context and predicted the backing of the US to the March. In an article published by Jacob Mundy in *Le Monde Diplomatique*, declassified records revealed that the morning after the release of the ICJ's opinion and the announcement of the Green March by Hassan II, Henri Kissinger, President Ford and the US National Security Advisor Brent Scowcroft had the following conversation at the White House:

> "Kissinger: Morocco is threatening a massive march on Spanish Sahara. The ICJ gave an opinion which said sovereignty had been decided between Morocco and Mauritania. That basically is what Hassan wanted.
>
> The President: What is it likely to happen?
>
> Kissinger: Spain is leaning to independence. That is what Algeria would like. I will talk to the Moroccan Ambassador today" (Cited in Mundy 2006, 4-5).

Already one can state that Kissinger's false reading of the ICJ's Advisory opinion. Mundy (2006) sarcastically made the remark mentioning that perhaps the only person who shared Kissinger's reading of the Court's opinion was the Moroccan King Hassan II. The tension was already mounting after Hassan II's intransigence to go ahead with the March, and in search of a formula for the dispute as an alternative to the one already established by ICJ, the former UN Secretary-General proposed a solution to Moynihan – the West Irian Jaya model (Mundy 2006).

In 1961, Indonesia invaded West Guinea, the former Dutch colony, currently West Irian Jaya. The invasion occurred before the ex-Dutch colony could

achieve independence. In 1962, the UN temporarily placed the territory under its administration, passed it back to Indonesia in 1963 and a controversial referendum formalized Indonesian sovereignty of the territory in 1969. With the idea of applying the West Irian Jaya model to Western Sahara, Waldheim already admitted that it would be difficult to find "some formula consulting the people" that Hassan II will agree to (Mundy 2006). The idea that the former UN Secretary-General was that Morocco will accept his proposal provided that a manipulated UN enterprise would soon turn over the territory to Morocco and Mauritania, in the same manner as it was for Indonesia in the West Irian Jaya case.

These facts represented the first sign on how the case was moving away from what the ICJ decision declared, and how the former UN secretary-General discussed the case with the US administration at that time. During the 3rd of November 1975 meeting of President Ford with Scowcroft and Kissinger, the US administration was finalizing the US policy towards the crisis generated by Western Sahara issue. Part of the conversation was as follows:

> "Kissinger: …on the Spanish Sahara, Algerian pressure has caused the Spanish to renege. Algeria wants a port and there are rich phosphate deposits. The Algerians have threatened us on their Middle East position. We sent messages to the Moroccans yesterday. I think we should get out of it. It is another Greek-Turkey problem where we lose either way. We could tell Hassan we would entirely oppose him; that might stop it but it would make us the fall guy. Or we could force Waldheim forward.
>
> President: I think UN should take on more of these problems; we shouldn't have to do it all and get a bloody nose.
>
> Kissinger: the UN could do it like West Irian, where they fuzz the "consulting the wishes of the people", and get out of it".
>
> President: let's use the UN route."(Cited in Mundy 2006, 6).

As mentioned by Mundy (2006), when Kissinger had a meeting with his staff about the issue of the Green March, it was suggested to "let the marchers go into it ten kilometers, and let a token go all the way to (Laayoune), and having done this, turn around and go back. This suggestion has been carried back to Hassan" (Atherton cited in Mundy 2006).

Speaking about Hassan II, Kissinger asked his staff during the meeting:

"But he is going to get the territory, isn't he?

> Atherton replied: "…he wants it 100 percent guaranteed. I think he is getting less than that – but he is getting probably the most he can hope for now in the position that the Spanish have taken…. In the way of a promise that it will come out in the end the way he wanted, after going through the UN procedure. It isn't a 100 percent guarantee. But I don't see that there is any more he can hope for or will have any support from anybody else". (Cited in Mundy 2006).

As described by Mundy (2006), Western Sahara becomes a "highly scripted affair". The March went off and the marchers accomplished their mission and went back on 9 November 1975. On 10 November President Ford, Scowcroft and Kissinger met again. Kissinger informed them that Hassan II has pulled back the marchers. He added that

> "If he [Hassan][65] doesn't get it, he is finished. We should now work to ensure he gets it. We would work it through the UN [to] ensure a favorable vote" (cited in Mundy 2006).

The favorable vote did not happen but things were 'worked out' through the UN Security Council anyway. The Western Sahara dispute was listed as a very low level dispute to avoid any chance of a crucial vote that would change the current facts

[65] Focus added

on the ground. James Baker described this particular point of the 'very low profile' of the dispute at the Security Council as the point that puts the dispute in the UN Security Council within the situation of "no action forcing event in the Western Sahara conflict". (Cited in ICG 2007, 16).

These conversations reveal how the US government at that time supported Hassan II to secure the Western Sahara. It was not going to happen through the UN General Assembly. This time the case was mainly 'worked out' with the members of the Security Council and that is how the ICJ Advisory opinion started fading away. At this point, there was a need for Morocco to 'calm down' the members of the General Assembly. To do so, Hassan II played out the card of time by waiting for contextual change that would favour another discourse, rather than the right of self-determination, and shift the dispute under newly constructed narratives that would favour Morocco's claim.

During this period of 1971 - 1972, two coup attempts against the monarchy in Morocco led to serious political internal problems for King Hassan II. His legitimacy as monarch of the country was seriously challenged by a section of the military. Some views have pointed out that to escape from internal problems, the monarch used the Western Saharan issue by making it a question of Moroccan nationalism and patriotism (Cravens 1998). All the political parties in Morocco then rallied behind the King's claim and the political pressure against his regime was lowered. Hassan II has been seen as using his last cards to sustain his regime, and that is the reason why the issue of Western Sahara has been regarded by the US as a danger of losing an old ally. This fact was the object of the conversation between President Ford and Secretary Kissinger in 11 November 1975:

> "President: how is the Spanish Sahara?
>
> Kissinger: It has quietened down, but I am afraid Hassan may be overthrown if he doesn't get a success. The hope is for a rigged UN vote, but it doesn't happen…" (Mundy 2006).

For Morocco, the Western Sahara dispute became not only a question related to national integrity, but also a condition for the monarchy's survival. The narrative of a peoples' right to self-determination became a threat to the Monarch who needed to counter such narrative by using newly constructed discourses. This time, the new discourses were based on national, regional and international state security.

4.2 Constructed Narratives of Mercenarism and Terrorism

4.2.1 Mecenarism

Since 1975 and until the early eighties, it was almost a crime in Morocco if one publicly spoke about the POLISARIO without adding the adjective of "mercenaries" or "enemies of national integrity". The choice by the Moroccan authorities of the narrative "mercenaries" coincided with the discussion in the African continent related to the "crime of mercenarism". These discussions came in response to the fact that since the era of independence in the 1960s, foreign governments and other agents recruited former veterans from battlefields to carry out military operations in other countries for the sake of various interests.

On 3 July 1977, the OAU passed in Libreville the Convention for the Elimination of Mercenarism in Africa, which Preamble states that Head of States and Government of the Member States were:

> "Considering the grave threat which the activities of mercenaries present to the independence, sovereignty, security territorial integrity and harmonious development of Member States of the Organization of African Unity;
>
> Concerned with the threat which the activities of mercenaries pose to the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom" (OAU Convention for the Elimination of Mercenarism in Africa 1977).

The choice by the Moroccan authorities of the “mercenaries” narrative was a strategic one at a time when the newly independent African states had been struggling with “the scourge that mercenarism represents” (OAU Convention EMA 1977, Preamble). Morocco needed Pan-African support to boost its claim for Western Sahara and discredit the POLISARIO that was seeking membership in the OAU. To do so, the Moroccan authorities needed to link the POLISARIO’s contestation of Western Sahara to the crime of mercenarism as defined in the African convention of 1977.

The reference of Morocco to “mercenary” POLISARIO was based upon the Moroccan government’s claim that the POLISARIO had been used as an extension of a “hostile” Algerian foreign policy. Many scholars and experts have addressed Algeria’s rivalry to Morocco as constant competition for influential control in the Maghreb region. It has been mentioned that the conflict represented a geopolitical dispute between Morocco and Algeria (Zoubir and Gambier 2004, pp. 49-77). The Popular Sahrawi Liberation Army (SPLA abbreviated in French ALPS) which is the POLISARIO’s Army had been mainly equipped by outdated Soviet-manufactured weaponry that was donated by Algeria (Air-scene UK, 2006). In an interview conducted for the European Strategic Intelligence and Security Center, Lahbib Ayoub (ESISC 2005) who was a co-founder of the POLISARIO and military commander has explained how Algeria chose Mohamed Abdelaziz as the head of the POLISARIO and how the Algerian government had supported thePOLISARIO. He stated: “we could not refuse them (Algerian Government) nothing: they were giving us everything or almost everything” (Ayoub cited in ESISC 2005). Algeria had long been supporting the POLISARIO. The Headquarters of the Sahrawi Arab Democratic Republic (SADR) are based in Tindouf, Algeria. The POLISARIO had developed its arsenal and military sophistication after its alliance with Algeria under President Boumediane in 1975. Morocco had been claiming that the POLISARIO was a group that had been recruited by Algeria to take part in the hostilities of the conflict without being a member of the Algerian Armed forces, but with a promise of material and private gain for its members.

To counter the POLISARIO's claim, Morocco counted with the idea of an "engaged pan-Africanism"[66] under the framework of regional state security. By using the framework of the crime of mercenarism, Morocco's choice of the narrative of "mercenary" coincided with the mercenaries' activities that represented a threat against sovereign African states. This threat had been the main target for Article 3 of the Convention for the Elimination of Mercenarism in Africa that started:

> "Any person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an Offence considered as a crime against peace and security in Africa and shall be punished as such".

Clearly, this article shows how the crime of mercenarism was considered as a 'regional crime' that threatened the security in Africa. In the case of Western Sahara the question is: did Morocco succeed in linking the dispute with the POLISARIO to the regional aspect of the crime of mercenarim in Africa?

To answer this question, one firstly needs to establish the characteristics of the crime of mercenarism as stipulated in the Convention for the Elimination of Mercenarism in Africa. According to the article1 paragraph 2 of the OAU Convention for the Elimination of Mercenarism in Africa, "the crime of mercenarism is committed by an individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, practices any of the following acts:

a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;

b) Enlists, enrols or tries to enrol in the said bands;

c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.

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[66] I am using the expression of "engaged pan-Africanism" in the context of the movement in the African continent to promote values that are the product of the African struggle against racism, colonialism and neo-colonialism.

Article 1 of the same convention defines the “mercenary” as any person who:

a) is specially recruited locally or abroad in order to fight in an armed conflict; does in fact take a direct part in the hostilities;

b) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;

c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflicts;

d) is not a member of the armed forces of a party to the conflict; and is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

In the Western Sahara case, the ICJ considered that since the territory fell into the category of self-non-governing territories and that there were no established legal ties between the Moroccan Kingdom and the Territory of Western Sahara, residents of Western Sahara have the right to decide on the future of the territory status including independence. The OAU - lobbied by South Africa [67] and Algeria - considered that the deficiency of the Moroccan discourse of “mercenary” regarding the POLISARIO was chiefly related to the fact that contrarily to the Convention, the members of the POLISARIO were residents of Western Sahara. In addition, the ICJ considered implicitly that Western Sahara was occupied territory. Also, Morocco had previously declared that there was no boundary dispute with Algeria. This meant that Morocco recognized that there were no conflict between Morocco and Algeria which could qualify the POLISARIO as recruited from abroad (by Algeria) in order to fight

[67] The diplomatic relations between Morocco and South Africa had deteriorated after the accession of Nelson Mandela to power at the end of the Apartheid regime. Currently, there is no established diplomatic relations between the two countries. When I spoke to persons who wished to remain anonymous, I was told that Nelson Mandela wanted to cut diplomatic relations with Morocco, even though Morocco helped the Nelson Mandela movement against Apartheid. I was also told that South Africa under Nelson Mandela responded by supporting the POLISARIO and SADR claim for independence from Morocco. What I learned from this is that the position of South Africa regarding Western Sahara issue is more a matter of a hostile political history between South Africa and Morocco rather than the conviction of Nelson Mandela of the right to independence of SADR. The pitfalls of Moroccan diplomacy in the South Africa conflict can be considered as one major reason of the recognition of SADR – supported by Nelson Mandela – as a member state of the OAU, the predecessor of the African Union.

in armed conflict as stated in Article 1 (a) of the Convention for the Elimination of Mercenarism in Africa. Furthermore, the OAU formally admitted the Sahrawi Arab Democratic Republic (SADR) as new member state.

The recognition of the SADR as member state of the OAU severed relations between Morocco and the OAU from which Morocco withdrew officially its membership in 1984. It represents the failure of Morocco to link the POLISARIO to the crime of mercenarism which led Morocco to look for other narratives. The September 11th attacks on the World Trade Center came with a new narrative of transnational terrorism, and that is what Morocco alternatively tried.

4.2.2 Transnational Terrorism

In the years after the September 11th attacks on the World Trade Center in New York, the world witnessed the proliferation of the security-based narrative of 'terrorism'. 'Terrorism' was by far a preferred discourse of the US, its close allies and all members of the Security Council, especially after the famous choice that George Bush gave to the world: "Either you are with us or with the terrorists". The phrase was used in 2001 to indicate US foreign policy as having the right to secure itself through the use of preemptory self-defense[68] against any country or regimes that harbor terrorist groups (Weisman, *The New York times* 2002). In 2006, some Moroccan government-sponsored press started to use the term 'terrorist' to describe POLISARIO members. On 29 April 2006, the online site Sahara Marocain.net published an article with the title: Al Qaida Recruits the Mercenaries of "POLISARIO" *(Al Qaida recrute les Mercenaires du "Polisario").* Basically, the article mentioned that the American, French and British secret services uncovered plans by al Qaida establishing a terrorist

[68] The notion of Preemptory self-defense goes back to the writing of Grotius. In 1625, Grotius asserted "the right to make war may be conceded against a king who openly shows himself the enemy of the whole people….For liberty to serve the interests of human society through punishments, which originally rested with individuals, now after the organisation of states and courts of law is in the hands of the highest authority…." (Cited in Buchan 2007). The Bush administration justified its use of anticipatory (or preemptive) self-defense referring to the principle of "anticipatory self-defense" in international politics which holds that preemptive self-defense may be justified only in cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation". Brian Crisher (2005) noted that central to the administration's argument is the changing nature of threats and the inability of past policies to deal with them. He pointed out that for the Bush administration, the past practice of waiting for an attack to occur and then responding accordingly, is no longer a viable policy.

base for recruits of the POLISARIO. Such base was said to have been established in December 2005 in Zouerate, Mauritania. The article ended by saying that such situation demonstrates the danger that the POLISARIO represents for security in the region, and the US is determined to fight against this base of terrorism. The article also mentioned that Donald Rumsfeld (the Former US Secretary of Defense)'s visit to Morocco announced the operation Trans-Sahara Counter-Terror Force:

> *("Dans la localité de Zouérate, Al Qaïda semble disposer de deux organisations opérationnelles, le Groupe salafiste pour la prédication et le combat (GSPC) en Algérie et la Jemaâ de l'Afrique du Nord au Maroc. Cette affaire souligne si besoin est le danger que représente aujourd'hui le Polisario pour la sécurité dans la région.*
>
> *Une chose est sûre : les Etats-Unis sont déterminés à lutter contre ce foyer naissant du terrorisme. D'ailleurs, la dernière visite du secrétaire américain à la Défense Donald Rumsfeld, dans certains pays du Maghreb dont le Maroc lui a permis de lancer l'opération baptisée Trans-Sahara Counter-Terror Force")* (Sahara Marocain.net 2006).
>
> [In the locality of Zeroute, Al Qaida seems to have two operating organizations, The Salafit Group for the Predication and Combat (SGPC) in Algeria and the Jemaa for North Africa in Morocco. This matter underlines if necessary the danger that the Polisario represents today to the security in the region.
>
> One thing for sure: the United States are determined to fight against home grown terrorism. In fact, the last visit of the American Secretary of the Defense Donald Rumsfeld to certain countries in the Maghreb including Morocco allowed the initiation of the

operation Trans-Sahara Counter-terror Force] (Sahara Marocain .net 2006).[69]

The article reveals the new discourse in the language of the Moroccan authorities in addressing the POLISARIO. "Terrorism" appeared to the Moroccan authorities as the appropriate discourse to shift the focus on security matters in the region of Maghreb and draw upon the common concern of security with the UN Security Council permanent members. This attempt by the Moroccan authorities in targeting the members of the POLISARIO failed for various reasons:

First, the definition of the word "terrorist" is too vague and there is no text, convention, treaty or declaration that defines it. Second, there were many Moroccan citizens that themselves were involved with Al Qaida and inside Morocco. This means what could justify an operation against the POLISARIO for the sake of targeting al Qaida members, could justify the same operation in Morocco. Lastly, the POLISARIO was already recognized by the international community as the legitimate representative of the Western Saharans populations/peoples.

The Moroccan intent of using the discourse of terrorism to draw upon common security interests with the Security Council members against the POLISARIO failed. However, what we can retain from this is that at this point Morocco started looking for a UN Security Council track to use in its claim of Western Sahara.

Clearly, the track of the UN General Assembly and the OAU that Morocco took could not favour Morocco's claim of Western Sahara. Alternatively, Morocco turned to the Security Council instead. Already with support from the US, Morocco shifted its legal dispute to a diplomatic one. In this sense, Morocco started to secure the support of as many Security Council permanent members as needed to establish an alternative interpretation of the ICJ Advisory Opinion in favour of the Moroccan claim.

This chapter has already discussed how the USA was looking to work the matter in favour of King Hassan II. In addition to the USA, France's prime concern in

[69] Author's translation

the conflict was to prevent a Moroccan infiltration into the Mauritanian 'entity'[70]- the former French colony. France's concern with a Moroccan infiltration in Mauritania goes back to the 17th century. According to Charles Toupet (1977, 54), this concern continued until the 20th century and even after Mauritania's call to Moroccan troops to aid defense against the POLISARIO's attacks against the Mauritanian troops.

According to Toupet (1977, 54):

> "Mauritania's concerns with Morocco revived when Mauritania had to call on Moroccan troops for defense against Polisario guerrilla attacks. The stationing of Moroccan soldiers inside Mauritania gave rise to suspicion that in providing military aid, Morocco was trying to resuscitate its old idea of a Greater Morocco".

Chapter 2 of this thesis discussed how France was not interested in the Western Sahara territory. Since Spain was the one interested in the territory, France used this to negotiate with Spain in order to secure support for French colonial expansion in Algeria. In 1956, amid the role of the national Moroccan resistance, the independence of Morocco was the product of negotiated processes led by King Mohamed V. The gradual independence of Morocco came within the framework of a French-Moroccan interdependence in which the Sultan agreed to transform the absolute Monarchy into a constitutional one with a French style parliamentarian regime. The constitution of Morocco was established by mainly a French Constitutional Assembly led by Georges Vedel and Georges Burdeau who moulded the Moroccan constitution according to the 1958 French constitution. Mohamed V succeeded in keeping the religion-based powers of the Sultan Amir Al Mouminine *(Commander of the Faithful)* which allowed the King, until today, to combine two types of constitutional powers: powers originated in the King's quality of Head of a modern Parliamentarian state (the same as those of the President of France) and those impinging his quality as a religious leader - *Amir Al Mouminine* - who rules outside

[70] I am using the word 'entity' in reference to ICJ expression 'Mauritanian entity' due to the fact that Mauritania was not recognized as a state until the mid 1960s.

the structure of separation of powers. Even though the lines are not clearly defined when the King could act as *Amir Al Mouminine*, it seems that the French officials did not much question the matter and were keen on keeping a political elite led by the King that promised to protect French interests in the independent Morocco. Also, France needed to secure advantageous and peaceful relations with Morocco while French colonial forces were fighting one of the world's vicious wars - *La bataille d' Algérie* (Algerian War of independence). This war occurred between France and the Algerian Independence Movement from 1954 to 1962; it ended with Algeria gaining independence.

After the accession of King Hassan II to the throne, and following Mauritania's peace treaty with the POLISARIO, King Hassan II annexed Tiris al Gharbiyya in 1979 which was part of the Mauritania territory. This annexing mounted an old Mauritanian fear from a concept of Greater Morocco that includes Mauritanian territories. The Mauritanian government of Colonel Mohamed Khouna Ould Haidalla sought French support against Morocco. French President Valery Giscard d'Estaing ordered a paratroop unit to Nouadhibou to defend Mauritania against a possible Moroccan invasion and to prevent the POLISARIO from using the nearby territory as a base for attacking the Moroccan forces in the Western Sahara (Toupet 1977, 54). In the mid-1980s and with the advice of the French government, Mauritania's principal foreign policy objective was to ensure its own territorial integrity. In the language of diplomacy, this objective has meant that Mauritania would pursue a policy of strict neutrality in the Western Sahara dispute, improving relations with Morocco and Algeria, recognizing SADR and seeking guarantees of support from France. Striking a deal with France, King Hassan II promised to keep protecting French interests in Morocco and those related to border issues with Mauritania. In exchange, France promised to support Morocco's claim in Western Sahara.

The historic developments that I presented in the last paragraph leads me to say that historically, Morocco was considered by France as much 'friendlier' with fewer casualties and history of hatred than Algeria. The French memories of the two countries have been impacted by the two different models of independence from French colonization. From one side, there was a model of independence that was mainly based on negotiations by working out the incompatibilities of the conflict and

deciding on preserving some of the respective parties' interests (the Moroccan independence model). On the other side, there was a model that was based on violence and war that forced the French forces out of the country and deconstructed the symbols of French colonialism (the Algerian independence model). Concerning Western Sahara, these realities of Moroccan and Algerian decolonization models have also granted Morocco with French support in the conflict against the POLISARIO that has been supported by Algeria.

With Great Britain - another member of the Security Council - there were already common grounds between Morocco and Britain; one of these grounds is the monarchy. Firstly, the idea of 'allegiance justifies propriety' or 'the King (or Queen) owns the Kingdom' is a traditional idea that is still very much accepted in Britain. Under English Common Law, the Crown has a radical title or the allodium (real propriety owned free and clear from any encumbrances) of all land in England. This means that the Crown has the ultimate ownership of all land, and not the people to whom the Crown can grant an abstract, although symbolic, entity (estate in land), called fee simple estates[71]. Originally during Norman period that began in 1066, the holder of an estate in fee simple could not sell it, but could grant subordinate fee simple estate to a third party. This subordination of fee simple estate to a third party is called 'subinfeudation'[72].

In England and Wales, freehold land is ultimately owned by the Crown (which is a separate concept from the Queen, who can and does also own land personally). Apart from the overriding right of compulsory purchase order (CPO)[73] lands, the concept of freehold land only becomes of relevance when the land

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[71] Fee simple estate in land means that the owner has the right to use it, exclusively possess it, commit waste upon it, dispose of it by deed or will, and takes its fruits. A fee simple represents absolute ownership of land, and therefore the owner may do whatever he or she chooses with the land. If an owner of a fee simple dies intestate, the land will descend to the heirs

[72] The Statute of Quia Emptores that was adopted in 1920 abolished the 'subinfeudation' and allowed the sale of free simple estates.

[73] Compulsory Purchase Order (CPO) is a legal function in the UK and the Republic of Ireland that right to certain bodies to obtain propriety or land without the consent of the owner, i.e. lands needed for when constructing motorways. In the United Kingdom, most Orders are made as subordinate legislation under powers given to Local Authorities in existing legislation (e.g. an Order for road works is made under the Highways Act 1980). Even though the powers are strong the Authority must demonstrate that the taking of the land is necessary and there is a "compelling case in the public interest".

effectively becomes ownerless. When this happens title to the land may, in certain circumstances, revert to the Crown as the ultimate owner of all the land in the England and Wales. This process is called 'escheat'[74].

Linking land propriety to the Crown can to a certain degree be compared to the idea of Islamic territorial sovereignty that Morocco defended during the proceedings in the Western Sahara case. As I explained in the chapter 3, Morocco argued that sovereignty over Western Sahara is based on the act of *Baya'a* or allegiance that some tribes in the territory gave to the Sultan. From the Moroccan perspective, the allegiance transferred Western Sahara into the territorial sovereignty of the Sultan, and therefore it belongs to the Kingdom.

In addition, Great Britain was facing many challenges across the countries of Commonwealth. These challenges were related to claim of the right to self-determination of peoples in old British colonies. The discourse of 'self-determination of peoples' is not what the British government would support unless it provided a confirmation for British sovereignty. This position has also reflected on British foreign policies including Western Sahara. Even though the British government showed some kind of neutrality in this regard, it did not support the POLISARIO's claim nor recognized SADR. This position could simply mean that the British government does not want to take a position that could change the facts on the ground in Western Sahara with a factual Moroccan sovereignty over the territory. At the same time, the

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[74] Under English common law, there were two main ways an escheat could happen:

1. A person's property escheated if they were convicted of a felony (other than treason, when the property was forfeited to the Crown). If the person was executed for the crime, their heirs were ineligible to inherit. (In most common-law jurisdictions, this type of escheat has been abolished outright. For example, the rule has been abolished in the United States under Article 3 § 3 of the United States Constitution, which states that attainders for treason do not give rise to posthumous forfeiture, or "corruption of blood".)
2. If a person had no heirs to receive their property under a will or under the laws of intestacy, then any property that they owned at death would escheat. (Again, this rule has been replaced in most common-law jurisdictions by *bona vacantia* or a similar concept.)

Although escheated properties are owned by the Crown, it is not part of the Crown Estate, unless the Crown (through the Crown Estate Commissioners) 'completes' the escheat, by taking steps to exert rights as owner. However, usually, in the example given above, the tenants of the flats, or their mortgagees would exercise their rights given by the Insolvency Act 1986 to have the freehold property transferred to them. This is the main difference between escheat and *bona vacantia*, as in the latter, a grant takes place automatically, with no need to 'complete' the transaction.

British Government must show neutrality in the sake to keep Spain ‘closer’ and not revive a Spanish claim for Gibraltar.

With China, Morocco established diplomatic relations in 1958. The political relations between China and Morocco have been developing steadily as the two countries share close or similar views on many international issues. Morocco supports China's stand on Taiwan, Tibet, human rights and other issues and spoke highly of China's resumption of sovereignty over Hong Kong according to the principle of "one country, two systems" (Ministry of Foreign Affairs of the People’s Republic of China 2003). In 1996, China and Morocco signed the agreement on holding regular political consultations between the two foreign ministries. In 2000, China explicitly renewed backing Morocco’s position on Western Sahara; China declared that it supported Morocco’s territorial integrity and confirmed that it will keep backing such position in the future (cited in Arabnews.com 2000).

Morocco has a substantive possession of Western Sahara territory, and such possession has not been disputed for the last 18 years. The report of the ICG (2007) states that “any recourse to force on the anti-Moroccan side (whether by the POLISARIO or Algeria) and Great Power saber-rattling in the Security Council are ruled out…”

However, as much as such possession by Morocco of the Western Sahara territories constitutes as a fact on the ground and strategically benefits Morocco, it comes with a high price. Morocco has spent 6.85% of its own GDP - an approximate amount of 4.45 Billion USD – trying to keep factual possession of the territories. The Western Sahara dispute has represented the essence of the regime’s survival in Morocco. During the 1970s, the dispute was used in gathering some kind of nationalistic feeling to outcast calls for socio-political and economic reforms in Morocco.

Table 2: The Cost of Western Sahara Dispute

Cost Of Sahara[75]	Percentage Of Gdp[76]	In Billions Of Mad[77]	Possible Impact
Military expenses	3.1	20	Covering the interests of the public debt
Exonerations, Subventions and Stipends	0.5	3.25	Doubling the salaries of employees in 4 ministerial departments
Diplomatic investments	0.75	4.87	Multiplying by 4 the investments of the Ministry of Health
Irrational investments	0.5	3.25	Doubling the Budget for investments of the Ministry of Energy and mines
Cost of Governance	0.5	3.25	Adding approximately 75% of the budget for National Education
Synergy related to the Maghreb	1.5	9.75	Doubling the investments of the ministry of Agriculture and Equipments
Total	6.85	44.5	Covering almost the total of the Budget for investment
Supplementary GDP[78]	3.4	22,25	Covering the budgetary deficit that occurs every year

Source: TELQUEL 2009, N 368

The cost of Western Sahara for Morocco came against the regime's own decision to adopt austerity measures (*Attaqachouf*) in early 1980s, which impacted the socio-economic development of the country for years. In economics, austerity is the measure by which the government proceeds to reduce the spending and/or increase taxes to pay back creditors. Austerity is very controversial as it hits the poorest segments of the society, and in many situations, it was applied by oppressive regimes that forced their citizens to repay the debts that were generated by their oppressors.

[75] Author's translation from French version

[76] The GDP rate at the end of 2008 is calculated on the basis of development rate (5.8%) as announced by the High Commissariat at the Plan, which shall inject 650 billion MAD

[77] Moroccan Dirham which at exchange rate at the end of 2008: 1USD equals 10 Moroccan Dirham (MAD)

[78] This is taking into consideration the effect of eviction of 50%. Half of the amount will be dilapidated or utilized in a manner less effective.

This is the case for example of Cuba (1991), Nicaragua (1997), and Argentina (1952) to mention a few.

From the table above, the military expenses related to the Western Sahara dispute mounted to represent 3.1% of Morocco's GDP, which could cover the entire interest of the public debt. The tax exonerations, subventions and stipends that were prescribed by the government in relation with the dispute totalled approximately 325 million USD which could double the salaries of the employees of 4 ministerial departments. The spending that was considered irrational and the cost of governance in the Western Sahara territory are calculated to circa 650 million USD, which could have been used to double the budget for investment of the Ministry of Energy and increase the budget of the Ministry of Education by 75%, in a time when both energy and education in Morocco have been two of the citizenry's major concerns.

The total of 6.85% of Morocco GDP (circa 4.45 billion USD) is what Western Sahara cost to Moroccan citizens (up to 2008). The cost could have been used to cover the all budget for investment in Morocco. While austerity was meant to be borne by the government (cut spending) and the citizens (tax increase), it seems that the government did not cut its spending relating to the Western Sahara dispute, but the citizens had no choice but to bear the heavy duty of the tax burden. The cost of the dispute delayed socio-economic development in the country, made the poor poorer and plunged the country into a deep economic crisis. Despite these consequences, the dispute is still ongoing, so is the spending. The government did not only induce itself in the 'legal' self-entrapment in relation to the ICJ decision, it also led Morocco to be socio-economically entrapped and mired in a deep economic crisis. Diplomatically, SADR has been recognized by 81 out of 192 states versus 21 states supporting Morocco's claim.

Article 6 of the Montevideo Convention on the Rights and Duties of States mentions that:

> "Recognition of a state simply means that the state recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable".

The recognition of a state as contained in Article 6 of the Montevideo Convention is irrevocable unless the state that has been recognized as sovereign ceases to exist; but in the case of SADR, the issue is different. Out of 81 states that previously recognized SADR, 24 states have frozen or withdrawn their recognition of SADR or suspended their official relations with it. On one hand, the SADR is fully recognized as sovereign state by the African Union (AU) and member states of the Asian African Conference (known as Bandung Conference) and the Asian-African Strategic Partnership. On the other hand, SADR is not recognized by the League of Arab States (LAS), the Organization of Islamic Conference (OIC) and the Greater Arab Free Trade Area (GAFTA); they all consider Western Sahara as part of Morocco. The SADR is not a member of the UN which argues for negotiations between Morocco and the POLISARIO; the same position is held by the European Union (EU). It is necessary to mention that the recognition of the SADR is subject to constant fluctuation chiefly because of the flurry of diplomatic activities predominantly by Morocco, the POLISARIO and Algeria.

4.3 Discussing Algeria's Place In The Dispute

Since 1975, the identification of the parties in the Western Sahara conflict has been contestably addressed. In the ICJ case, the parties in the conflict have been identified under two different discourses: the "concerned parties" namely Morocco, the POLISARIO and Mauritania, and the "interested parties", namely Algeria is somehow bound to be affected by the dispute. The distinction has enabled Algeria to justify support of the POLISARIO and its refusal to engage in the negotiation as "concerned party". According to ICG (2007, 11), Algeria's position is arguably the most complex and certainly the most controversial.

Referring to the use of the word "parties" in the conflict, the Uppsala Project distinguishes between the primary parties in the conflict, secondary supporting non-warring parties and secondary warring parties. The Uppsala Project defines "primary parties" as the parties that have formed the incompatibility, secondary supporting party as the party that gives a primary party support that somehow affects the development of the conflict. The project explains that

> "The support given can be of several types, for instance financial, military (short of regular troops), logistic etc. Anything relating to text interaction between states (profits from trade etc.) is not considered as support in the conflict, even if the consequences of that interaction may be to the benefit of the warring party that is on the receiving end. We are only considering support that is actively given to strengthen the party in the particular conflict and not support which unintentionally happens to strengthen the warring party. Support may come from neighboring states or organizations of states, opposition organizations (or diasporas) in other states that have ethnic or ideological affinities with the group in question, or, some other organization within or outside the state in question" (Uppsala Project 2008).

Algeria has long supported the POLISARIO[79]. The Headquarters of the Sahrawi Arab Democratic Republic (SADR) are based in Tindouf, Algeria. The Polisario's position on self-determination with the possibility of territorial independence is a longstanding position of Algeria. According to ICG (2007, 12), the emphasis of the UN and international community has led to obscure Algeria's position that has mainly rested on the principle of *uti possedetis.* Accordingly, the emphasis on self-determination represents only one aspect of the dispute. It follows that only Morocco and the POLISARIO[80] are concerned parties. However, from the perspective of the applicability of *uti possidetis*, the dispute has three concerned parties, with the inclusion of Algeria. According to ICG (2007), Algeria has long articulated the principle of stability of frontiers inherited from a colonial power (or *uti possidetis*), but the UN has always defined the dispute as a matter of self-determination only and that

[79] In the interview conducted for the European Strategic Intelligence and Security Center, Lahbib Ayoub who is a co-founder of the POLISARIO and military commander, has explained how Algeria chose Mohamed Abdelaziz as the head of the POLISARIO and how the Algerian government supported the POLISARIO. He stated: "we could not refuse them (Algerian Government) nothing: they were giving us everything or almost everything".

[80] It is necessary to mention that because of the fact that Mauritania abandoned its claim on the territory, this thesis considers that Mauritania is no longer a party in the dispute.

consequently, a significant aspect of Algeria's incompatibility in the dispute has not been efficiently taken into account.

In this regards, there are few remarks that need to be made. First, if Algeria was considered as an 'interested' instead of a 'concerned' party in the conflict within the legal processes of the ICJ, it is indeed a secondary supporting party within the conflict approach as defined by the Uppsala project. This means that once the analysis of the dispute moves away from the ICJ legal framework and becomes analyzed from the political aspect of the dispute; Algeria becomes considered as 'concerned' and not only an 'interested' party in the conflict. Second, the ICG distinction of the rule of *uti possidetis* and self-determination ignores in fact that the two notions are closely inter-connected. The ICG analysis does not acknowledge that self-determination came within the movement of decolonization after WWII. The end of the Second World War has led to the creation of a new system based upon the Charter of the United Nations; the right of peoples to self-determination has largely been seen in the context of the decolonization process, referring to the right of peoples under colonial occupation to achieve statehood and independence (Tomuschat 1993, 1). The international legal framework behind the right of self-determination began in 1960 with UN Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples [81] and it is precisely under this framework that the ICJ established its Advisory Opinion and upon which the UN General Assembly has based its resolutions regarding the case. The ICG analysis came against the background of framing an issue within the track of decolonization and means giving the people the right to choose between independence, integration and any other status. This implies that the right of self-determination came originally within the framework of

[81] Article 1 (2) of the UN Charter only refers to the "principle of equal rights and self-determination of peoples". Reference to the "right" of peoples exists in other instruments:
Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 was the outcome of the UN General Assembly Resolution 1514 (XV) of 14 December 1960
Friendly Relations Declarations in 1970 is an Annex to the UN General Assembly Resolution2625 (XXV) of 24 October 1970
The 1975 Helsinki Final Act was adopted by the Conference on Security and Cooperation in Europe (CSCE) on 1 August 1975
Two Advisory opinions of the International Court of Justice, one regarding the legal consequences for states of continued presence of South Africa in Namibia (1970). The other one is related to the Western Sahara issue (1975)

decolonization that was based on the principle of stability of frontiers inherited from a colonial power (or *uti possidetis*),

The overall process of recognition of the SADR has been undertaken at state-based level. This means that each state has weighted its recognition of the SADR depending on respective state interests in establishing diplomatic activities with SADR and benefiting from closer cooperation with Algeria, or damaging its diplomatic relations with Morocco. This also means that when the political context changes, states that previously recognized the SADR may see their states' interests better protected in moving toward reestablishing closer diplomatic relations with Morocco. Accordingly, they may decide to freeze, withdraw and cease their recognition of the SADR, or simply suspend their diplomatic relations with it. Such diplomatic activities with regard to the recognition of the SADR are in contradiction with Article 6 of the Montevideo Convention which affirms that state recognition is irrevocable. In this regard, the Western Sahara issue represents a case in which the recognition of states' sovereignty is mainly diplomatic. The customary international law of the Montevideo Convention seems to be trespassed upon whenever states consider their interests are better protected when canceling their recognition of the SADR. These diplomatic fluctuations regarding recognition are awkward for Morocco, the POLISARIO and Algeria in the sense that no one of these states can secure a definite diplomatic favorable position from members of the international community. The current UN Security Council's position is that neither the claim of Morocco nor the position of the POLISARIO is valid without the parties agreeing on a *politically* negotiated solution. It is precisely at this point that Morocco and the POLISARIO started to understand the necessity of a negotiated alternative solution, and that the notion of 'autonomy' emerged as an idea for a possible compromise.

4.4 Emergence of Autonomy As A Compromise

The idea of autonomous status for Western Sahara was initiated in the 1980s when Former King Hassan II declared that the only thing he wanted was a flag and a postage stamp and that everything else is negotiable (cited in Mundy 2004, pp 140-141). The notion of autonomy re-emerged during the difficulties of the 1991 Settlement Plan. On 23 January 1993, Boutrous Boutros-Ghali proposed to the UN

Security Council the alternative of 'autonomy' as one option for settling the dispute. In 1996, former head of MINURSO, Erik Jensen, invited Morocco, the POLISARIO and Algeria to discuss and consider any other solution to the dispute "except pure and simple independence or pure and simple integration" (Jensen 2005, 75). Jensen considered that autonomy constitutes a *realistic* compromise to the dispute. In his report of 27 February 1997 to the Security Council, Kofi Annan proposed three options to address the deadlock of the issue: the execution of the Settlement Plan as it is; amend the Settlement Plan to make it acceptable to the parties in conflict; or move towards the establishment of a new way by which the international community can help the parties to resolve their conflict. But it was not until 20 June 2001 that the UN officially proposed the autonomy of Western Sahara to the parties; James Baker who was the UN Secretary-General's Special Envoy officially proposed the project of autonomy of Western Sahara to the parties.

The POLISARIO rejected the project because it does not provide the possibility of independence. Algeria also rejected it especially because the text does not refer to the 'people' but 'population' of Western Sahara. Nevertheless the Security Council decided in its Resolution 1359 (29 June 2001) to invite the parties under the auspices of the Special Envoy with the aim to examine the project and negotiate any modifications. Also, the Security Council Resolution 1359 encouraged the parties to examine any other proposal suggested by the parties. This resolution constitutes the first official step towards negotiating an alternative solution in the form of 'autonomy'.

Many scholars argue that the notion of 'autonomy' has been considered as an essential element in dealing with claims of territorial disputes and self-determination, which can be operated in pluralist societies more effectively. This thesis argues that the notion of autonomy served as an extra-legal political discourse that has been used by the Security Council in dealing with territorial disputes, following an old practice of the League of Nations. However, 'autonomy' has always been regarded being a form of internal self-determination and cannot be solely applied to cases of decolonization. It needs to constitute one possibility among others that the concerned people are given the free choice to decide: independence, integration or any other status including autonomy.

International treaties, the League of Nations and the constitutional practice of states have been instrumental in moulding the notion of autonomy (Welhengama 2000, 97). Currently, there are over 110 cases of established territorial autonomy status in the world. For example: the Mosquito Indian Territory in Nicaragua (1869), the Memel territory under the Sovereignty of Lithuania (1924), the German-Polish convention relating to upper Silesia (1922), the Åland Islands (1921), the Faeroe Islands (1948), Greenland under Denmark (1978), the Cook Islands under New Zealand, the Catalan and Basque regions in Spain, and South Tyrol/Alto Adige in Italy are some of the prominent autonomy models which came into force in the 19th century. In all these cases, the idea to give a special status to a given territory in the form of autonomy started from the premise that the territory is part of the national state, and not outside as it is the case of Western Sahara under the international law of *uti possidetis*.

Originally, autonomy was used by sociologists (Heintze, 1998,7). It expresses the idea of "the right to make rules and regulation over one's affairs" or according to Jellinek "the authority to govern, to administer and to judge" (1960 cited in Welhengama, 98). As legal concept, autonomy was questioned as a legal norm. Eide, clarifying the UN practice and the position of international law, expressed his doubts about the claim that there already existed a general right of autonomy in international law. However, he admitted the possibility that autonomy could evolve as a general right through instruments relating to minority rights, the rights of UN Declaration on Minorities or UN Declaration on the Rights of Indigenous Peoples[82] (Eide, 1993).

[82] It is necessary to mention that both minorities and indigenous peoples have some similarities. Both are vulnerable and in constant struggle to preserve their identity, traditions and customs, and above all their way of life. Both are dominated in the structure of the modern nation-state, and accordingly exposed to exploitation and discrimination (Thornberry, 1995, 64 cited in Welhengama, 134). However, indigenous peoples are different conceptually and practically from minorities, and their rights are different from other rights as stated by Chief Justice Lamer in the case *R v Van der Peet* (1996), because such rights can be exercised only by indigenous peoples. Additionally, indigenous rights are collective rights, in contradiction to individual rights or minority rights (Kyle, 1998, 299). Indigenous peoples have been transformed in the 1990s from defenseless, scattered tribal groups to a force with considerable bargaining power (Anaya, 1996). Most of indigenous peoples are well organized and have been fighting for greater autonomy.

According to Suski (1998, xi), autonomy "seems to be very elastic and capable of stretching into a multitude of social and legal relationships". Sohn (1980,190) suggests that the concept of autonomy is in between the concept of non-self-governing territory and an independent state, meaning that autonomy enables the inhabitants of a territory to control their economic, social and cultural affairs, with partial independence from the influence of the national or central government. Autonomy is a political tool without being a rule of international law often used by minority groups, indigenous peoples and states to strengthen their respective interests and power bases.

There are different types of autonomy, from the more restrictive one such as cultural and religious autonomy, to the more expansive of shared sovereignty. Autonomy is "determined primarily by the degree of actual as well as formal independence enjoyed by autonomous entity in its political decision-making process" (Hannum and Lillich, 1980, 860). Generally, autonomy is understood to refer to independence on the *internal* or *domestic* level, but foreign affairs and defense normally are in the hands of the central or national government. Occasionally power to conclude international agreements concerning cultural or economic matters may be in the hands of the autonomous entity (Hannum and Lillich, 1980, 860). Autonomous entities do not normally have an international personality and are not treated as 'states' in the sense of international law. In some few instances, limited authorities were granted to some autonomous territories to join international organizations and/or enter into international agreements, but even in such instances, autonomous territories enjoyed less independence than a 'state'; this was the case of the federal states of Micronesia and the Charter of the Kingdom of the Netherlands in reference to Aruba and Netherlands Antilles. Oppenheim argues that State sovereignty can be shared, most importantly in federal states, but the sovereign state is the one that "possesses independence all round and therefore full sovereignty" (1992, 165 cited in Welhengama, 109). Autonomous entities are not-full sovereign states and therefore they are not fully subject to international law" (Oppenheim, 245 cited in Welhengama, 109).

Special Rapporteur Asbjorn Eide (1993), clarifying the UN practice and the position of international law, admits the possibility that autonomy could evolve as

a general right through instruments relating to the rights of indigenous peoples. On 13 September 2007, The UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (Resolution 61/295). Two Articles of the Declaration are worth analyzing in the way in which they address the issues of autonomy and the right to self-determination.

> Article 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (2007 UN Declaration on the Rights of Indigenous Peoples).

> Article 4: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions" (2007 UN Declaration on the Rights of Indigenous Peoples).

This is the first time that 'autonomy' figures in an international Declaration of the United Nations. It is important indeed to examine how autonomy was considered in the Declaration. This is not to say, however, that the Western Sahara dispute is framed within indigenous peoples' rights. When discussing indigenous peoples' rights as framed by the UN, one must bear in mind that indigenous peoples' rights begin with the idea that indigenous peoples are within an already existing state. (Not in relation to territories that the UN put in the track of decolonization, framing them as non-self governing territories like Western Sahara). However, an analysis of how 'autonomy' was adopted and combined with 'self-determination' is worthwhile in the overall analysis of the relationship between the two discourses of 'autonomy' and 'self-determination'.

When reading these two Articles, one may question if Article 4 explains and defines the scope of the right to self-determination within the framework of internal self-determination in the form of autonomy; or if the two Articles need to be read separately in a way that they are not linked. The answer to this question is: maybe yes or maybe no. The Declaration was on the UN agenda for 27 years as it originated

in 1982 by the Economic and Social Council (ECOSOC) when it set up its Working Group on Indigenous Populations (WGIP). The Draft of the Declaration and its provisions was a long process and progress towards the adoption of the final draft was slow precisely because of the key provision of indigenous peoples' right to self-determination that some states were concerned about. The final version of the declaration was drafted in a way that the text could be interpreted in various ways and that the states and the indigenous groups in ECOSOC could find an interpretation that satisfied their interests. The UN General Assembly adopted the Declaration with 143 countries that voted for it, four against (Australia, Canada, New Zealand and USA) and 11 abstaining; it was described by the UN Secretary-general Ban Ki-moon as a "historic moment when UN member states and indigenous peoples have reconciled with their painful histories…." (UN News 2007). Bolivia under the President Evo Morales was the first country to adopt it, while some African countries expressed their concern about the term 'indigenous'. The spokesman of the United States mission to the UN – Benjamin Chang commented:

> "What was done today is not clear. The way it [the Declaration] is now is subject to multiple interpretations and doesn't establish clear universal principal" (International Herald Tribune 2007).

The adoption of the Declaration on the Rights of Indigenous Peoples came after a long process of negotiation between various states and indigenous groups especially on the terms of self-determination and autonomy. Even with regards to indigenous peoples' rights, the Declaration does not make clear that autonomy fulfills the idea of the right of indigenous peoples to self-determination (internal self-determination). Even within the framework of internal self-determination, autonomy is not yet accepted to fully justify the exercise of self-determination, let alone cases related to decolonization with peoples' right to external self-determination.

Five months before the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples, Morocco and the POLISARIO submitted their proposals in which they expressed their views on how they proposed resolving the Western Sahara dispute. They suggested the application of the right of self-determination to the

Western Sahara issue, but their approach to what the right of self-determination meant was in contrast.

4.5 Polisario Initiative

The POLISARIO submitted its proposal to the UN Secretary-General on 10 April 2007, one day before Morocco's submission in a time when there was talk about a new proposal from Morocco in the pipeline. The POLISARIO's submission one day before Morocco's submission was considered by the ICG (2007, 6) as "an attempt to steal a march on the Moroccans".

Basically, the POLISARIO's proposal does not change much of its previous position after the 1975 ICJ Advisory Opinion[83]. The POLISARIO has maintained its attachment to the necessity of holding a referendum on self-determination, meaning the Sahrawi peoples' choice of independence or integration of Western Sahara. The POLISARIO stated that they will accept the results of the referendum. Also, the POLISARIO committed to accepting the results of the referendum, whatever they are, and to negotiate with Morocco, under the auspices of the United Nations, the guarantees that it is prepared to grant to the Moroccan populations residing in Western Sahara for 10 years. In addition, The POLISARIO stated that it is prepared to negotiate similar guarantees to the Kingdom of Morocco in the political, economic and security domains in the event that the referendum on self-determination would lead to independence.

The POLISARIO has framed their proposal within the framework of external self-determination as a way for decolonization. They refer to the UN General Assembly Resolution 1514 (XV) in the form of people's the choice between independence, integration into the Kingdom of Morocco and self-governance.

4.6 Morocco Initiative of Autonomy

Morocco submitted its proposal entitled "Moroccan Initiative for Negotiating an Autonomy Status for the Sahara" to the UN Secretary-General Ban Ki-

[83] Annex 13 includes the official version of the POLISARIO's Proposal as submitted to the UN Secretary-General on 10 April 2007.

Moon on 11 April 2007[84]. Already one can remark on the changing of the language concerning how Morocco addresses the territory. Morocco's proposal did not speak about either 'the Moroccan southern territories' or did it address the territory as 'the Western Sahara', but the proposal spoke about 'the Sahara'. Also, nowhere in the proposal was the name of the POLISARIO mentioned; instead, the Proposal spoke about 'all Sahrawis', 'the Sahara populations' or 'the populations of the Sahara autonomous region'. Basically, the text of the Moroccan initiative proposed a scheme for the establishment of the 'Sahara autonomous region' under domestic arrangements. The text outlined the framework of self-government of the Sahara autonomous region within 'the framework of the Kingdom's sovereignty and national unity'. The Proposal suggested that once the autonomy statute wass agreed on as the outcome of negotiations, "it shall be submitted to the populations concerned for a referendum, in keeping with self-determination and the provisions of the UN Charter" (Morocco's Initiative 2007).

It is to realize that Morocco frames Western Sahara within the concept of internal self-determination with no possibility for independence, but with some rights for democratic governance within the sovereignty of Morocco. Also, the proposal does not refer to the 'Sahrawi people' or the 'POLISARIO' who are recognized internationally as the sole representatives of the Sahrawi people, and with whom the Moroccan representatives are negotiating. It seems that Morocco's idea of autonomy is thought of as within a framework of cultural minorities' rights with some rights of self-government[85] within domestic arrangements.

The Moroccan proposal describes comprehensively the prerogatives of the Sahara autonomous regional institutions including the regional parliament,

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[84] The complete official version of Morocco's proposal as submitted to the UN Secretary-General on 11 April 2007 is included in the Annex 12.

[85] In my conversation with an eminent Human Rights figure in Morocco (who wants to remain anonymous), I asked whether the Western Sahara conflict is a matter of minority rights or indigenous peoples' rights in Morocco. To my stunning surprise, the person said that Morocco does not have indigenous peoples because the populations have mixed and therefore there are no indigenous peoples in Morocco in the strict sense of the word, and that the populations in the 'Sahara' are looked at within the framework of minorities' rights. Also, Abdelhamid El Ouali, who was involved in the establishment of Morocco's Proposal argues that the Autonomy in the Sahara comes within the framework of Lund recommendations for national minorities' effective participation in the public life (El Ouali 2008, pp 61-66).

government and the judiciary and their relations with the central government of Morocco. The proposal has been supported by the USA, France, Great Britain and to a certain degree by Spain. The UN Security Council made it clear that the Council encourages a 'realistic' political solution. It can be said that perhaps the proposed autonomy in the Moroccan initiative falls within the notion of realism as previously advanced by the Security Council. It could also be advanced that currently the Council considers that the idea of autonomy matches somehow the interests of the majority of the Security Council permanent members and perhaps still corresponds to the US idea of using the UN track like in West Irian Jaya, where they 'fuzz the consulting the wishes of the people, and get out of it'.

In general, the two proposals form the basis of the still on-going negotiations among the parties at the time of writing this thesis. They both have ground for positional bargaining, which lock the two parties into their positions. This means that the more a party in the dispute is trying to convince the other side of the impossibility of changing the opening position, the more difficult it becomes to do so. The critical part of that positional bargaining in which Morocco and the POLISARIO lock themselves makes it less and less likely that any agreement will wisely reconcile the parties' original interests. After the last four rounds of negotiations that the parties entered under the auspices of the UN Secretary-General, the POLISARIO and to a lesser degree Morocco, are still paying attention to their original positions and are less devoted to reconcile their underlying concerns. Also, the dispute led to the formation of coalitions among parties with shared, symbolic rather than substantive, interests. Accordingly, it becomes much harder to agree upon a solution especially when influential members of the coalitions do not take active part in the process of negotiations. It is the case of Algeria and Mauritania, which are invited to the negotiations as 'interested' parties only, Spain, France, representatives of the African Union and the USA.

4.7 Conclusion 3

The analysis that this chapter came against the background of chapter 3 that discussed the meaning of self-determination as perceived in the case of Western Sahara. This chapter proposes further ideas on how the interpretation of the

international law of self-determination has been used by the power politics of the UN Security Council. The idea of peoples' right to self-determination remains partly defined and states have no interest in precisely defining it, and prefer to leave it flexible so that it can suit states' interests on a case-to-case basis. At some point, the idea of autonomy seems to fulfill the idea of self-determination that was originally established for the sake of giving a special status to territories within established states. Western Sahara is a relatively large area, unlike Goa or Macau for example, and cannot be considered entirely as an 'enclave' that is geographically part of a large state. As a further example, Ifni formed part of the Western Sahara and was considered in the past and accepted to form an undisputable part of Morocco. After Spain left the territories, only two possibilities were thought as possible concerning the Western Sahara territory: either be absorbed by a larger state entity or remain an overseas colony. Both possibilities may seem extreme for the UN to endorse against the intransigence of the parties in the conflict. However, if international law is clear in banning the first possibility without the Sahrawi peoples' will, the second possibility cannot be included because modern international law had precisely the objective of the decolonization of overseas territories.

From the development of this chapter, the Western Sahara dispute was perceived as a dispute not only between Morocco and the POLISARIO, but mainly as a conflict between 'friendly' Morocco and 'hostile' Algeria who hosted politically the cause of the POLISARIO. The idea of autonomy that came against this background seems to constitute a compromise between these two possibilities to safeguard the regime in Morocco and protect the strategic interests of the permanent members of the Security Council. However, the requirement of autonomy to be justified is that the territory of Western Sahara must be legally framed within the sovereignty of Morocco, which was not the case. Autonomy is not a legal norm yet and consequently, the dispute remains open to the power politics in the region. The inclusion of 'autonomy' as a possible solution to the dispute also reveals the way in which powerful countries such as the USA carry forth their policies in cases of territorial disputes in the world from one side, and the struggle of Morocco and its 'allies' in the Security Council to frame its proposal of autonomy for Western Sahara within an international arrangement, overshadowing the decision of the ICJ in this case.

CHAPTER V
THESIS CONCLUSION
RE-DEFINING THE WESTERN SAHARA DISPUTE

This thesis started with my curiosity to know why lines have been stretched over the map of Morocco. I have learned to draw the map without questioning the reasons, and until today questions are sometimes not allowed to be asked because the authorities of Morocco may consider such curiosity as questioning the 'unquestionable' national integrity of Morocco. I am one of the many Moroccans who have similar curiosity; some of us resigned themselves to ignorance of this national matter and relied on what the authorities wanted them to know, and others took the risk of questioning and understanding. Western Sahara represents a case that cannot be explained simply to a population that was forced into ignorance regarding the rights of the 'other'. From the analysis in the previous chapter, I suggest that the dispute is more complex than what was simply understood as a dispute between Morocco and the POLISARIO over the Western Sahara territory. The Western Sahara case is a dispute between two different approaches; the one of the international lawyer and the other one of international politician. An approach of a lawyer whose 'legal clock started ticking' in the 1960s with the Declaration on Decolonization of Overseas Territories under the framework of the inheritance of colonial administrative boundaries from one side, and an approach that looks at states' interests ignoring the modern international law of territorial disputes. If the first approach lacks a human history framework, the second approach lacks a legal framework. Also, this is a dispute between the right of Saharawis to choose their sovereignty that is based on colonial territorial sketches and the imposition of autonomy in its domestic (or internal) aspect to a situation that necessitates an international arrangement as ordered by the ICJ. The Western Sahara dispute is a conflict between 'what must be done' and 'what it is'.

On the other hand, the Western Sahara dispute reflects states' desperate desire for the establishment of much needed regime stability through an imagined national identity and the peoples' hope for a better regime. Morocco and Algeria used the case to establish a much needed national feeling of populations that had been dispersed politically because their states could not bring about democracy, and human rights remain limited. But, for Algeria to host the POLISARIO and be diplomatically in the frontline of the conflict, backfired on the POLISARIO. Unlike Morocco, Algeria's independence is remembered not by peaceful negotiations with the French but by the violent Battle of Algiers. Unlike Morocco, Algeria's religious movements are known for their radicalism and rejection of Western models, Unlike Morocco, Algeria was known as having a fervent penchant towards the USSR, while Morocco chose the USA. Algeria's hosting of the POLISARIO was not only a negative fact to Morocco but also to the 'West', which explains why the negative rivalry of Algeria to Morocco overshadowed the cause of the POLISARIO in Western Sahara conflict.

After introducing the aim and the reason of this thesis (chapter 1), I started by putting the story of the Western Sahara dispute together (chapter 2). This chapter helped me in answering the question of: when did the problem with Western Sahara start? The answer is that the origins of the dispute go back to the battle of Isly in 1844 where Moroccan troops lost to colonial Spain who imposed peace on Morocco in exchange for Spanish control of the Moroccan southern territories including the Ifni region which is part of the Western Sahara (Treaty of Tetuan 1860). Also, the Treaty allowed Spain to be the closest colonial power to the rest of the Western Sahara territory with active colonial interests that were translated into the Spanish occupation of the rest of Western Sahara under the classical international law framework of *terra nulluis*. The Moroccan defeat in the Battle of Isly, and the Treaty of Tetuan as it was signed by the Moroccan Sultan, is one of the 'black spots' in the monarchic history of Morocco, which was missing in the public versions of the Moroccan history books. In time, when the monarchy was challenged in Morocco after the coups-d'etat against King Hassan II, the regime thought that bringing the 'black spots' of the Monarchy out into public space and the humiliation of letting the Western Sahara go, went against the regime itself; so there was a 'skip-over' in the history books as prescribed by the regime. Crucial details in the understanding of the origins of the dispute were missing.

Also in this chapter, I argued that Morocco has seen its territory divided into pieces between France and Spain, in addition to the international status of the city of Tangier. These divisions gave various statuses to various parts of the country. Morocco negotiated the consolidation of the various territories differently; while negotiation from France drew upon the consolidation of common interests between the French colonial authorities and the Monarchy in Morocco, the 'stubbornness' of Spain's President Franco could not lead to a negotiated deal with Spain before Morocco's submission of the Case to the ICJ in 1975. King Hassan II's understanding of decolonization was based on negotiations and striking profitable deals for all parties; Franco was perhaps neither ready nor able to make similar concessions on the territory as the French did for the other parts of Morocco. Accordingly, for King Hassan II to order that the case be addressed to the International Court of Justice was in fact within the process of negotiating the 'consolidation' of the territory, a way for looking to destabilize Franco's stand on Western Sahara and have an opportunity to strike a deal with Spain. King Hassan II's wish came against an international law and a context of a wave of decolonization that did not take into account the pre-colonial territorial claims. While thought of as a conflict between Morocco and Spain, Morocco naively expected to have the Court look at Morocco's decolonization from Spain, and did not expect that the Court would address the self-determination of the people of Western Sahara instead. Was the position of Spain necessary for Morocco to take the case to the ICJ?

When discussing the ICJ Western Sahara case (chapter 3), my point of inquiry was that the advisory opinion was clear in overturning Morocco's claim; the Court retained a consent-based approach in the form of the Saharawi peoples' right to self determination; the court was clear in explaining its approach of self-determination: for the court, self-determination in Western Sahara case meant that the Sahrawis are 'peoples with the right to choose independence. Any other interpretation of the decision that considers self-determination as self-government, autonomy or any other form of internal self-determination cannot be considered as the right interpretation of the ICJ Advisory opinion in Western Sahara case, but a twisted one. By ordering the Green March after the ICJ decision, Morocco acted in violation of international law, just like South Africa in Namibia when it held onto Namibia after the UN cancelled the mandate: similarly with Indonesia in East Timor when it

exploited an unstable situation to grab the former Portuguese colony. Moroccan representatives tried to justify why it was not in violation of international law by saying that the ICJ decision was ambiguous or the international law of self-determination was ill-defined. The regime in Morocco did not admit to the Moroccan people that were becoming more and more against their rulers and that it lost the ICJ ruling.

One contribution of this thesis is that it considers neither *uti possidetis* - a default but binding rule of international law that was intended to reduce conflict among newly established independent states, nor the notion of state territorial integrity were effective in reducing the conflict over the territory of Western Sahara or/and avoiding the challenges to the territorial state integrity of Morocco. Also, the Court position in addressing the case through its approach to *uti possidetis* has intensified the conflict. Basically, the court ordered that Morocco must deal with the 'facts on the ground'; such decision comes in respect of modern international law but has triggered Morocco to create new 'facts on the ground' in violation of international law; the Green March allowed the establishment of a new territorial situation in which Morocco has a factual possession of the Territory. Now and under the narrative of 'realism', Morocco is asking the other parties and the UN to deal with the new facts on the ground. The UN Security Council somehow encourages the shift of the outcome of the Advisory Opinion from what 'must be done' from the UN General Assembly perspective, to 'what could be done' from the UN Security Council approach taking into account the new territorial situation of the Western Sahara. In other words, from a solution that is based on international law to a political 'compromise' in the form of autonomy, which comes in contradiction to the international law of decolonization. The most recent adoption by the UN Security Council in 2010 - Resolution 1920 - does not include the discourse of decolonization: "the free and genuine choice of the Saharawi people". The resolution does not mention the 1960 Declaration on the Decolonization of Overseas Territory nor UN Resolution 1514 on the right of Sahrawi people to self-determination, but it refers to self-determination in the language of the UN Charter on friendly relations between nations. The Resolution states that the Security Council:

> "Calls upon the parties to continue negotiations under the auspices of the Secretary-General without preconditions and in good faith, taking into account the efforts made since 2006 and subsequent developments, with a view to achieving a just, lasting, and *mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations*, and noting the role and the responsibilities of the parties in this respect" (UNSC 2010, Resolution 1920) (Italic focus added).

While the narrative of "free and genuine choice of the Saharawi people" as provided by ICJ is fading away in favour of the narrative of "mutually accepted solution", Morocco has recently announced the establishment of an "advanced" style of regionalization. The Moroccan Government announced that a committee has been appointed to put forward the governmental strategy for the application of the regionalization that will comprise the Western Sahara territories as well. This regionalization fits the idea of some kind of a general decentralization policy, which is framed within a general view of local autonomy arrangements in internal or domestic aspects; not international.

As discussed in chapter 4, autonomy has been around in international practice since the era of the League of Nations. It helped settle territorial conflicts without being a rule of international law. The similarity of the proposed autonomy in the case of Western Sahara is that it also appears in the era of the United Nations and it is still not yet a norm of international law, while decolonization has rules. Autonomy was applied to serve as a solution within the framework of internal self-determination. It came as a compromise for territories within states that need a specific status; this is the case of Quebec in relation to Canada and Åland Islands in relation to Finland. In this thesis, I argue that the innovation of the issue is that autonomy as proposed for Western Sahara, still on the table of negotiations at the time of writing this thesis, marks the gradual fading of the ICJ decision. Also, 'autonomy' is imposed to serve the idea of a 'compromise' between the right of Sahrawi people to external self-

determination as supported by 'hostile' Algeria from one side, and the current reality on the ground of Morocco's territorial possession that is in violation of international law but backed up by members of the Security Council on the other.

My final arguments in this thesis refer to the lack of public participation and the true value of the UN in territorial disputes. Firstly, the Saharawi populations were not represented in the ICJ proceedings, which they could have been, and there was no indication of their inclusion in the establishment of the POLISARIO's proposal that was submitted to the UN in 2007. It is the same case for the people of Morocco that were neither consulted to take the Western Sahara case to the ICJ, nor were they included in the establishment of Morocco's initiative related to autonomy of the 'Sahara region'. Despite the diversity of the peoples in the Western Sahara, and just like it is in other regions in the Maghreb, the state machinery, whether of the parties involved or of the United Nations, treated these human diversities as one 'thing' that is much apprehended within conceptions of territorial space, rather than distinct human values. Secondly, the Western Sahara issue gives an ultimatum to the UN; an ultimatum that puts the UN on shaky ground in a way that the members of the UN Security Council are somehow saying to the UN General Assembly "either you rubberstamp the Security Council member-states geopolitics or we will act anyway, and the irrelevance and impedance of the UN General Assembly will be clear for the world to see". This is a true Hobson's choice between two courses of actions: whether to have an impotent UN General Assembly with integrity or a debased UN General Assembly that has a nominal relevance to issues of war and peace? The members of the Security Council such as the US, France and China - the leading countries in the world and the architects of the UN - put the organization in this appalling situation at the present moment**,** in the case of Western Sahara especially.

Regarding my personal views on what this research has left me with, I want to end this thesis by an analogy to what the Spanish producer Manuel Dominguez said about the people who came to watch for the first time the performance of the Saharawi singer Mariem Hassan. He mentioned in an interview that people said: "I don't know who she is, I don't know where she comes from, but I want her records; she drives me crazy". Now, I know what the Western Sahara dispute is, I know where it comes from, I have some records but there are still many questions to be asked, which drives me crazy.

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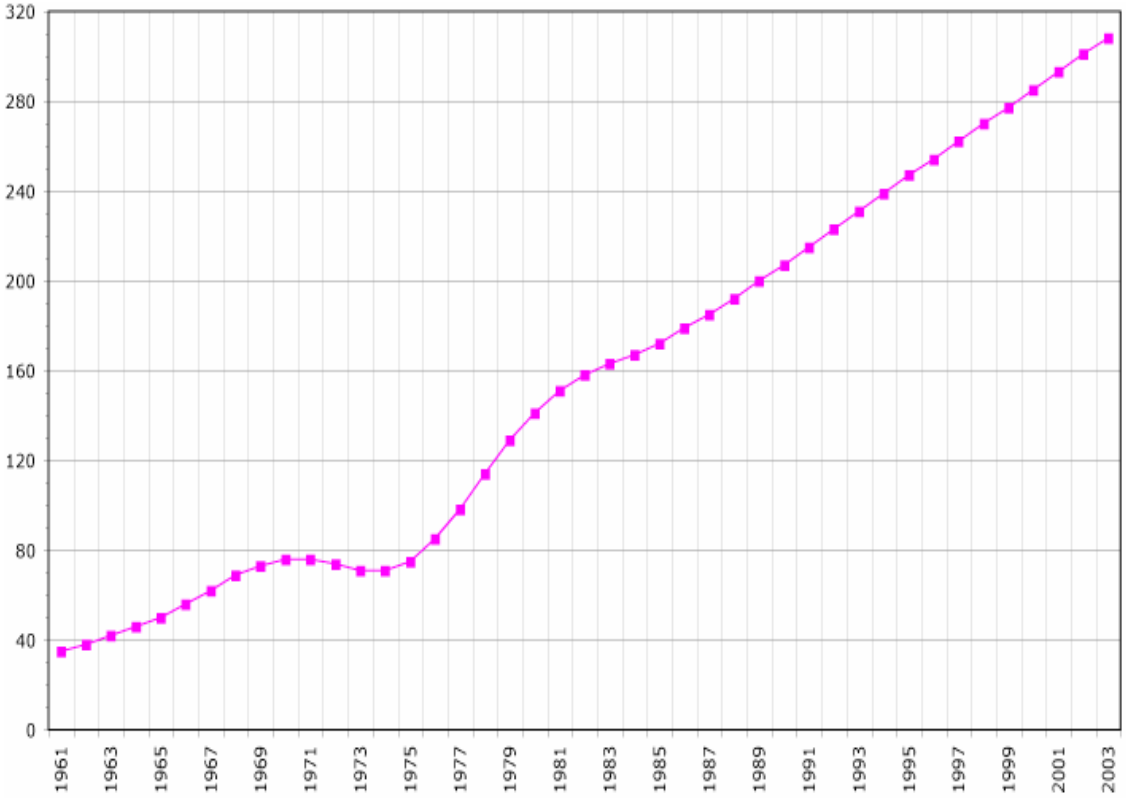
APPENDICES

APPENDIX A

Figure 1*:* Western Sahara Inhabitants In Number

(In thousands)



Source: FAO 2005

Figure 2: Western Sahara Map And Depoyment of Minurso

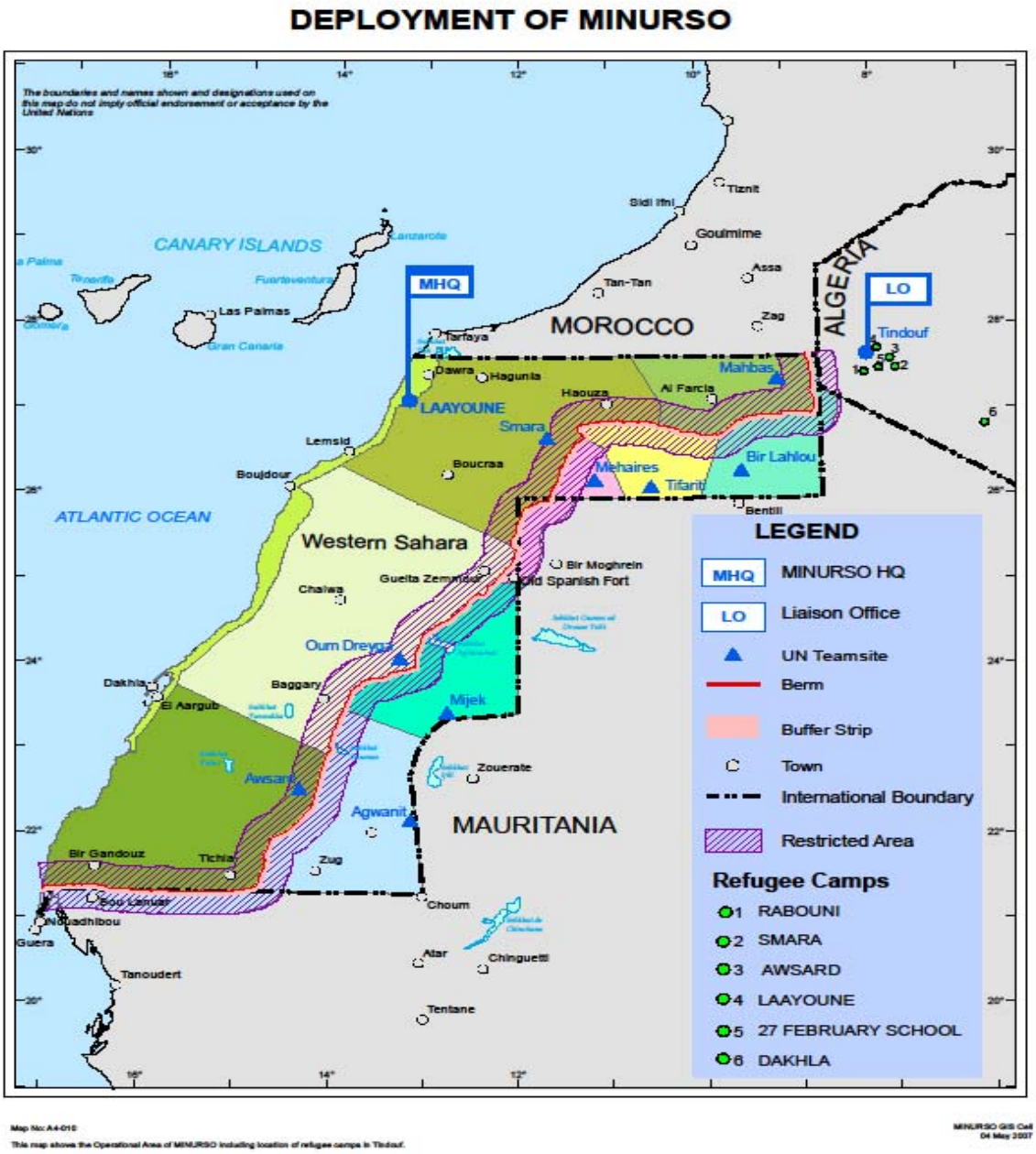


Figure 3 : La Batalla De Tetuan

Salvador Dali

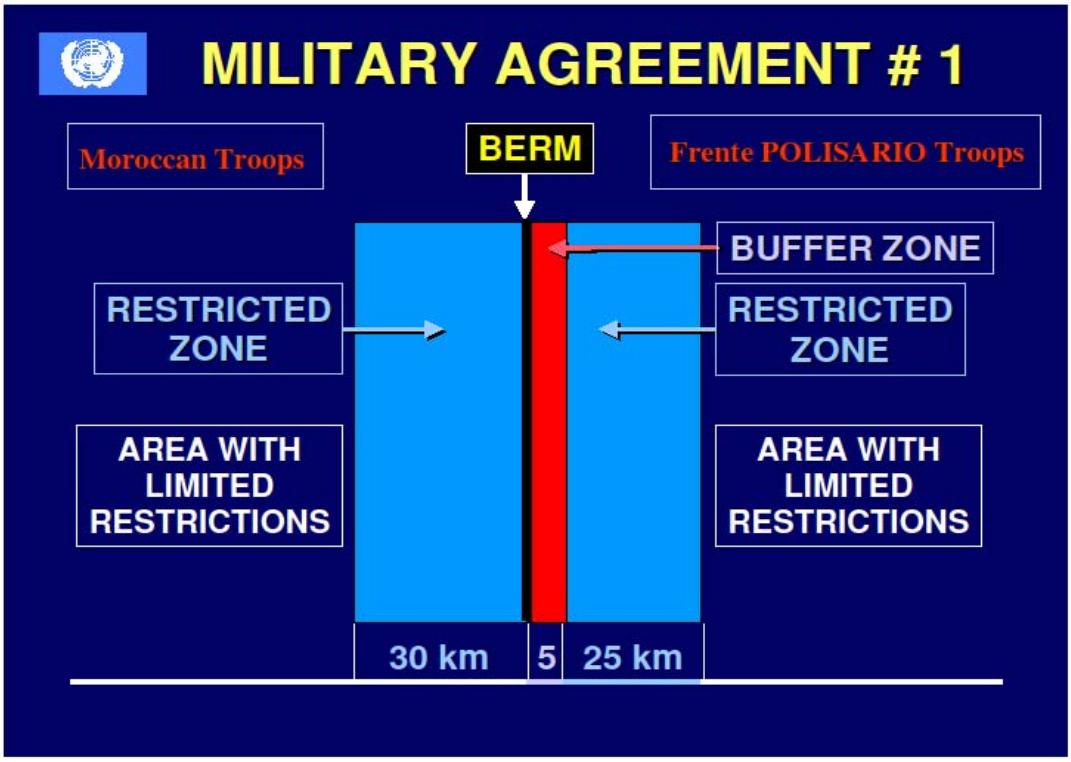
Source: Museum Syndicate

Figure 4: Redencion D Tetuan

San Juanquin Church (Philippines)

Source: Robert J. Hammerslag

Figure 5: Military Agreement # 1



Source: MINURSO

Figure 6

SPAIN.

The Reception of the Treaty with Morocco —Its Ratification—Santa Cruz de Mar— Carlist Disturbances—Repairs to the San Jacinto.

From Our Own Correspondent.

CADIZ, Thursday, April 5, 1860.

Since my last of the 30th of March, O'DONNELL DON ENRIQUE, nephew of the General in command, has arrived at Madrid, with the preliminaries of the treaty. It was ratified by ISABELLA on the 1st of April, and immediately returned to the hands of its bearer, to proceed, *viâ* Alicante, to the Tetuan encampment.

The dissatisfaction has been allayed, and probable revolutions averted, by the excellent terms which have been offered to the Spanish Government by the Emperor of Morocco. At first, when the armistice was made known to the Spanish people, a heavy gloom seemed to cast itself all over the country, and they would have sacrificed their wives and children rather than be satisfied with an ignominious treaty.

They were kept in suspense, and O'DONNELL'S popularity decreased daily. Five days were thus spent in awkward uncertainty, until at last trophies arrived, and the conditions were made public. Satisfied with the large amount of money—$20,000,000—which amply repaid all the expenses of their six months' war, they were no longer dispirited, and O'DONNELL has again become the greatest man of Spain.

The port of Santa Cruz de Mar or Agadir Mouna, which has been put at the disposition of the Spanish Government, is situated on the African Coast, lat. 30° 30′ north, lon. 9° 30′ west—no great distance from the Canary Islands. It belonged to the Spaniards in 1476, and a rich capitalist—DIEGO HERRERA—established a large fishery there. Below this point of Agadir, the country is said to offer a great advantage to the Spaniards in their commerce with the neighboring Canaries, as a good port of refuge to vessels in distress will probably be established there.

Spanish newspapers talk largely of the honorable peace that has been concluded, and of the distinguished position that the nation continues to occupy among the Powers of Europe, They heap commendation upon their Government, which in two regular battles and twenty-three minor actions has triumphed, and declare that no other nation in the world can exhibit such a record on the pages of history. It is

well for Spanish editors to write this, as they are paid for it, and are not permitted to contradict it; but where are the accounts of this war given by the Goverment of Morocco? Here in Spain we cannot see them, except as they come to us though English or American correspondence, which gradually finds its way hither, and gives us a different idea of this short, but bloody war.

Yesterday the excitement at Cadiz was great, on account of alarming and no doubt exaggerated rumors with regard to the appearance of a small party of 20 Carlists in Aranda de Duero, which Gen. Ortega joined with a battalion of his troops from San Carlos de la Rapita. With these Ortega directed his course towards Tortosa, in the Province of Tarragona, intending to establish a Republican Government. As soon as the news of this new rebellion arrived at Madrid and Barcelona, the citizens of both these places offered resolutions asking the Government to quell the rebellion, and at Barcelona the excitement was so great that the Bank of Barcelona offered the Government forty millions of reals to crush the disturbance.

To-day a telegram from Tarragona announced that a Captain of the *Carabineros* had presented himself to the Alcalde of Tortosa, and offered the entire submission of the troops under the command of Ortega. It appears that the troops were shipped under a false

pretext by ORTEGA to Tortosa, and as soon as he declared his intentions they left him, and offered their allegiance to the Spanish crown. ORTEGA will certainly becondemned for his foolish farce during the present excitement and preparations for the Holy Week.

The Easter Holidays, now so near at hand, incline the minds of the Spanish *puebla* to thoughts of the festivities of the religion, and no doubt the comiag grand processions and bull fights will induce them to a quiet submission to the mandates of the Church.

Among the late arrivals nere is that of the bark *Emblem*, Capt. ATKINS, 26 days from Boston, with a cargo of ice. A similar cargo arrived here some years ago, but, no ice-houses being built then, it proved an entire loss to its owners. Now all this has been ameliorated, and we are in the earnest hope that this luxurious article will gradually find its way into Spain, and alleviate the excessive heat of the coming Summer.

The steam-frigate *San Jacinto*, under the command of Capt. JAS. F. ARMSTRONG, is still repairing at the Arsenal. It is due to the activity and seamanship displayed by her commander to mention the difficulties and dangers that he had to contend with before he arrived here safely. From her officers I learn that the *San Jacinto* had been condemned by a survey at Porto Grande, St. Vincent, in the month of September, and that her propeller was then reported unfit for service. But Commodore INMAN, in command of the African Squadron, the duties at the coast of Africa making her presence there necessary, ordered her to proceed to cruise around the Congo. At Loando, in January, 1860, her former

Captain was relieved from his command, and the ship was again reported unseaworthy. Then the orders from the Na y Department was received for her to proceed to Cadiz and be placed in the Dry Dock. They came at a critical moment. The officers on board were dilatory in proceeding to sea with such a vessel at the risk of the life and property on board. Lieut. ARMSTRONG then assumed the command by order of the Flag Officer, who, as a compensation for the arduous duties performed by the former officer in the *Sumpter*, offered him the important position of Captain of one of our finest steam frigates. Encountering gales and strong trade winds, he has brought her safely to port. The repairs of the *San Jacinto* are proceeding slowly, and she will not be able to leave here for two months. I am sorry to learn that Capt. ARMSTRONG is to be relieved from his command.

MARS.

The New York Times

Published: April 28, 1860

APPENDIX B

TRAITE DE LALLA MAGHNIA (18 MARS 1845)

(Traité de délimitation conclu le 18 mars 1845 entre la France et le Maroc)

Louanges à Dieu l'unique ! Il n'y a de durable que le royaume de Dieu !

Traité conclu entre les Plénipotentiaires de l'Empereur des Français et des possessions de l'Empire d'Algérie et de l'Empereur du Maroc, de Suz et Fez et des possessions de l'Empire d'Occident.

Les deux Empereurs, animés d'un égal désir de consolider la paix heureusement rétablie entre eux, et voulant, pour cela, régler de manière définitive l'exécution de l'article 5 du Traité du 10 septembre de l'an de grâce 1844 (24 cha'ban de l'an 1260 de l'hégire).

Ont nommé pour leurs Commissaires Plénipotentiaires à l'effet de procéder à la fixation exacte et définitive de la limite de souveraineté entre les deux pays, savoir:

L'Empereur des Français, le sieur Aristide-Isidore, comte *de la Rue*, Maréchal de camp dans ses armées, commandeur de l'Ordre Impérial de la Légion d'honneur, commandeur de l'ordre d'Isabelle la Catholique et chevalier de deuxième classe de l'ordre de Saint Ferdinand d'Espagne.

L'Empereur du Maroc, le *Sid Ahmida-Ben-Ali-el-Sudjâaï*, gouverneur d'une des provinces de l'Empire. Lesquels, après s'être réciproquement communiqués leurs pleins pouvoirs, sont convenus des articles suivants dans le but du mutuel avantage des deux pays et et d'ajouter aux liens d'amitié qui les unissent :

Art. 1. - Les deux Plénipotentiaires sont convenus que les limites qui existaient autrefois entre le Maroc et la Turquie resteront les mêmes entre l'Algérie et le Maroc.

Aucun des deux Empires ne dépassera la limite de l'autre; aucun d'eux n'élèvera à l'avenir de nouvelles constructions sur le tracé de la limite ; elle ne sera pas désignée par des pierres. Elle restera, en un mot, telle qu'elle existait entre les deux pays avant la conquête de l'Empire d'Algérie par les Français.

Art. 2. - Les Plénipotentiaires ont tracé la limite au moyen des lieux par lesquels elle passe et touchant lesquels ils sont tombés d'accord, en sorte que cette limite est devenue aussi claire et aussi évidente que le serait une ligne tracée. Ce qui est à l'Est de cette limite appartient à l'Algérie- Tout ce qui est à l'ouest appartient au Maroc.

Art. 3. - La désignation du commencement de la limite et des lieux par lesquels elle passe est ainsi qu'il suit : Cette ligne commence à l'embouchure de l'oued (c'est à-dire cours d'eau) Adjeroud dans la mer, elle remonte avec ce cours d'eau jusqu'au gué où il prend le nom de Kis ; puis elle remonte encore le même cours d'eau jusqu'à la source qui est nommée Ras-el-Aïoun, et qui se retrouve au pied de trois collines portant le nom de Menasseb-Kis, lesquelles, par leur situation à l'ouest de l'oued, appartiennent à l'Algérie. De Ras-el Aïoun, cette même ligne remonte sur la crête des montagnes avoisinantes jusqu'à ce qu'elle arrive à Drâ-el-Doum ; puis elle descend dans la plaine nommée El-Aoudj. De là, elle se dirige à peu près en ligne droite sur Haouch-Sidi-Aïèd. Toutefois, le Haouch lui-même reste à cinq cents coudée (250 mètres) environ, du côté de l'Est, dans la limite algérienne. De Haouch-Sidi Aïèd, elle va sur Djerf-el-Baroud, situé sur l'oued Bou-Naïm ; de là elle arrive à Kerkour-Sidi-Hamza ; de Kerkour-Sidi-Hamza à Zoudj-el-Beghal ; puis longeant à l'Est le pays des Ouled-Ali-ben-Talha jusqu'à Sidi-Zahir, qui est sur le territoire algérien, elle remonte la grande route jusqu'à Aïn-Takbalet, qui se trouve entre l'oued Bou-Erda et les deux oliviers nommés el-Toumiet qui sont sur le territoire marocain. De Aïn-Tak-balet, elle remonte avec l'oued Roubban jusqu'à Ras-Asfour ; elle suit au-delà le Kef en laissant à l'Est le marabout Sidi-Abd-Allah-Ben-Mohammed el-Hamlili ; puis, après s'être dirigée vers l'ouest, en suivant le col de El-Mechêmiche, elle va en ligne droite jusqu'au marabout de Sidi-Aïssa, qui est la fin de la plaine de Missiouin. Ce marabout et ses dépendances sont sur le territoire algérien. De là, elle court vers le Sud, jusqu'à Koudiet-el-Debbagh, colline située sur la limite extrême du Tell (c'est-à-dire le pays cultivé). De là, elle

prend la direction Sud jusqu'à Kheneg-el-Hada, d'où elle marche sur Tenïet-el-Sassi, col dont la jouissance appartient aux deux Empires.

Pour établir plus nettement la délimitation à partir de la mer jusqu'au commencement du désert, il ne faut point omettre de faire mention et du terrain qui touche immédiatement à l'Est la ligne sus-désignée, et du nom des tribus qui y sont établies.

A partir de la mer, les premiers territoires et tribus sont ceux de Beni-Mengouche-Tahta et de Aâttïa. Ces deux tribus se composent de sujets marocains qui sont venus habiter sur le territoire de l'Algérie, par suite de graves dissentiments soulevés entre eux et leurs frères du Maroc. Ils s'en séparèrent à la suite de ces dissensions et vinrent chercher un refuge sur la terre qu'ils occupent aujourd'hui et dont ils n'ont pas cessé jusqu'à présent d'obtenir la jouissance du souverain de l'Algérie, moyennant une rente annuelle.

Mais les commissaires plénipotentiaires de l'Empereur des Français, voulant donner au représentant de l'Empereur du Maroc une preuve de la générosité française et des dispositions à resserrer l'amitié et à entretenir les bonnes relations entre les deux Etats, ont consenti au représentant marocain, à titre de don d'hospitalité, la remise de cette redevance annuelle (cinq cents francs pour chacune des deux tribus), de sorte que les deux tribus susnommées n'auront rien à payer, à aucun titre que ce soit, au Gouvernement d'Alger, tant que la paix et la bonne intelligence dureront entre les deux Empereurs des Français et du Maroc.

Après le territoire des Aattia vient celui de Messirda, des Achâche, des Ouled-Mellouk, des Beni-Bou- Saïd, des Beni-Senous et des Ouled-el-Nahr. Ces six derniéres tribus font partie de celles qui sont sous la dénomination de l'Empire d'Alger.

II est également nécessaire de mentionner le territoire qui touche immédiatement à l'Ouest la ligne susdésignée, et de nommer les tribus qui habitent sur ce territoire, à portée de la mer. Le premier territoire et les premières tribus sont ceux des Ouled-Mansour-Rel-Trifa, ceux des Beni-Iznéssen, des Mezaouir, des Ouled-Ahmed-ben-

Brahim, des Ouled-el-Abbès, des Ouled-Ali-ben-Talha, des Ouled-Azouz, des Beni-Bou_Hamdoun, des Beni-Hamlil et des Beni-Mathar-Rel-Ras-el-Aïn . Toutes ces tribus dépendent de l'Empire du Maroc.

Art. 4. - Dans le Sahara (désert), il n'y a pas de limite territoriale à établir entre les deux pays, puisque la terre ne se laboure pas et qu'elle sert seulement de pacage aux Arabes des deux Empires qui viennent y camper pour y trouver les pâturages et les eaux qui leur sont nécessaires. Les deux souverains exerceront de la manière qu'ils l'entendront toute la plénitude de leurs droits sur leurs sujets respectifs dans le Sahara. Et, toutefois, si l'un des deux souverains avait à procéder contre ses sujets, au moment où ces derniers seraient mêlés avec ceux de l'autre Etat, il procédera comme il l'entendra sur les siens, mais il s'abstiendra envers les sujets de l'autre gouvernement. Ceux des Arabes qui dépendent de l'Empire du Maroc, sont : les M'béïa, les Beni Guil, les Hamian- Djenba, les Eumour-Sahara et les Ouled-Sidi-Cheikh-el-Gharaba. Ceux des Arabes qui dépendent de l'Algérie sont : les Ouled-Sidi-el-Cheikh-el Cheraga, et tous les Hamian, excepté les Hamian-Djenba-susnommés.

Art.5.- Cet article est relatif à la désignation des kessours (villages du désert) des deux Empires. Les deux souverains suivront, à ce sujet l'ancienne coutume établie par le temps, et accorderont, par considération l'un pour l'autre, égards et bienveillance aux habitants de ces kessours. Les kessours qui appartiennent au Maroc sont ceux de Yiche et de Figuigue.

Les kessours qui appartiennent à l'Algérie sont : Aïn-Safra, S'fissifa. Assla, Tiout, Chellala, El-Abiad et Bou-Semghoune.

Art. 6.- Quant au pays qui est au sud des kessours des deux gouvernements, comme il n'y a pas d'eau, qu'il est inhabitable et que c'est le désert proprement dit, la délimitation en serait superflue.

Art. 7. - Tout individu qui se réfugiera d'un Etat dans l'autre ne sera pas rendu au gouvernement qu'il aura quitté par celui auprès duquel il se sera réfugié, tant qu'il voudra y rester.

S'il voulait, au contraire, retourner sur le territoire de son gouvernement, les autorités du lieu où il se sera réfugié ne pourront apporter la moindre entrave à son départ. S'il veut rester, il se conformera aux lois du pays, et il trouvera protection et garantie pour sa personne et ses biens. Par cette clause les deux souverains ont voulu se donner une marque de leur mutuelle considération. Il est bien entendu que le présent article ne concerne en rien les tribus : l'Empire auquel elles appartiennent étant suffisamment établi dans les articles qui précèdent.

Il est notoire aussi que *El-Hadj-Abd-el-Kader* et tous ses partisans ne jouiront pas du bénéfice de cette Convention, attendu que ce serait porter atteinte à l'article 4 du traité du 10 septembre de l'an 1844, tandis que l'intention formelle des hautes parties contractantes est de continuer à donner force et vigueur à cette stipulation émanée de la volonté des deux souverains, et dont l'accomplissement affirmera l'amitié et assurera pour toujours la paix et les bons rapports entre les deux Etats.

Le présent traité, dressé en deux exemplaires, sera soumis à la ratification et au scel des deux

Empereurs, pour être ensuite fidèlement exécuté.

L'échange de ratification aura lieu à Tanger, sitôt que faire se pourra.

En foi de quoi, les Commissaires Plénipotentiaires susnommés ont apposé au bas de chacun des exemplaires leurs signatures et leurs cachets.

Fait sur le territoire français voisin des limites, le 18 mars 1845 (9 de rabïà-el-oouel, 1260 de l'hégire).

Puisse Dieu améliorer cet état des choses dans le présent et dans le futur !

Le général Comte De La Rue Ahmida-Ben-Ali

APPENDIX C

TREATY OF TETUAN (26 APRIL 1860)

Official French Translation

Traité de paix de Tétouan, 26 avril 1860 (extraits)

(…)

Art. 2 - Pour faire disparaître les causes qui ont motivé la guerre aujourd'hui heureusement terminée, S.M. le roi du Maroc, animé du désir sincère de consolider la paix, convient d'étendre le territoire appartenant à la juridiction de la place de Ceuta jusqu'aux lieux les plus convenables pour le sécurité et la défense complète de sa garnison (…)

Art. 8 - S.M. Marocaine s'engage à concéder à perpétuité à S.M. Catholique, sur la côte de l'Océan, près de Santa- Cruz la Petite, le territoire suffisant pour la formation d'un établissement de pêcherie comme celui que l'Espagne y possédait autrefois*.

Art. 9 - S.M. Marocaine s'engage à payer à S.M. Catholique, comme indemnité pour les frais de guerre, la somme de 20 millions de piastres soit 400 millions de réaux de vellon.**

Art . 10 - S.M. le Roi du Maroc, en suivant l'exemple de ses illustres prédécesseurs qui accordèrent une protection si efficace et spéciale aux missionnaires espagnols, autorise l'établissement dans la ville de Fez, d'une maison de missionnaires espagnols, et confirme en leur faveur tous les privilèges et exemptions que les précédents souverains du Maroc leur avaient accordés.

(…)

Art. 13 - Il sera conclu dans le plus bref délai possible un traité de commerce par lequel tous les avantages déjà accordés ou qui seraient accordés à l'avenir à la nation la plus favorisée seront concedes aux sujets espagnols.

(…)

Les plénipotentiaires l'ont signé et cacheté du sceau de leurs armes, à Tétouan, le 26 avril 1860 Luis Garcia, Thomas de Ligues y Bardaji, le serviteur de son créateur,

Mohammed - El-Jetib, le serviteur de son Dieu, Ahmed-El-Chabli, fils d' Abd - el - Melek .

*Point occupé par l'Espagne de 1470 à 1526. En 1878, il est décidé de le situer à l'emplacement d'Ifni. Mais l'occupation d'Ifni ne préoccupe l'Espagne qu'en 1910, après que le traité du 17 novembre 1909 en a renouvelé la cession.

** 85 000 000 de francs.

APPENDIX D
PROTOLE D'ACCORD ENTRE LE GOUVERNEMENT DE SA MAJESTE LE ROI DU MAROC ET LE G.P.R.A (6 JUILLET 1961)

Le Gouvernement de sa Majesté et le Gouvernement provisoire de la république Algérienne, animées par des sentiments de solidarités et de fraternité Maghrébines, conscients de leur destin africain et désireux de concrétiser les aspirations communes de leurs peuples, ont convenu de ce qui suit :

Fidèles a l'esprit de la conférence de Tanger du mois d'avril 1958 et fermement attachés à la charte et aux résolutions adoptées à la conférence de Casablanca, les deux gouvernements décident d'entreprendre l'édification du Maghreb Arabe sur la base d'une fraternelle association notamment dans le domaine politique et économique.

Le Gouvernement de sa majesté le roi du Maroc, réaffirme son soutien inconditionnel au peuple algérien dans sa lutte pour l'indépendance et son unité nationales. Il proclame son appuie sans réserve au Gouvernement provisoire de la république Algérienne dans ses négociations avec la France sur la base du respect de l'intégrité du territoire Algérien.

Le Gouvernement de sa majesté le roi du Maroc, s'opposera par tous les moyens à toute tentative de partage du territoire algérien.

Le Gouvernement provisoire de la République algérienne reconnaît pour sa part que le problème territorial posé par les délimitations imposées arbitrairement par la France entre les deux pays, trouvera sa solution dans des négociations entre le Gouvernement du Maroc et celui du gouvernement de l'Algérie indépendante.

A cette fin, les deux gouvernements décident de la création d'une commission algéro-marocaine qui se réunira dans les meilleurs délais pour procéder à l'étude et à la solution de ce problème dans un esprit de fraternité et d'unité maghrébine.

De ce fait le Gouvernement provisoire de la république Algérienne réaffirme que les accords qui pourrons intervenir à la suite des négociations Franco-Algériennes ne sauraient être opposables au Maroc, quant aux délimitations territoriales algéro-marocaine.

Fait à Rabat le 6 Juillet 1961

Signé: **Sa majesté Hassan II**
Roi du Maroc

Signé: **Son Excellence Ferhat abbas,**
Président du Gouvernement Provisoire de la République Algérienne

APPENDIX E
LIST OF UNITED NATIONS SECURITY COUNCIL RESOLUTIONS ON WESTERN SAHARA

Year	Date	Number	Main Decisions
1975	22 October	377	Appeals to the parties to exercise restraint and moderation, and to enable the mission of the Secretary-General (SG) to be undertaken in satisfactory conditions
1975	2 November	379	Urges the King Of Morocco to urgently put an end to the declared March into Western Sahara
1975	6 November	380	Urges Morocco to Withdraw from the territory and call for negotiations among the parties
1988	20 September	621	Decides to authorize the SG to appoint a Special Representative for Western Sahara Requests to SG to submit a report on the holding of referendum for self-determination
1990	27 June	658	Supports SG mission of good offices (UN/OAU) Approves SG report Calls for detailed information on the cost for UN mission in WS
1991	29 April	690	Approves SG report Establish a Ceasefire and Settlement Plan Establish the UN Mission for Referendum in Western Sahara (MINURSO)
1991	31 December	725	Call the two parties to fully cooperate with the SG for the implementation of the settlement Plan

Year	Date	Number	Main Decisions
1993	2 March	809	Urges the SG to resolve issues of criteria for voter eligibility Invite the SG to report on the cooperation of the parties on the holding of a referendum
1995	26 May	995	Expresses concern about practices indentified of the SG report that are hampering progress in the implementation of the Settlement Plan Extension of MINURSO until 30 June 1995
1995	22 December	1033	Welcomes the SG framework contained in his report on 25 November 1995 related to identification processes Requests to SG to provide the orderly programme for the MINURSO withdrawal
1995	31 January	1042	Expresses deep concern about the stalemate in hindering the process of identification and lack of progress in completion of settlement Plan Encourages the parties to consider additional ways for the implementation of the Settlement Plan
1996	29 May	1056	Expresses deep regret for the fact the willingness does not exist to cooperate with MINURSO Suspends identification process until the parties give convincing evidence of their commitment to resume the process Reduces the military component of MINURSO with 20%
1996	27 November	1084	Supports the activities of the Action Special Representatives in continuing dialogue with the parties and the two neighbouring countries Extends MINURSO mandate until 31 May

Year	Date	Number	Main Decisions
			1997 Welcomes the UNHCR ongoing activities
1996	22 May	1108	Extends MINURSO until 30 September 1997 Urges the parties to cooperate with the Personal Envoy of the SG
1996	29 September	1131	Extends the MINURSO until 20 October 1997 Expresses its readiness to consider further actions in accordance with the recommendation of SG report of 27 September 1997
1996	20 October	1133	Extends MINURSO until 20 April 1998 Requests the SG to begin the identification of voters in accordance with the Settlement Plan, and finish the process by 31 May 1998 Requests the SG to submit a comprehensive report on the holding of referendum no later than 15 November 1997
1998	26 January	1148	Welcomes progress made since the resumption of the identification process Welcomes the appointment of the Special Representative of SG Approves the deployment of the engineering unit required for demining activities
1998	17 April	1163	Calls on Morocco, Algeria and Mauritania to conclude respective status-of-forces agreements with the SG
1998	20 July	1185	Extends MINURSO until 21 September 1998 Notes with satisfaction the readiness of the government of Morocco to cooperate with UNCHR
1998	18 September	1198	Extends MINURSO until 31 October 1998

Year	Date	Number	Main Decisions
			Welcomes Morocco agreement to formalize the presence of UNCHR Supports the intention of MINURSO to start publishing the provisional list of voters by 1 December 1998
1998	30 October	1204	Extends MINURSO until 17 December 1998 Calls on the parties to agree to the package included in the SG report on 26 October regarding the identification process, UNHCR activities and the outline of the next stages of the Settlement Plan, by mid-November 1998 Welcomes Morocco's agreement to formalize the presence of UNCHR Support the intention of MINUSO to start publishing a provisional list of voters by 1 December 1998
1998	17 December	1215	Extends MINURSO until 31 January 1999 Asks the parties and interested states to sign the repatriation protocol with the UNCHR Urges morocco to promptly sign a status-of-force agreement with the SG
1999	28 January	1224	Extends MINURSO until 11 February 1999
1999	11 February	1228	Extends MINURSO until 31 March 1999
1999	30 March	1232	Extends MINURSO until 30 April 1999 Requests the parties to move ahead for an agreement on the refugee repatriation protocol Welcomes Polisario resumption of pre-registration activities of UNCHR in Tindouf Welcomes Morocco signature of an agreement with MINURSO on mines and unexploded ordnances Urges Polisario to engage in similar efforts

Year	Date	Number	Main Decisions
1999	30 April	1235	Extends MINURSO until 14 May 1999
1999	14 may	1238	Extends MINURSO until 14 September 1999 Support the proposed increase in staff of the Identification Commission Requests UNCHR to provide recommendations on confidence-building Requests the SG to submit a revised timetable and financial implications for the holding of referendum
1999	13 September	1263	Extends MINURSO until 14 December 1999 Requests the SG to report every 45 days on significant developments on the implementation of the Settlement Plan
1999	14 December	1282	Extends MINURSO until 29 February 2000 Welcomes the parties agreement in principle draft of plan of action for cross-borders confidence building Calls the parties to cooperate with UNHCR and MINURSO Takes note of the problem posed by the number of candidates who used their rights of appeals and opposing positions taken by the parties which allow a little possibility of holding the referendum before 2002 Takes note of the difficulties in reconciling the opposing views as reported by the SG
2000	29 February	1292	Extends MINURSO until 31 May 2000
2000	31 May	1301	Extends MINURSO until 31 July 2000
2000	25 July	1309	Extends MINURSO until 31 October 2000
2000	30 October	1324	Extends MINURSO until 28 February 2001
2001	27 February	1342	Extends MINURSO until 30 April 2001
2001	27 April	1349	Extends MINURSO 30 June 2001
2001	29 June	1359	Extends MINURSO until 30 November 2001

Year	Date	Number	Main Decisions
			Fully supports the SG to invite the parties for direct or proximity talks under auspices of Personal Envoy and encourages the parties to discuss the Draft Framework Agreement and negotiate any other political solution Affirms that the proposal to overcome the obstacles that was submitted by Polisario will be considered
2001	27 November	1380	Extends MINURSO until 28 February 2002
2002	27 February	1394	Extends MINURSO until 30 April 2002
2002	30 April	1406	Extends MINURSO until 31 July 2002
2002	30 July	1429	Extends MINURSO until 31 January 2003 Welcomes the release of 101 Moroccan Prisoners of war and calls upon Polisario to release the remaining prisoners without further delay Calls upon Morocco and Polisario to cooperate with red Cross to resolve the fate of those unaccounted
2003	30 January	1463	Extends MINURSO until 31 March 2003
2003	25 March	1469	Extends MINURSO until 31 May 2003
2003	30 May	1485	Extends MINURSO until 31 July 2003
2003	31 July	1495	Extends MINURSO until 31 October 2003 Calls on Polisario to release all the remaining prisoners without further delay
2003	28 October	1513	Extends MINURSO until 31 January 2004
2004	30 January	1523	Extends MINURSO until 30 April 2004
2004	29 April	1541	Extends MINURSO until 31 October 2004
2004	28 October	1570	Extends MINURSO until 30 April 2005 Calls on members states of consider voluntary contributions to fund Confidence Building Measures
2005	28 April	1598	Extends MINURSO until 31 October 2005

Year	Date	Number	Main Decisions
			Urges Polisario to release the remaining prisoners without further delay Affirms the need for full respect of the Ceasefire
2005	28 October	1634	Extends MINURSO until 30 April 2006 Takes note of the Polisario's release of 404 Moroccan prisoners of war Welcomes the appointment of the SG's Personal Envoy Peter van Walsum
2006	28 April	1675	Extends MINURSO until 31 October 2006 Reaffirms its commitment to assist the parties to achieve just, lasting and mutually accepted political solution Requests the SG to continue to take the necessary measures to achieve actual compliance of MINURSO with UN zero-tolerance on sexual exploitation and abuse
2006	31 October	1720	Extends MINURSO until 30 April 2007
2007	30 April	1754	Taking note of the Moroccan proposal on 11 April 2007 Taking note of the Polisario proposal on 10 April 2007 Extends MINURSO until 31 October 2007
2007	31 October	1783	Taking note that the parties agreed to continue negotiation through UN sponsored talks Extends MINURSO until April 2008
2008	30 April	1813	Taking note of the four rounds of negotiations held under the auspices of the SG and welcoming the progress made by the parties to enter into direct negotiations Noting the SG' view that the consolidation of status quo is not acceptable outcome of the

Year	Date	Number	Main Decisions
			current process of negotiations Endorses that report's recommendation that **realism and a spirit of compromise** by the parties are essential to maintain the momentum of the process of negotiations (Focus added) Calls the parties to continue the negotiations under the auspices of SG without preconditions and in good faith Extends MINURSO until 30 April 2009

APPENDIX F
THE MADRID ACCORDS
(14 NOVEMBER 1975)

(Official translation)

On November 14, 1975, the delegations lawfully representing the Governments of Spain, Morocco and Mauritania, meeting in Madrid, stated that they had agreed in order on the following principles:

1. Spain confirms its resolve, repeatedly stated in the United Nations, to decolonize the Territory of Western Sahara by terminating the responsibilities and powers which it possesses over that Territory as administering Power.

2. In conformity with the aforementioned determination and in accordance with the negotiations advocated by the United Nations with the affected parties, Spain will proceed forthwith to institute a temporary administration in the Territory, in which Morocco and Mauritania will participate in collaboration with the Djemaa and to which will be transferred all the responsibilities and powers referred to in the preceding paragraph. It is accordingly agreed that two Deputy Governors nominated by Morocco and Mauritania shall be appointed to assist the Governor-General of the Territory in the performance of his functions. The termination of the Spanish presence in the Territory will be completed by February 28, 1976 at the latest.

3. The views of the Saharan population, expressed through the Djemaa, will be respected.

4. The three countries will inform the Secretary General of the United Nations of the terms set down in this instrument as a result of the negotiations entered into in accordance with Article 33 of the Charter of the United Nations.

5. The three countries involved declare that they arrived at the foregoing conclusions in the highest spirit of understanding and brotherhood, with due respect for the principles of the Charter of the United Nations, and as the best possible contribution to the maintenance of international peace and security.

6. This instrument shall enter into force on the date of publication in the Boletin Oficial del Estado of the 'Sahara Decolonization Act' authorising the Spanish Government to assume the commitments conditionally set forth in this instrument."

This declaration was signed by the president of the government Carlos Arias Navarro, for Spain; the Prime Minister, Ahmed Osman, for Morocco; and the Foreign Minister, Hamdi Ould Mouknass, for Mauritania.

APPENDIX G
MOROCCAN INITIATIVE FOR NEGOTIATING AN AUTONOMY STATUTE FOR THE SAHARA REGION MOROCCAN INITIATIVE FOR NEGOTIATING AN AUTONOMY STATUTE FOR THE SAHARA REGION

(Official translation)

I. Morocco's commitment to a final political solution

1. Since 2004, the Security Council has been regularly calling upon "*the parties and States of the region to continue to cooperate fully with the United Nations to end the current impasse and to achieve progress towards a political solution*".

2. Responding to this call by the international community, the Kingdom of Morocco set a positive, constructive and dynamic process in motion, and pledged to submit an autonomy proposal for the Sahara, within the framework of the Kingdom's sovereignty and national unity.

3. This initiative is part of the endeavors made to build a modern, democratic society, based on the rule of law, collective and individual freedoms, and economic and social development. As such, it brings hope for a better future for the region's populations, puts an end to separation and exile, and promotes reconciliation.

4. Through this initiative, the Kingdom of Morocco guarantees to all Sahrawis, inside as well as outside the territory, that they will hold a privileged position and play a leading role in the bodies and institutions of the region, without discrimination or exclusion.

5. Thus, the Sahara populations will themselves run their affairs democratically, through legislative, executive and judicial bodies enjoying exclusive powers. They will have the financial resources needed for the region's development in all fields, and will take an active part in the nation's economic, social and cultural life.

6. The State will keep its powers in the royal domains, especially with respect to defense, external relations and the constitutional and religious prerogatives of His Majesty the King.

7. The Moroccan initiative, which is made in an open spirit, aims to set the stage for dialogue and a negotiation process that would lead to a mutually acceptable political solution.

8. As the outcome of negotiations, the autonomy statute shall be submitted to the populations concerned for a referendum, in keeping with the principle of self-determination and with the provisions of the UN Charter.

9. To this end, Morocco calls on the other parties to avail the opportunity to write a new chapter in the region's history. Morocco is ready to take part in serious, constructive negotiations in the spirit of this initiative, and to contribute to promoting a climate of trust.

10. To achieve this objective, the Kingdom of Morocco remains willing to cooperate fully with the UN Secretary-General and his Personal Envoy.

II. Basic elements of the Moroccan proposal

11. The Moroccan autonomy project draws inspiration from the relevant proposals of the United Nations Organization, and from the constitutional provisions in force in countries that are geographically and culturally close to Morocco. It is based on internationally recognized norms and standards.

A. Powers of the Sahara autonomous Region

12. In keeping with democratic principles and procedures, and acting through legislative, executive and judicial bodies, the populations of the Sahara autonomous Region shall exercise powers, within the Region's territorial boundaries, mainly over the following:

- Region's local administration, local police force and jurisdictions;
- in the economic sector: economic development, regional planning, promotion of investment, trade, industry, tourism and agriculture;
- Region's budget and taxation;
- infrastructure: water, hydraulic facilities, electricity, public works and transportation;
- in the social sector: housing, education, health, employment, sports, social welfare and social security;
- cultural affairs, including promotion of the Saharan Hassani cultural heritage;
- environment.

13. The Sahara autonomous Region will have the financial resources required for its development in all areas. Resources will come, in particular, from:

- taxes, duties and regional levies enacted by the Region's competent authorities;
- proceeds from the exploitation of natural resources allocated to the Region;
- the share of proceeds collected by the State from the exploitation of natural resources located in the Region;
- the necessary funds allocated in keeping with the principle of national solidarity;
- proceeds from the Region's assets.

14. The State shall keep exclusive jurisdiction over the following in particular:

- the attributes of sovereignty, especially the flag, the national anthem and the currency;
- the attributes stemming from the constitutional and religious prerogatives of the King, as Commander of the Faithful and Guarantor of freedom of worship and of individual and collective freedoms;

- national security, external defense and defense of territorial integrity;
- external relations;
- the Kingdom's juridical order.

15. State responsibilities with respect to external relations shall be exercised in consultation with the Sahara autonomous Region for those matters which have a direct bearing on the prerogatives of the Region. The Sahara autonomous
Region may, in consultation with the Government, establish cooperation relations with foreign Regions to foster inter-regional dialogue and cooperation.

16. The powers of the State in the Sahara autonomous Region, as stipulated in paragraph 13 above, shall be exercised by a Representative of the Government.

17. Moreover, powers which are not specifically entrusted to a given party shall be exercised by common agreement, on the basis of the principle of subsidiarity.

18. The populations of the Sahara Autonomous Region shall be represented in Parliament and in the other national institutions. They shall take part in all national elections.

B. Bodies of the Region

19. The Parliament of the Sahara autonomous Region shall be made up of members elected by the various Sahrawi tribes, and of members elected by direct universal suffrage, by the Region's population. There shall be adequate representation of women in the Parliament of the Sahara autonomous Region.

20. Executive authority in the Sahara autonomous Region shall lie with a Head of Government, to be elected by the regional Parliament. He shall be invested by the King.
The Head of Government shall be the Representative of the State in the Region.

21. The Head of Government of the Sahara autonomous Region shall form the Region's Cabinet and appoint the administrators needed to exercise the powers devolving upon him, under the present autonomy Statute. He shall be answerable to the Region's Parliament.

22. Courts may be set up by the regional Parliament to give rulings on disputes arising from enforcement of norms enacted by the competent bodies of the Sahara autonomous Region. These courts shall give their rulings with complete independence, in the name of the King.

23. As the highest jurisdiction of the Sahara autonomous Region, the high regional court shall give final decisions regarding the interpretation of the Region's legislation, without prejudice to the powers of the Kingdom's Supreme Court or Constitutional Council.

24. Laws, regulations and court rulings issued by the bodies of the Sahara autonomous Region shall be consistent with the Region's autonomy Statute and with the Kingdom's Constitution.

25. The Region's populations shall enjoy all the guarantees afforded by the Moroccan Constitution in the area of human rights as they are universally recognized.

26. An Economic and Social Council shall be set up in the Sahara autonomous Region. It shall comprise representatives from economic, social, professional and community groups, as well as highly qualified figures.

III. Approval and implementation procedure for the autonomy statute

27. The Region's autonomy statute shall be the subject of negotiations and shall be submitted to the populations concerned in a free referendum. This referendum will constitute a free exercise, by these populations, of their right to self-determination, as per the provisions of international legality, the Charter of the United Nations and the resolutions of the General Assembly and the Security Council.

28. To this end, the parties pledge to work jointly and in good faith to foster this political solution and secure its approval by the Sahara populations.

29. Moreover, the Moroccan Constitution shall be amended and the autonomy Statute incorporated into it, in order to guarantee its sustainability and reflect its special place in the country's national juridical architecture.

30. The Kingdom of Morocco shall take all the necessary steps to ensure full integration, into the nation's fabric, of persons to be repatriated. This will be done in a manner which preserves their dignity and guarantees their security and the protection of their property.

31. To this end, the Kingdom of Morocco shall, in particular, declare a blanket amnesty, precluding any legal proceedings, arrest, detention, imprisonment or intimidation of any kind, based on facts covered by this amnesty.

32. Once the parties have agreed on the proposed autonomy, a Transitional Council composed of their representatives shall assist with repatriation, disarmament, demobilization and reintegration of armed elements who are outside the territory, as well as with any other action aimed at securing the approval and implementation of the present Statute, including elections.

33. Just like the international community, the Kingdom of Morocco firmly believes today that the solution to the Sahara dispute can only come from negotiations. Accordingly, the proposal it is submitting to the United Nations constitutes a real opportunity for initiating negotiations with a view to reaching a final solution to this dispute, in keeping with international legality, and on the basis of arrangements which are consistent with the goals and principles enshrined in the United Nations Charter.

34. In this respect, Morocco pledges to negotiate in good faith and in a constructive, open spirit to reach a final, mutually acceptable political solution to the dispute plaguing region. To this end, the Kingdom of Morocco is prepared to make a positive

contribution to creating an environment of trust which would contribute to the successful outcome of this initiative.

35. The Kingdom of Morocco hopes the other parties will appreciate the significance and scope of this proposal, realize its merit, and make a positive and constructive contribution to it. The Kingdom of Morocco is of the view that the momentum created by this initiative offers a historic chance to resolve this issue once and for all.

APPENDIX H
PROPOSAL OF THE FRENTE POLISARIO FOR A MUTUALLY ACCEPTABLE POLITICAL SOLUTION THAT PROVIDES FOR THE SELF-DETERMINATION OF THE PEOPLE OF WESTERN SAHARA

(Official translation)

I / The Conflict of Western Sahara is a decolonisation question:

1. Included since 1965 on the list of the Non-Self-Governing territories of the UN Decolonisation Committee, Western Sahara is a territory of which the decolonisation process has been interrupted by the Moroccan invasion and occupation of 1975 and which is based on the implementation of the General Assembly resolution 1514 (XV) regarding the Declaration on the Granting of Independence to Colonial Countries and Peoples.

2. The UN General Assembly and the Security Council have identified this conflict as a decolonisation conflict between the Kingdom of Morocco and the Frente POLISARIO whose settlement passes by the exercise by the Saharawi people of their right to self-determination.

3. Likewise, the International Court of Justice, at the request of the General Assembly has clearly ruled, in a legal opinion dated 16 October 1975, that “the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory”.

4. Furthermore, on 29 January 2002, at the request by the Security Council, the UN Legal Counsel clearly established that Morocco was not the administering power of

the territory, that the Madrid Agreement of 1975 dividing the territory between Morocco and Mauritania did not transfer any sovereignty to its signatories and, finally, that the status of Western Sahara, as Non-Self-Governing Territory, had not been affected by this agreement.

II / The solution of the conflict passes by the holding of a referendum on self-determination:

5. The question of Western Sahara having been identified by the International Community as a decolonisation question, the efforts aiming to settle it have consequently and naturally been guided by the objective of offering the people of this territory the opportunity to decide their future through a free and fair referendum on self-determination.

6. The Settlement Plan approved by the two parties to the conflict, the Kingdom of Morocco and the Frente POLISARIO, and by the Security Council in its resolutions 658 (1990) and 690 (1991), complemented by the Houston Agreements negotiated and signed in September 1997 by the Kingdom of Morocco and the Frente POLISARIO, under the auspices of James Baker III, Personal Envoy of the UN Secretary-General, and endorsed by the Security Council as well as the Peace Plan for Self-determination for the People of Western Sahara or Baker Plan approved by the Security council in its resolution 1495 (2003), all provide for the holding of a referendum on self-determination in Western Sahara. All these efforts failed because of the reneging of the Kingdom of Morocco on its international commitments.

III / Readiness of the Frente POLISARIO to negotiate with a view to holding the referendum on self-determination and the granting of post-referendum guarantees to Morocco and to Moroccan residents in Western Sahara:

7. The Frente POLISARIO that unilaterally declared a cease-fire which it has ever since respected scrupulously, and that accepted and implemented in good faith the Settlement Plan by virtue of which the United Nations Mission for the Referendum in Western Sahara (MINURSO) was deployed as well as the Houston Agreements, and that has honoured all the commitments it has undertaken by making concessions

sometimes painful in order to offer to the Saharawi people the opportunity to freely decide their destiny, reiterates solemnly its acceptance of Baker Plan and declares its readiness to negotiate directly with the Kingdom of Morocco, under the auspices of the United Nations, the modalities for implementing it as well as those relating to the holding of a genuine referendum on self-determination in Western Sahara in strict conformity with the spirit and letter of the UN General Assembly resolution 1514 (XV) and within the format envisaged in the framework of Baker Plan, namely the choice between independence, integration into the Kingdom of Morocco and self-governance.

8. The Frente POLISARIO is also committed to accepting the results of the referendum whatever they are and to already negotiate with the Kingdom of Morocco, under the auspices of the United Nations, the guarantees that it is prepared to grant to the Moroccan population residing in Western Sahara for 10 years as well as to the Kingdom of Morocco in the political, economic and security domains in the event that the referendum on self-determination would lead to independence.

9. The guarantees to be negotiated by the two parties would consist in:
9.1: the mutual recognition of and respect for the sovereignty, independence and territorial integrity of the two countries in accordance with the principle of the intangibility of the borders inherited from the independence period;

9.2: the granting of guarantees concerning the status and the rights and obligations of the Moroccan population in Western Sahara, including its participation in the political, economic and social life of the territory of Western Sahara. In this respect, the Saharawi State could grant the Saharawi nationality to any Moroccan citizen legally established in the territory that would apply for it;

9.3: the agreement on equitable and mutually advantageous arrangements permitting the development and the joint exploitation of the existing natural resources or those that could be discovered during a determined period of time;

9.4: the setting up of formulas of partnership and economic cooperation in different economic, commercial and financial sectors;

9.5: the renunciation by the two parties, on a reciprocal basis, of any compensation for the material destructions that have taken place since the beginning of the conflict in Western Sahara;

9.6: the conclusion of security arrangements with the Kingdom of Morocco as well as with the countries of the region that may be interested;

9.7: the commitment of the Saharawi State to work closely with the Kingdom of Morocco as well as with the other countries of the region with a view to bringing to conclusion the integration process of the Maghreb;

9.8: the readiness of the Saharawi State to participate with Morocco and the countries of the region in the maintenance of peace, stability and security of the whole region in the face of the different threats that could target it.
Likewise, the Saharawi State would positively consider any request from the United Nations and the African Union to participate in peace-keeping operations.

10. The Frente POLISARIO is ready, under the auspices of the United Nations and with the approval and the support of the Security Council, to enter in direct negotiations with the Kingdom of Morocco on the basis of the aforementioned parameters with a view to reaching a just, lasting and mutually acceptable political solution that provides for the self-determination of the people of Western Sahara in conformity with the relevant resolutions of the United Nations mainly the General Assembly resolution 1514 (XV), thus bringing about peace, stability and prosperity for the whole region of the Maghreb.

BIOGRAPHY

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