Western Sahara Dispute and the Mediterranean-From The Political Legacy of *Uti Possidetis* to Autonomy

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Abstract: The debate on territorial autonomous status for Western Sahara that started in 2001 can be seen as a promising breakthrough in the long-drawn-out conflict over Western Sahara territory and regional security especially in the Mediterranean region. Nonetheless, this case should also be remembered as reflecting ambiguities and inconsistencies within the international law of decolonization and self-determination. It replicates the differences of international bodies in dealing with issues related to territorial state sovereignty and the application of the *uti possidetis*, which provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence. Currently, the debate over the Western Sahara illustrates the gradual fading of the legal paradigm based upon the rule of *uti possedetis* and the emergence of autonomy as realistic solution based upon conflict resolution approach. The Western Sahara issue remains at the heart of the dismantled Maghreb Union and the reason behind Morocco’s withdrawal from the African Organisation Unity, the predecessor of the African Union. It has impacted the relations among a number of countries especially in Africa, and is approached divisively among the European Union member states. It will most probably constitute a platform for *realpolitik* within the newly established Union for the Mediterranean. Focusing on the Western Sahara case, because it represents the heart of most regional policies addressing the Maghreb and the Mediterranean, this research argues that the pillars in the contestation of the right to self determination remain obscure (*lex obscura*). The international Court of Justice has not developed common criteria regarding the evidence of state sovereignty nor does the international community. In particular, the United Nations and the European Union have not established yet an overall clear position respective to the right of self-determination and decolonization. This research argues that cases of self-determination are at the nexus of the paradoxical international law related to decolonization and self-determination that has left territorial disputes to the power of *realpolitik* to which only a shift to political solution within the conflict resolution approach is likely. Accordingly, there is a need for a coherent approach

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among states in the Mediterranean area regarding the Western Sahara dispute. Such approach must address the regional concerns and global security based upon human rights and democracy.

The research draws upon the legal analysis of the position of the International Court of Justice (ICJ), comparatively to the former Permanent Court of International Justice (PCIJ) and Permanent Court of Arbitration (PCA) regarding territorial sovereignty and self-determination, as well as the application of the rule of *uti possidetis*. It will also address the extra-legal aspect of the dispute in tracking the various political debates on the decolonization, right of self-determination and autonomy. It will suggest a framework in considering Western Sahara case through a Mediterranean approach. The framework focuses upon alternative solution centered on democratic governance and meaningful human rights. It suggests a justice-based conception that emphasizes on peoples’ rights, arguing that unless an entity meets certain minimal standards of justice, human rights and democracy, it ought not to be regarded as a primary member of international society.

1. Introduction

The advisory opinion of the International Court of Justice (ICJ) on Western Sahara case stands out as one of the major international jurisprudential decisions on the meaning of the right to self-determination and decolonisation. The decision has entrenched its importance as an innovation in the explanation of decolonization and self-determination. It could be remembered for its legal innovation through its rare insight into the clash of the political and legal perception of the contested conceptions of state territorial integrity and those impinging the right of indigenous peoples.

For more than three decades, the Western Sahara dispute remains at the crossroad of various legal interpretations and political maneuvers that freeze a yet definite agreed upon solution. The United Nations Peace Plan has been initiated since 1991 with U.N Security Council Resolution 690. It established the United Nations Mission for the Organization of a Referendum in the Western Sahara (MINURSO) with the chance that a referendum for self-determination, as ordered by the International Court of Justice, will be held. However, it seems that the possibility for such an outcome is unlikely as long as it initiates the possibility of the territorial independence of Western Sahara. This is primarily due to the fact that any referendum that includes the possibility of territorial independence needs stronger grounds than an inconsistent legal process regarding the applicability of a controversial international law of self-determination.
Nowadays, we are witnessing an attempt to advance an approach to resolve the Western Sahara dispute. The UN Secretary-General’s report of June 2001 proposed the option of limited autonomy of Western Sahara under the Moroccan sovereignty.

The juridical and political complexities and the elusiveness surrounding the case of Western Sahara shoved the UN to persuade the parties to consider an alternative political solution 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 in comparison to its initial stand. The Popular Front for the Liberation of Saquiat Al Hamra

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2 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.

3 The use of the word “parties” refers to the definition given by Uppsala Project, which distinguishes between the primary parties in the conflict, secondary supporting non-warring parties and secondary warring parties. In this regard, the research will address the parties that were involved whether as primary parties, namely Morocco and Polisario, or secondary supporting parties, namely Algeria. The research will exclude Mauritania that voluntarily withdrew from the conflict living its claimed part of Western Sahara to be under the sovereignty of Morocco, after a peace agreement with Morocco in 1979. The research will also exclude Spain which current position is similar to most European countries. 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. Note that – as is the case regarding parties in general – we are looking for organizations, however loosely organized, and not individuals. Support may come from neighbouring 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 defines secondary warring party as the party that enters a conflict with troops to actively support one of the sides in the conflict. The Project further explains that “a secondary warring party is always a state actor who shares the position in the incompatibility with one of the sides in the conflict. A secondary warring party does not need to meet the 25 battle-related deaths criteria to be included in the database. An active troop participation of their forces is enough”.

and Rio del Oro (POLISARIO) has also submitted a proposal that contains the autonomy but with the possibility of territorial independence.

The aim of this paper is to unveil the inconsistencies of the international legal process regarding the Western Sahara Dispute, as well as the role of the struggle to power and realpolitik in shaping the identification of the concerned parties, their arguments and discourses. Also, the research aims to scrutinize some of the studies that have been conducted on the topic, which remain scattered and mostly lacking the foundation on which the dispute is to be analyzed. This foundation relies on the framework that is articulated in debating state boundaries and frontiers, which differs from the debates on the dichotomy of internal versus external self-determination that appears in the most scholarly literature on the Western Sahara dispute.

My argument proceeds in four parts. After a brief presentation of the historical contours of the dispute, the paper will review the genealogy and the legal foundation of the doctrine of uti possidetis. The following part will discuss the 1975 decision of the International Court of Justice in assessing the territoriality of Western Sahara. Finally, this paper will suggest some recommendations that address the much needed role of the newly established Union for the Mediterranean in easing the deadlock of the dispute.

My purpose is thus to marry the conceptual literature on political boundaries fixture and the international law related to territorial disputes with conflict resolution approaches as means to overcome the inconsistencies of Courts and elusiveness of laws.

2. Background of the Dispute
Morocco estimates its national territory to be about 740,000 square kilometers. The international community counts it to be about 466,000 Km square. The difference represents the contested part of the Western Sahara land. For more than three decades, this land that has been manily covered by desert and a population that adopted a nomadic lifestyle has been in the agenda of the United Nations. Western Sahara is considered rich in fish, phosphates (and probably oil)\(^4\) that one can believe \textit{a priori} that the

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\(^4\) Morocco has not yet discovered oil even though there is much talk about the possible oil reserves in Western Sahara. Toby Shelley observed that 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.
natural resources of the land, as well as its geopolitical position, have been the foremost interest in the area in question.

The territory now known as Western Sahara was under Spanish colonization in 1884. In the mid-1970s, under pressures from Morocco and Mauritania, Spain was forced to decolonize the region and decided to hold a referendum for Western Saharans so that they can 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 and based upon the contestation of their “historic rights”.

Morocco has called 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 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” (Western Sahara, 1975).

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).

5 During the first decade of the 20th century, after an agreement among the European colonial powers at the Berlin Conference in 1884 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.

6 The terms “Saharan” and “Sahrawi” are used to refer the same meaning. They both refer to the member(s) of Western Sahara population.
On 6 November 1975, Morocco launched a “Green March” (Almassira Al Khadra) of approximately 350,000 unarmed civilians to the Western Sahara to take back the territory still under the Spanish occupation. Subsequently, and after the Madrid Accord in 1976, Spain agreed to withdraw and transfer the region to a shared Moroccan and Mauritanian administration. The Popular Front for the Liberation of Saqiat Al Hamra and Rio del Oro (POLISARIO) founded in 1974 and seeking independence, militarily resisted the Moroccan and Mauritanian presence in the territory. With the support of Algeria, the Polisario established its Headquarters in Tindouf, in southwest Algeria, and founded the Sahrawi Arab Democratic Republic (SADR) in 1976.

During the armed conflict, Mauritania decided to sign a Peace Treaty with the Polisario and abandon 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). It called for a referendum to offer Sahrawi people a choice between independence and integration with Morocco. Morocco and the Polisario have 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 a “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

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7 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.

8 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, the two parties to the interstate conflict agreed on a demilitarized zone and Morocco recognized the Algerian border in exchange for joint mineral exploitation in Tindouf.

9 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.
consulted separately during the talks. During the previous rounds of discussions, the parties continued to express strong differences on the fundamental questions at stake.

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

### 3. Conceptual Debate on the Rule of *Uti Possidetis*: Legalization of Colonial Boundaries

The Western Sahara dispute reflects what Georges Scelle called the “obsession du territoire” (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” and are extra-legally commanded and hold (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* has been inherited from the Roman law and has been considered by some scholars as a principle of international law that has been used to formalize territorial situation by ensuring that states emerging from decolonization inherit the colonial administrative boundaries that they held at the time of their independence. 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 has seen the OAU resolution as a further evidence of the role of *uti possidetis* in the process of decolonization.

\textsuperscript{10} The displacement of Moroccan citizens who were residing in Algeria was ordered by the Former Algerian President Boumediane.
However, the possibility for the application of *uti possidetis* is closely related to the absence of another discourse of decolonization, also inherited from the Roman law and which refers to *Terra nullius*. In brief, the *uti possidetis* applied only to territories that were not considered as *Terra nullius* (a land belonging to nobody), and has not been related in any case to the degree of development regarding the population of a given territory. Such population retains the right to self-determination as a process for decolonization as long as the territory is not classified as a *Terra nullius*.

It is in these lines that the conceptual framework of this paper will be developed. In view of that, it is necessary to analyze the principle of *uti possidetis* and how it applied to the decolonization in Africa. The second part of the framework will address the juxtaposition between the application of the *uti possidetis* and people’s right to self-determination.

The origins of *uti possidetis* can be traced back to the Roman civil law. It was used as a temporary solution to litigations over propriety. In case of parties’ litigation over the ownership of a real propriety, the Roman edict issued by the praetor or administrative of justice would grant a provisional possession to the party who had the material possession of the land during the litigation. The possession of the land must not have 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 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* has been 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* has been changed from private land disputes to claims of state’s territorial sovereignty. Second, and most importantly, the status of the rule has been shifted from a provisional to permanent one. Consequently, 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 paper is deemed to understand its evolution and its subsequent interpretation as a rule of international law.

In international law, the principle of *uti possidetis* has been established to determine the frontiers of newly independent states. These frontiers had to follow the boundaries inherited from the colonial territories from which they emerged. The principle was confirmed by UN Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, and the practice of *uti possidetis* began in parallel to its juxtaposition to peoples’ self-determination in Latin America. During the nineteenth century, the Creoles struggle for their independence from their Spanish ‘brethren’. According to Benedict Anderson (1991, 56-59), the newly independent states in Latin America formed a political allegiance to the administrative units of the Spanish colonialism. In other words, the Creoles have adopted the rule 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. The leaders of the new republics did not take time to start codifying the *uti possidetis* into domestic law and treaties (Ratner 1996, 594). As example, this was the case of the Venezuelan Constitution after the 1830 separation from Gran Columbia.

It is clear that *uti possidetis* in Latin America received a remarkable acceptance among the new republics, however, its scope and effects remain blurred. The Latin American states have agreed upon 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 its 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).

In addition to the blurred scope and effects of *uti possidetis* in Latin America, it is crucial to mention, in line with Sorel and Mehdi (1994) observations that *uti possidetis* could not resolve the issue of boundaries which demarcation was unclear due to the ignorance of the local geography, nor 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 mutual arrangements.

Some scholars have raised the issue related the exact meaning of *uti possidetis* in Latin America. From the scholastic debate two terms have emerged: *uti possidetis juris* and *uti possidetis facto*. 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 through legal documents, but without excluding the possibility in which *uti possidetis facto* could also be applied. For instance, *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”.

In Africa, As much as one can welcome the process of decolonization, 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 the frontiers in Africa were zones through which tribes and clans crossed from a region to another, and boundaries 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 contestations that lead to the recognition by colonial states of zones of
influence (Ratner 1996, 595). These zones of influence became defined allocations through specific delimitations based on experience rather than specific knowledge of the local inhabitants or geography (Touval 1972). The colonial European powers draw lines and boundaries to reduce armed conflicts among themselves. Herbst (1989) considered that in that sense alone were they rational.

After the independence, the ambitions of the new African states were to prevent what has been called the “black imperialism”. They have been faced with two approaches: either the reconstruction of boundaries to rectify past injustices or the acceptance of inherited colonial lines. The OAU pronounced in the 1963 Cairo Declaration to “the respect the frontiers existing on the achievement of independence”. The ICJ considered this pronouncement as a manifestation of the rule of *uti possidetis*, which may confirm that *uti possidetis* is a general principle of international law. In 1977, the former Secretary-General of the OAU Willian Etiki Mboumoua stated that “the respect of boundaries inherited from colonization is not a principle which is sacrosanct. It is certainly an irreplaceable working basis, but one which will be overtaken or revised in the context of a vast consensus, for in the long term, the right of self-determination must be taken into account” (cited in Lalonde 2002, 136).

The juxtaposition of the rule of *uti possidetis* as it was perceived in Africa, and the right to self-determination in its liberal interpretation formed the core dilemma that the ICJ had to deal with in the Western Sahara case. The case represents an example in which the interpretation of rules of international law can depend on case-to-case basis rather than a general application of international legal principles.

### 4. Inconsistencies within the International Judicial Processes: Case of Western Sahara

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:

1. Was Western Sahara at the time of the Spanish colonization a *terra nullius*, meaning a territory belonging to no one?
2. What were the legal ties between Western Sahara and the Kingdom of Morocco and the Mauritanian entity?

In answering the first question, the Court stated that the legal approach in determining if the territory was a *Terra nullius* at the time of colonization is to look at the territorial issue from the “occupation” perspective rather
than by means of cession or succession. In other words, the Court denied that Spain had the right to occupation because it had signed treaties with Sahrawi tribes. As Roussellier (2007, 57) pointed out, the Court considered that even official agreed upon hand-over by the parties on the territory should not be considered as a proof of “occupation” of a *terra nullius*. The Court considered that the capacity of the local tribes in entering into agreements is a sufficient indication of the political and social organisation of these tribes, which suppress any doubt that the territory was not a *Terra nullius* (Western Sahara, 1975).

Regarding the second question, the Court has relied mainly on two precedents: 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. The Court found in the PCIJ that sovereignty was defined 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 supplemented by the proven records of international treaties independently from the internal display of authority *per se* (Roussellier 2007, 59).

As 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” (Rousselier 2007, 60). The principle was also applied by ICJ in the *Minquies and Ecrehos* in 1953. However, the ICJ did not apply this principle in the Western Sahara case since it only recognised ties of allegiance between some tribes from one side, and Morocco and Mauritania from the other side.

The Court did not recognize that these ties of allegiance constituted territorial sovereignty over the territory. This is mainly due to the fact that the ICJ has conservatively applied the principle of *uti Possidetis*, which provides that states emerging from decolonization shall presumptively inherit the colonial administrative frontiers that they held at the time of independence. Controversially, the ICJ in the Western Sahara case did not set the basis of its decision, nor did it mention its reference to the principle of *uti Possidetis*. Whether the *uti Possidetis* had to be applied to the case or not, and whether the nomadic character of Saharans would hinder the essence of their consultation *vis-à-vis* the status of the territory, the Court
took the charge of assessing the contestations of territorial sovereignty and referred to the definition of the territorial sovereignty under the PCIJ and PCA. The ICJ did not strictly adhere to the PCIJ’s approach in Eastern Greenland, nor did it define clear criteria on how effective sovereignty could be assessed. In addition, The Court did not rely on the relativism of the PCA in Island of Palmas in waving at a certain degree the assessment of the evidence of effective and continuous display of state’s exercise of authority. The links to the suzerainty between the natives of the Island of Palmas and the Netherlands are comparable to the ties of allegiance between some tribes in Western Sahara and the Moroccan Sultan (Roussellier 2007, 70). Instead, 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.

Basically, the ICJ lacked consistent and objective criteria in evaluating the evidence of state sovereignty. In Western Sahara case, the Court sat legal standards that Morocco could not fulfill even on the Moroccan legitimate and undisputed provinces. Furthermore, and according to these standards, no state in the Middle East and North Africa, nor many Western countries, especially the European states in the Mediterranean region in which monarchs unified their states during the sixteenth and seventeenth centuries, would be considered as legitimate political entities. The ICJ’s approach in Western Sahara case draws attention to its exceptional approach in assessing territorial sovereignty, which constitute perhaps an indicator of its willingness to diffuse political sensitivities among the parties, regional and international actors. Currently, the UN and the EU are advocating for a political solution to the dispute, which underscores the fading of the mitigated legal paradigm of the case set forth by the ICJ.

5. Recommendations: Shifting from Legal Paradigm to a Regional Mediterranean Policy on Conflict Resolutions

Decolonization through pre-existing colonial boundaries in the form of *uti possidetis* is clearly the easiest method in determining the boundaries of newly independent states. However, the principle of *uti possidetis* was originally included in international law because it stemmed from the arguments that it would reduce the prospects of armed conflicts. In the absence of such policy, all borders would be open to disputes and
eventually armed conflicts. In Africa, the European states and indigenous elites opted for upholding the colonial lines as the most feasible method for “speedy decolonization” (Ratner 1996, 595). One year after the establishment of the OAU the predecessor of the African Union (AU), the African Head of states and governments signed the Cairo Declaration with the agreement “to respect the frontiers existing on their achievement of independence” (OAU, resolution 1964). However, the acceptance of the *uti possidetis* should not induce 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 did not rule out the peaceful and mutually agreed upon boundary adjustments in Europe.

It is in this line that the issue of Western Sahara should be addressed. The Western Sahara cannot be resolved on the basis of the UN conservative approach of decolonization through colonial fixed frontiers (*uti possidetis*), and to what Franck referred to as “idiot rule” (cited in Ratner 1996, 617). Also, and according to international Crisis Group (ICG 2007), by defining the dispute in terms of self-determination with the possibility of territorial independence, the UN has long endorsed the POLISARIO and Algeria’s view on the question, while in this case the prospect for sustainable agreement, the parties must be enabled to move away from their longstanding positions. The objective must be the promotion of negotiations between the parties with the prospect of meaningful human rights to resolve the conflict rather than securing a mitigated ICJ call for self-determination with territorial independence of Western Sahara as an option (ICG 2007).

The promotion of an agreed upon solution is what the UN General Assembly is advocating in its Resolution 1813 adopted in 2008. The resolution endorses that “realism and a spirit of compromise by the parties are essential to maintain the momentum of the process of negotiation” (UNGA 2008). However, to promote meaningful negotiations, it is crucial to identify the parties in the dispute and their respective needs and interests.
Since 1975, the identification of the parties in the Western Sahara conflict has been contestably addressed. In the ICJ case, as well as in the UN, AU and EU discourses, the parties in the conflict have been identified under two different discourses: the “concerned parties” of which there are two, namely Morocco and POLISARIO, and the “interested parties”, namely Mauritania and Algeria that are somehow bound to be affected by the dispute. The distinction has enabled Algeria to justify support of 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. Many scholars and experts have addressed Algeria’s rivalry to Morocco for a constant competition for influence in the Maghreb region. Regarding the Western Sahara dispute, it has been mentioned that the conflict represents a geopolitical dispute between Morocco and Algeria (Zoubir and Gambier 2004, pp. 49-77).

Referring to the use of the word “parties” in the conflict, Uppsala Project distinguishes between the primary parties in the conflict, secondary supporting non-warring parties and secondary warring parties. 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 been supporting Polisario. 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 top of Polisario and how the Algerian government has been supporting Polisario. He stated: “we could not refuse them (Algerian Government) nothing: they were giving us everything or almost everything”.

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of territorial independence is a longstanding position of Algeria. Decolonization and self-determination played a crucial role in Algeria’s own independence and its struggle of independence explains in part its support for the right to self-determination. However, in the Western Sahara case and according to ICG (2007, 12), the emphasis of the UN and international community has led to obscure that Algeria’s position has mainly rested on the principle of \textit{uti possedetis}. Accordingly, the emphasis on self-determination represents only one aspect of the dispute. It follows that only Morocco and Polisario\textsuperscript{12} are concerned parties. However, from the perspective of the applicability of the \textit{uti Possidetis}, the dispute has three concerned parties, with the inclusion of Algeria. Since 1975, “the international law and the UN have failed to operate coherently and effectively in accordance with the self-determination” (ICG 2007, 13). Algeria has long articulated the principle of stability of frontiers inherited from colonial power, but the UN has always defined the dispute as a matter of self-determination only. Consequently, a significant aspect of Algeria’s incompatibility in the dispute, its position and behaviour has been obscured and thus hindered progress towards resolution of the conflict. The role of the Union for the Mediterranean is to extend the narrowed UN definition of the conflict by focusing on the parties incompatibilities, and pressure all the parties, namely Morocco, Polisario and Algeria to negotiate a political solution.

The approach to the territoriality issue related to Western Sahara that is advocated in this paper is based upon the reality that territorial sovereignty is legal and political bedrock and that consequently is not sacrosanct. Whether or not a state’s or a group of people’s contestation to a territory ought to be given the special emphasis and high priority that the UN, AU and the EU associate with rights, must also depend upon a number of moral considerations. Situations can change and group of people, or states’s failure to protect citizens from injustice can void previously valid title (Buchanan 1991, 154). In other words, the international relations and politics must be based upon not only peace but also justice from peoples’ standpoint. Accordingly, justice can only exist when peoples are contributors to rules settings. The issues of human rights, political representation, respect of diversity and minorities’ rights represent the minimum standards of justice for state formation. The Western Sahara issue created a chauvinistic national consensus to counter Algeria’s rivalry in the Maghreb region. Peoples’ rights have been trapped in this rivalry for

\textsuperscript{12} 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.
over thirty three years. The human rights of Sahrawis population would be better by an international and regional advocacy and support for democratic rights instead of promoting elusive rights for territorial independence. Many scholars argue that the notion of autonomy has been considered as an essential element in democratic governance, which can be operated in pluralist societies more effectively. International treaties, the League of Nations and the constitutional practice of the States have been instrumental in moulding the notion of autonomy (Welhengama 2000, 97). 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.

Autonomy has long been a popular subject amongst scholars in the 19th century and early 20th Century and it has been used as an efficient tool for territorial conflict resolutions. 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 (1960 cited in Welhengama 2000, 98) “the authority to govern, to administer and to judge”. As legal concept, autonomy was even questioned if it would constitute a legal norm of international law. Special Rapporteur Asbjorn Eide (1993), clarifying the UN practice and the position of international law, admits the possibility that autonomy could evolve as general right through instruments relating to minority and indigenous peoples’ rights, the rights of UN Declaration on Minorities or Universal Declaration on the Rights of Indigenous Peoples. The Article 4 of the UN declaration on the Rights of Indigenous Peoples that was adopted by the General Assembly on 13 September 2007 states:

13 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 2000, 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.
“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”. The Declaration confirms that autonomy is rising to be a principle of
international law and self-determination is more perceived on its internal aspect.

The recent proposal of Morocco regarding the establishment of “Sahara autonomous region” with measure for self-government within the framework of Morocco’s sovereignty is now on the table of negotiation. The current deadlock is the insistence of Polisario and Algeria on including the possibility of territorial independence as an outcome of referendum, which could create a crisis in Morocco and destabilize the region. For the last fifteen years, Western Sahara has been a militarily undisputed part of Morocco. The Uppsala Project and James Baker consider the dispute as a low-level conflict “with no action forcing event in the Western Sahara conflict”. Accordingly, the Western Sahara is no longer a priority in the agenda of the Security Council and any future recourse whether by Polisario or Algeria, and members of the Security Council in reversing the current “facts on the ground” are ruled out (ICG 2007, 17). Therefore, negotiations of an adequate type and degree of autonomy is what the UN, EU, Union for the Mediterranean and the concerned parties would have to emphasis upon, with special focus on people’s human rights, democracy and regional security.

Conclusion
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. The Western Sahara dispute represents one of those cases in which the international law was challenged in setting criteria regarding the evidence of state sovereignty. In a sense, international law like any other law is a history that renders more ardent knowledge of the historical development of the law. The Western Sahara dispute, as a case of self-determination, requires harmonization with pre-existing law on acquisition of territory and the essence of the application of the rule of uti possidetis. Until now, the dispute epitomizes the initial political alliance structures that could affect the justice and legitimacy. Self-determination is a great deal of complex processes of international law, and at times, its external aspect leading to territorial independence might hamper the goal to enable individuals and
groups to realize their human rights. Therefore, the complexity of the territorial situations cannot be wished without the internal aspect of self-determination based upon democratic governance. It is in this line that the Union for the Mediterranean, building on its fresh credibility, needs to build a coherent policy on self-determination for the Maghreb and Middle East region. Until now, the current member states of the Union for the Mediterranean have scattered positions vis-à-vis territorial disputes in the region. Such diverse positions represent a challenge for the newly established Union in the Mediterranean region. The time has come to face the challenge. An effective and just Union for the Mediterranean policy can benefit populations through an effective self-government in the form of autonomy, because it represents a sound alternative solution, as long as the focus draws upon human rights, democracy and regional security.

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