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The Western Sahara Conflict
in Light of its International Law
Implications

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*To my Mom, to whom I owe everything, with heartfelt gratitude.
To all the extraordinary women that I was lucky enough to meet
in Morocco, never stop fighting for freedom.*

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1 The background of the conflict in Western Sahara

Western Sahara is a 266000 km² wide territory of Northwestern Africa, overlooking the Atlantic Ocean and including a vast, almost entirely desert, inland. On the political level, Western Sahara is currently the largest non-autonomous territory in the world¹: its Atlantic extremity, situated on the border between Morocco, Mauritania and Algeria, represents a vast territory of war.

The conflict has been going on for over forty years and seems to have been forgotten by the world public opinion. Currently, the parties in the dispute are the State of Morocco and the *frente* Polisario; but the history of the litigation has undergone several passages over the years and has had several different protagonists. In the course of this analysis concerning the implications of international law in the conflict, we will see the different steps that led to the current situation and we will evaluate the interests at stake.

The attractiveness of the territory, in fact, lies in the presence of mineral resources along the coasts; especially phosphates². Simplifying the succession of events, which will be explored later, it is possible to divide the background of the dispute into three historical periods.

The first goes from prehistory until the arrival of the Arabs and sees the territory being inhabited by nomadic populations which will merge, in a second period, with tribes of Arab origin, thus giving rise to what would later become the Saharawi people. In a third period, beginning in the fifteenth century, Spain has established agreements with the chiefs of the tribes born from the fusion between nomads and Arabs, for the purpose of making the territory a Spanish colony. From the Berlin conference (1884-1885) onwards, Western Sahara formally becomes a Spanish colony, thus taking the name of Spanish Sahara.

The real dispute begins before the end of decolonization, in 1975, with the Green March: a strategic mass demonstration organized and implemented by Morocco to gain control over the territory. Following decolonization, the territory was occupied by Morocco and Mauritania; in fact, both States were claiming rights to this. Following the withdrawal of Mauritanian troops, Morocco remained the only State occupying the territory, which is still contended by it and the Polisario. The latter constitutes the political entity representing the Saharawi people and is supported and hosted by Algeria.

It is easy to see how, within the dispute over Western Sahara, numerous factors come into play. In this first chapter is reported the history of the tribes that inhabited the territory before colonization in order to understand how the fragmentation of the latter and their nomadic nature contributed to create ambiguity about who really constitutes the people which has the right to politically control the territory. This ambiguity is further accentuated after the arrival of the Arabs since the latter established linkages with the tribes, which are at the origin of Moroccan claims on the territory.

¹ G. PAPALLO, *Il conflitto Dimenticato nel Deserto del Sahara occidentale*, in *Opinio Juris*, September 3 2018, available at www.opiniojuris.it.

² The natural resources of the territory will be deepened in paragraph 1.4.

Afterwards, there is a narration of the Spanish colonization to which the conflict has followed and which gave rise to Resolution 3292³ adopted by the General Assembly to establish whether or not the territory represented *terrae nullius* at the time of colonization. Finally, there is an evaluation of natural resources present in the region; these, as anticipated, are at the basis of the economic interests lying behind the dispute.

1.1 The prehistory of Western Sahara and the passage from fragmentation to the Saharawi people

Archaeological studies have shown that in the Neolithic age the Sahara was not a desert environment, it was rather characterized by dense vegetation. There was, indeed, a lush savannah that an ecological disaster at the end of 3000 BC led to desertification.

The sandy expanse is the most common aspect of the Sahara desert, its formation is linked to the action of ancient, large waterways. The clouds that come from the Mediterranean, are stopped by the Atlas mountain ranges which subtract their dampness canceling the rains. Years can pass without a drop of rain touching the ground: the Saharan has never known the benefit of a regular rain. However, there are hurricanes, which are as violent as they are rare. In the desert there is a constant struggle to survive against reptiles, insects, droughts and bad weather; the oases – the only points where water emerges from the subsoil - are separated from each other by immense distances⁴.

The wild and hostile nature of the territory explains why it is so hardly habitable. In fact, the peoples who came there and who inhabited it over the centuries have been mostly nomadic peoples. The Berber nomads migrated to the area around 1000 BC, they were divided into two main groups: the *Zanata* and the *Sanhaja*; the former were more sedentary and controlled the oases of the Northern desert, the latter were nomads dedicated to sheep farming and agriculture in a hostile environment, they led the black populations that inhabited the Southern desert to migrate to the South of the Senegal river⁵. The *Sanhaja* were also named “cloud hunters”⁶ because of the nomadic nature which characterized them; their subsistence was helped by camels and dromedaries, also known as the ‘desert ships’: they are pack animals, means, units of exchange, an instrument of war, the foundations of their diet and a source of leather⁷.

The *Sanhaja* and the *Zenata* were divided into fragmented tribes of a belligerent nature, among the various tribes there were mostly hostile relations also because there were no over-tribal forms of exercise of power that unified the people, the nomadic nature of which further contributed to accentuating tribal divisions.

The fact itself that the tribes were so fragmented helped to favor the invasion by other peoples. However, the very presence of external forces, represented by the invasions, meant that these initially

³ Resolution 3292 (XXIX) of the General Assembly of 13 December 1974, on the question of Spanish Sahara.

⁴ A FIORE, *Cos'è il Sahara*, Turin, 1972, p. 24-25.

⁵ M. GALEAZZI, *La Questione del Sahara Occidentale, Profilo Storico e Documentazione*, Rome, 1985, p.13.

⁶ T. HODGES, *The Western Sahara File*, in *Third World Quarterly*, 1984, p.74-76.

⁷ *Ibidem*.

fragmented tribal organizations *became united against a common enemy and by a common interest related to sovereignty* to be exercised in the territory in order to prevent the establishment of foreign settlers.

As far as concerns the Saharawi population, in fact, the unifying elements of the society consist mainly of two external shocks: the arrival of the Arabs and colonization. These two events have slowly led to the birth of an identity and a collective feeling, which will spill over into the emergence of the Saharawi people⁸. Before the colonization, indeed, the arrival of the Arabs led to the creation of the first nucleus of Saharawis.

1.2 The region before colonization: the arrival of the Arabs

If the situation on the ground in Western Sahara remains unchanged since 1947, the reasons behind troubles in resolving the conflict are definitively rooted also in the history that precedes it. It is difficult, in fact, to reconstruct the oldest history of the territory and to determine the relations between it and the neighboring states, particularly Morocco. We know that the first Arab wave arrives in Northern Africa in the VII century and leads, in the XI century, to the establishment of the empire of the Moravids in the Maghreb⁹.

Since we have found that, in order to properly evaluate the issue, it is fundamental to understand how the Saharawi national identity has developed, we must mention that, even though the empire of the Moravids lasted only half a century, it brought the nomad tribes for the first time to develop the dimension of community.

In the XII century, a second Arab wave is characterized by the invasion of the Maqil Arabs coming from Yemen. It will further contribute to the formation of the aforementioned community dimension mainly because a Maqil fraction, called *Bani Hasan*, emigrated to Western Sahara and merged with the pre-existing *Sanhaja* and *Zenata* tribes, thus forming the first embryo of what will then become the Saharawi people.

Indeed, most researchers agree that the two main Berber tribes and the Yemeni tribe of *Bani Hasan* constitute the genealogical ancestors of the Saharawi people¹⁰: thanks to the establishment of family ties, a fusion between the local tribes and the Arab populations took place. Adherence to Islam confers a new strength to the community and makes it possible to achieve greater unity.

The cultural elements assimilated following the Arab invasion are numerous, but it is important to note that, over the centuries, *there has never been a real extension of Arab domination over the territory of Western Sahara*. Despite the numerous expeditions carried out by the sultans during the 16th century, indeed, a stable and total dominion was never guaranteed. One can and instead refer to the influence that the sultanate has had on the region and to the linkage that has been created between it and the Saharawi tribes over the centuries¹¹.

⁸ In this regard, in the following paragraph, and particularly in ch.3, we will discuss how the existence of a collective identity legitimizes the applicability of the Principle of Self-determination.

⁹ C. BONTEMS, *La guerre du Sahara Occidental*, Paris, 1984, p. 224.

¹⁰ S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.21.

¹¹ M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, Turin, 2017, p.5.

The issue, however, is still debated: Morocco and Mauritania have for long vaunted linkages with the territory which, despite contrasting among them, are still supported by the two parties. Is certainly feasible that, being nomad the tribes inhabiting the territory of Western Sahara, ethnical and cultural linkages with the neighboring populations were created.

1.2.1 The influence of the sultanate in the region

The people born from the fusion between the Berber tribes with the *Bani Hasan* tribe, spoke an Arabic dialect called *Hassanya*. The Saharawi have taken from the Maqil Arabs the language and Islamic religion, they share with them elements of the social structure and traditions. This process has contributed to make a highly fragmented society more cohesive from a social and cultural point of view.

If, on the one hand, the elements in common with the then Moroccan sultanate are at the basis of the State's claims on the territory inhabited by the Saharawi people, on the other the latter has always maintained its autonomy and independence by refusing to submit both to the sultanate of Morocco and to the emirs of Mauritania¹².

The external event of the formation of the sultanate has indeed allowed the tribes to unite furtherly in order to create a more cohesive society against a common enemy. This cohesion generated the failure of attempts by the sultan to appropriate the territory of Western Sahara, which was fundamental for the control of trans-Saharan trade.

From the late nineteenth century, however, there were tribes who expressed their bond of loyalty (called *bai'a*) to the Moroccan sultans¹³. This moment represents a dark spot in the history of Western Sahara since Morocco will draw from the *bai'a* the bases of its claims on the territory. According to Islamic law, in fact, this constraint entails submission and, importantly, *the exercise of sovereignty*. After the expressed recognition of sovereignty of the sultan, these tribes ended up undergoing the attraction of it.

Despite this, however, there was not a political control of the king over the territory: he did exercise religious authority, but the tribes were still politically autonomous. However, the expansionist aims of the French who looked to the territory of Algeria from 1830, pushed the sultan to appoint *caids*, or royal officials, at the tribal level. The presence of *caids* will then become one more element invoked by Morocco to further enhance the vaunted links with the territory¹⁴.

¹² An answer to the question concerning the existence of legal ties between Morocco and Western Sahara is given by the General Assembly Resolution 3292 (XXIX) of 13 December 1974, on the question of Ifni and Spanish Sahara; explained in detail throughout paragraph 1.3.1.

¹³ *Ibidem*.

¹⁴ M. GALEAZZI, *La Questione del Sahara Occidentale, Profilo Storico e Documentazione*, Rome, 1985, p.15.

1.3 The Spanish colonization

Since the beginning of the fifteenth century, the Western powers have shown interest in the North African area mainly because it had a strategic importance for both the Atlantic and the Mediterranean trade. At first, the Portuguese reached the Maghreb in 1415, followed by the Spaniards in 1497 then, in 1574, Sultan Muhammad al Madi, chased the Portuguese thanks to an alliance with the British.

Madrid began to look at Western Sahara in 1881, with the establishment of a mercantile enterprise at Villa Cisneros (currently Dakhla). The Spanish settled on the territory because this one had for Spain a strategic value of coverage of the Canary Islands. The settlement began with double agreements with the Sultan on one side and with the heads of the tribes on the other, for the construction of fishmongers on the coasts of Western Sahara.

In 1884, at the Berlin conference, Spain's claims on the territory were formally recognized. Morocco is involved, in this occasion, in the balance of powers of the Westerns due to the question of Western Sahara; this is mainly due to the fact that the sultan was the only political institution in the area¹⁵.

Until 1900, the Spanish presence was rather timid, but the establishment of the Franco dictatorship pushes France, which at the time controlled Morocco, to enter into agreements with Spain in order to delimit their respective interests. From 1901, the territory of Western Sahara began to depend on the Ministry of Foreign Affairs and, in the following years, a progressive penetration from the coasts to the internal areas of the territory had started¹⁶.

A concrete change of approach towards the colony takes place after Morocco has achieved independence in 1956. The neighboring State began to make claims on the territory by organizing food riots and insurrections which were constantly eradicated from Spain, and Madrid was forced to grant the area of Tarfaya to Rabat in 1958.

In those years, Morocco experienced a climate of growing nationalism, powered by King Mohammed V, who was returned from exile. Despite all the efforts of the Madrid government to maintain control over Western Sahara, the Fez negotiations of 1969 between Spain and Morocco induced Franco to end the occupation of Ifni. The control of the remaining part of the territory was left to the Spanish government, which in 1961 had created a direct link between Madrid and the Spanish Sahara.

¹⁵ However, the negotiation of agreements with the sultanate has been used later by Morocco as a proof of the exercise of effective sovereignty on the territory: the involvement of the Moroccan sultanate seemed to imply that the territory of Western Sahara and its population were objects for which the Sultan could have access; while actually, as we have seen, the Sultan did not exercise effective political control over the territory.

¹⁶ S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.22-23-24.

The province was administered by a governor general detaining military powers¹⁷; the Spanish government tried to avoid a clash with the existing tribal system, not affecting some aspects of the social life of the Saharawi society¹⁸.

The latter possessed a decision-making and political system centered on the *Ayt Arba'in* (council of forty), composed by the members of the tribes of most undisputed importance¹⁹, this argument is used by the advocates of the Saharawi cause to testify the existence of a political organization and of an identity already at the beginning of the Spanish domination. Moreover, already during the colonization, there was a national liberation movement of Saharawi origin which strongly opposed the submission to Spain. The attacks of the revolutionaries against Spanish stations gradually turned into a real struggle for liberation.

In particular, the action of Muhammed Sidi Aabrahim was fundamental: after being persecuted by the Moroccan government, he returned to Sahara in 1967 and founded the first movement for the liberation of Saguia al Hamra and Rio de Oro, the original nucleus of the *frente Polisario*²⁰.

The Spanish reacted to the strength of the movement with the construction of some schools and with economic investments; the PUNS - *Partido de Union Nacional Saharawi* was also founded, however, it was more an instrument in the hands of the Spaniards created with the purpose of neutralizing Saharawi action, rather than a real and effective national party.

From 1959 the Spaniards had begun to make economic contributions to the Saharawi population, in those years the subsidies were justified by the colonizers as 'compensations for the lack of rains'; but in reality, the interest towards the territory was increased following the discovery of natural resources in the subsoil. Nevertheless, Spanish contributions made it possible to create a dynamic economic and social elite tending to sedentarization; the latter representing the matrix, at the same time, of the national sentiment that will lead to the struggle for self-determination.

It is known that Western Sahara suffered a delay in decolonization compared to other countries in the Maghreb area; this was due to several factors. First of all, the discovery of important natural resources in the territory made it even more coveted by Spain; moreover, Morocco and Mauritania undertook increasingly stronger actions towards claiming the territory. The Spanish troops left the territory of Western Sahara in 1976 but, before then, the dispute with Morocco and Mauritania for the control of the territory had already begun.

In 1975, the two States of the Maghreb urged the General Assembly hoping that the latter could determine the illegitimacy of Spanish colonization, questioning whether the territory constituted *terra nullius*

¹⁷ Decree of the Spanish Government, Art. 44, Law of the 19 of April 1961 on the Organization and Juridical System of Spanish Sahara.

¹⁸ Such as the right to vote, which was granted only to men, adults, over 23 and heads of families.

¹⁹ The *Ayt Arba'in* ceases to exist in 1934, following repressive actions jointly made by France and Spain. It will then be restored, in a 'colonial' version with a Spanish act in 1967, taking the name of *Yema'a*: the General Assembly of the Spanish Sahara.

²⁰ The name derives from the abbreviation of *Frente Popular de Liberación de Saguia el Hamra y Rio de Oro*, it was founded on the 10th of May 1973.

before the arrival of the Spaniards. This action signs the beginning of the long dispute between the States involved that led to the -unresolved- current situation.

*1.3.1 The *terrae nullius* issue*

After the two World Wars the international community began make pressure for the territories which were under foreign domination to be decolonized, as the colonial impetus was one of the reasons for litigation that had given rise to the conflicts. As anticipated, decolonization of Western Sahara occurred with a considerable delay; the United Nations dealt for the first time with Spanish Sahara in 1963, as the issue was handled by the Special Committee of the General Assembly on the implementation of the Declaration on the Granting of Independence to the Territories and Colonial Peoples²¹.

In the first Resolution on Western Sahara, the General Assembly “Urgently requests the Government of Spain, as the administering Power, to take immediately all necessary measures for the liberation of the territories of Ifni and Spanish Sahara from colonial domination and, to this end, to enter into negotiations on the problems relating to sovereignty presented by these two Territories”²².

It is important to note that the second part of the resolution concerning the dispute over sovereignty, which was voted separately and applied thanks to a small number of votes, can be considered a first stumble with respect to the orthodox application of the principle of self-determination of peoples²³.

The following year the General Assembly adopts a further Resolution in which, in addition to mentioning the principle of self-determination, it states that this must take place through the implementation of a referendum that must occur “in consultation with the governments of Mauritania and Moroccan and any other interested party”²⁴.

In the following years, the General Assembly did not intervene in the matter until Morocco and Mauritania put essentially two questions to it:

- I. “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*)?”

If the answer to the question is in the negative, de

- II. “What were the legal ties between these territories and the Kingdom of Morocco and the Mauritanian entity?”²⁵

²¹ M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, Turin, 2017, p.12.

²² Resolution 2072 (XX) of the General Assembly of 16 December 1965, on the question of Ifni and Spanish Sahara.

²³ The principle of self-determination of peoples is not mentioned in the first Resolution of the General Assembly, but it will then be mentioned in subsequent Resolutions and will become the central principle through which it is necessary to observe the issue, as ch.3 further clarifies.

²⁴ Resolution 2229 (XXI) of the General Assembly of 20 December 1966, on the question of Ifni and Spanish Sahara.

²⁵ Resolution 3292 (XXIX) of the General Assembly of 13 December 1974, on the question of Ifni and Spanish Sahara.

With Resolution 3292 dated 13 December 1974, the General Assembly seeks an opinion from the International Court of Justice for the issue titled ‘Question of Spanish Sahara’. The aim is to determine whether or not the Western Sahara constituted *terrae nullius* at the time of Spanish colonization.

The Court provides for the implementation of a mission in the territory in order to understand the position of the members of the population itself. The Resolution is adopted with 87 votes in favor and 43 abstentions, the visiting mission begins on May 8th in Madrid, and is concluded on the 9th of June in Mauritania. The commission composed of representatives of the Ivory Coast, Cuba and Algeria reports, after having come into contact with the population not only residing in the Spanish Sahara but also in the bordering territories of Morocco and Algeria, that *the majority of the population itself was openly favorable to independence and contrary to the territorial claims of both Morocco and Mauritania*.

To answer the first question, after an analysis of the available historical data, the International Court of Justice states that *the territories of Western Sahara before the Spanish colonization were not to be considered terra nullius* since they were inhabited by populations that, although nomads, had such a social organization as to be placed under the authority of competent leaders to represent them.

The Council of Forty (*Ayt Arba'in*) represented indeed the authority to which each tribal entity presented its own interests. When Spain colonized the region, it declared that arrangements were made with the tribal leaders in order to obtain the protectorate of Rio de Oro²⁶.

As regards the second question, the International Court of Justice analyzes separately the documents that both Morocco and Mauritania had presented to it with the purpose of demonstrating the juridical ties existing between each one of the two States and the territory of Western Sahara. After having examined the arguments presented by Morocco, the Court stated that *there were no elements that constituted concrete proof of the existence of legal ties between Morocco and Western Sahara*, even though there were close relations of loyalty between the Sultan of Morocco²⁷ and “some and only some of the nomadic populations” of the territory of Western Sahara²⁸.

As regards the opinion of the Court concerning ties with Mauritania, it is important to make two considerations. First of all, the aforementioned juridical links claimed by the Mauritanian entity at the time of colonization contrasted with those claimed by Morocco. Second, at the time of colonization, Mauritania did not exist as a State²⁹ and could therefore be considered only in light of simple links of inclusion in the *Bilad*

²⁶ “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 chiefs of local tribes”, Advisory Opinion of the ICJ of 16 October 1975, *Western Sahara, Nature of Legal Ties and their Relation to Decolonization and Self-Determination*.

²⁷ The historical linkages of the Moroccan sultanate with the territory of Western Sahara at the time of colonization and the ties of loyalty of the tribes will be deepened in the conclusive Chapter 4, within an analysis of Moroccan position on the issue.

²⁸ Advisory Opinion of the ICJ of 16 October 1975, *Western Sahara, Nature of Legal Ties and their Relation to Decolonization and Self-Determination*.

²⁹ The constitution of the Islamic Republic of Mauritania is dated 12 July 1991, before then the socio-political structure of the Mauritanian Union was heterogeneous and lacking a central government that could exercise its authority over the tribes of the territory.

*Sanqiti*³⁰. Analyzing the documents presented by Mauritania, which were in clear-cut opposition with those put forward by Morocco, the Court, on the one hand, *denied that there could be legal exercise of sovereignty from Mauritania* over the region and, on the other hand, considered that, since many inhabitants of Western Sahara had emigrated to neighboring regions after colonization, *the emigration had created legal ties between the tribes of the territory and the tribes of the neighboring regions*.

Thus, if it is established that with the Sultan there was a relationship of loyalty on the part of some tribes, with the Mauritanian people there were relations of a social, linguistic, religious, cultural and economic nature. However, there were no ties of sovereignty or belonging to the same legal entity between the Saharawi people and nor the Mauritanian nor the Sultanate authorities³¹.

Following these conclusions of the International Court of Justice, it is clear that the interests of the States involved are mainly of an economic nature, since *legal ties* between populations which would legitimate the claims of the two parties have shown to be absent. Not surprisingly, in fact, these have tightened up after the discovery of phosphate deposits in the Bu Craa area.

1.4 Natural resources of the territory

The history of the involvement of foreign powers in Western Sahara is a history of appropriation of resources by outsiders. Since the Saharawi were colonized, they have never benefited from the resources discovered; neither from the fishing stations on the coasts, nor from the phosphate mines discovered later.

Starting from 1885, year in which the Spaniards formally settled on the territory, fishing on the coasts of Western Sahara was managed and practiced exclusively by vessels from the Canary Islands³². The fishiness of the coasts of Western Sahara was the first resource to be discovered and exploited, but in addition to the richness of the sea, also the subsoil of the hinterland of the territory proved to be a precious asset: very rich, above all, in phosphates, but also in iron, salt and oil.

As in most conflicts, indeed, economic interests underlie the ambitions on the territory of Western Sahara. If different powers contended this apparently arid and uninhabitable territory, it is mainly due to its important resources. It is precisely following the discovery of these, that the situation has become more complex and that the conflict has escalated.

As already mentioned, fishing represents a great resource for the territory: the Atlantic Saharawi coasts are considered among the richest in the world because of the movements of fluid masses that influence the

³⁰ For Mauritania the *Bilad Sanqiti*, or Mauritanian Union, included the current Mauritania and Rio de Oro and constituted an entity united by historical, religious, linguistic, social, cultural and juridical ties which formed a community having its own cohesion.

³¹ Advisory Opinion of the ICJ of 16 October 1975, *Western Sahara, Nature of Legal Ties and their Relation to Decolonization and Self-Determination*.

³² J.J. SMITH, *The taking of the Sahara: the role of natural resources in the continuing occupation of Western Sahara*, in *Global change, Peace & Security*, volume 27, issue 3, New York, 2015, p.263-284.

migration of numerous species of fishes, shellfishes and crustaceans. It is estimated that the extension of the Saharawi bank is around 150'000 km², with an average annual productivity of ten tons of fish per km²³³ and at least 190 different species of fish present on the shores of Western Sahara.

The fish resources were mainly exploited on two floors, the first being the artisanal fishing of the Canary Islands, the second being the fishing on an industrial scale conducted by the Japanese, Soviet and South African fleets. In both cases, the indigenous population of Western Sahara hardly benefited from the resources of its territory.

Spain began to exploit the fish of Western Sahara on an industrial level since 1945, in the following year the region flourished economically also because of the subsidies decided by Spain, defined as aid for the lack of rain, which actually were hiding the interest of the Spaniards in the important deposits of phosphates just discovered in the area.

Explorations in the hinterland by the Spaniards led the Spanish National Institute of Industry to found the ENMINSA, *Empresa Nacional Mineraria del Sahara*, because of the discovery of one of the largest phosphate deposits in the world in the area of Bu Craa: about 76 km long, 1 to 15 km wide and from 2 to 4 meters deep³⁴, the field covers an area of about 250 km² and has a reserve of about 10 billion tons of calcium triphosphates³⁵.

In addition to phosphates, Spanish exploration has revealed the presence of an iron field of over 70 million tons; while the French multinational *Compagnie Générale Gèophysique* (CGG) revealed the presence of gas and oil³⁶ in the subsoil. Later on, the issue of exploitation of land resources by Morocco since the latter occupies Western Sahara, i.e. from 1975³⁷, is analyzed.

It is difficult to estimate the value of resources taken from Western Sahara by Spain during colonization due to the lack of relevant data and the passage from colonization to occupation from Morocco (which represents the beginning of the litigation) will be explained in the next chapter; but it is easier to compute the value of resources exploited by Morocco since 1975, the available data will be shown here in order to understand the reasons why this territory has been the cause of litigation for so many years.

³³ M. AMIMOUR- BENDERRA, *Le peuple saharaoui et l'autodetermination*, ENAP, Algeri, 1988, p.22; A. GAUDIO, *Le dossier du Sahara*, Paris, 1978, p.340.

³⁴ The deposit is thus very close to the surface, this makes the phosphates easy to extract; moreover, the proximity to the Atlantic Ocean favours their transport and commerce.

³⁵ S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.17.

³⁶ Relevant, in this context, are the authorizations granted by Morocco to the oil multinationals for the exploration of the subsoil, which we will discuss in Chapter 2.

³⁷ Not only, we will see, thanks to the resources of Western Sahara, Morocco is one of the most important phosphate exporters in the world, but also the concessions sold to foreign fishing vessels to fish on the coasts of Western Sahara bring a lot of money to the Moroccan state.

Resource	Present Value at 1 October 2015³⁸
Fishery	\$1.34 billion
Phosphate rock	\$4.27 billion
Petroleum	\$0 (single well production December 2014- March 2015)
Other	\$40 million (mainly sand and salt)
Total	\$5.65 billion

³⁸ J.J.SMITH, *The taking of the Sahara: the role of natural resources in the continuing occupation of Western Sahara*, in *Global change, Peace & Security*, volume 27, issue 3, New York, 2015, p.263-284; D. KINGSBURY, *Western Sahara International law, justice and natural resources*, New York, 2016, p.20.

2 The conflict and its management

In Chapter 1, we saw how the historical process undergone by Western Sahara brought the various nomadic tribes that lived there to unite under the name of the Saharawi people. As already mentioned, the events that led to unification of the people and to the birth of a feeling of belonging were mainly the arrival of the Arabs and the Spanish colonization. In the last of the 92 years of Spanish colonization, indeed, national liberation movements started their uprising against the colonizers, these led, on the 29th of April 1973, to the birth of the *frente* Polisario, who declared the armed struggle an instrument to obtain the liberation of the Saharawi people³⁹.

In this second chapter, we will see that the Polisario will not stop fighting for liberation even at the end of colonization which, happening in 1976, represents only a tiny piece of the elaborate puzzle that constitutes the dispute. The conflict begins in fact in the same year, immediately after the end of colonization, with the occupation of the territory by Morocco and Mauritania following the retreat of the Spanish troops.

In the next paragraphs we will analyze the passages of the conflict and the attempts to reach a stable and permanent solution made by the Organization of African Unity and the United Nations, which, since 1991, decided to establish a mission for the realization of a referendum in Western Sahara. The referendum, however, more than forty years after the beginning of the dispute, has not taken place yet, for reasons that we will analyze in the following chapters.

2.1 The origins of the conflict: from decolonization to foreign occupation

As anticipated, after 1945, the newly formed international community began to push for the beginning of the decolonization process. The colonies, in fact, had been one of the reasons that allowed disputes to escalate; moreover, their survival was undermined by the birth of the parties fighting for independence.

In Morocco, the *Istiqlal*⁴⁰ took hold and led to the cessation of French colonial rule in March 1956. Mohammed V, previously recognized as a legitimate sultan, obtained the title of King of Morocco. From this moment the development of the Moroccan State began, alongside two other States of the Maghreb: Algeria and Mauritania.

Each of the previously mentioned States played a role in the conflict of Western Sahara which brought the territory from being a colony to being the cause of a very long war between the powers of the region.

Although most States had already achieved independence in the late 1950s, for decolonization of Western Sahara to occur it will take more than 20 years. The question of granting independence to the

³⁹ In the Document of the constitutive declaration of the *frente* Polisario, Archive of the Library of the SADR Presidency, refugee camps of Tindouf, Algeria.

⁴⁰ The party for the liberation of Morocco launched the idea of *al-Magrib al-Kabir*: 'The Great Morocco'; it did not only fight for independence, but also claimed the territories of Western Sahara and Mauritania.

population of the Spanish Sahara, indeed, was not only opposed by Spain but also by neighboring states: Morocco and, to a lesser extent, Mauritania.

The situation in the region radically changes when the national liberation movement of the Saharawi people takes hold: the *Frente Popular de Liberación de Saguía el Hamra y Río de Oro* was founded in 1973 and had as its first objectives to counter the colonial rule and to fight for independence; the establishment of the Polisario led Spain to attribute more powers to the *Yema'a* the following year and to announce the intention to grant independence to the Saharawi people.

In order to understand how the transition from colonization to occupation took place, it is necessary to deepen the balance of the situation: on the one hand, Spain could not oppose the will of the international community by contrasting colonization, from the moment that all other Western powers were taking a step back on the colonial issue. On the other hand, the Kingdom of Morocco had a strongly unbalanced internal political situation after decolonization because of evident social imbalances and rampant corruption; the King needed more stability following the *coup* attempts of the beginning of the 1970s⁴¹. Hassan II made the revindication of Western Sahara a national issue, wanting to mobilize Moroccan people on the question with the purpose of diverting attention from the internal problems of the Kingdom⁴².

Mauritania also had an unstable internal situation and, at the summit of the Arab countries of Rabat in 1966, concluded a secret agreement with Morocco for the division of the territories in Western Sahara. On November 6, 1975, king Hassan II brings about the Green March. This represents a crucial moment for the issue, as it generates both the formalization of Moroccan claims and the convening of the UN Security Council.

The last Spanish troops finally left the territory of the former Spanish Sahara on February 28, 1976; but once the flag of the government of Madrid was lowered, the flags of two newly independent states were now set in its place: the Moroccan and Mauritanian troops immediately occupied the territory, setting the stage for a conflict destined to last more than 40 years.

2.2 The conflict management process: United Nations intervention

The issue of Spanish Sahara has been addressed by the United Nations for the first time in 1963, in the context of the Special Committee of the General Assembly on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁴³. From the 1960s onwards, the General Assembly will deal with the issue on the basis of its competences in matters of decolonization and

⁴¹ A first attempt to assassinate the King was made rebel military leaders in 1971, it was followed by a second attempt in 1972 orchestrated by General Mohamed Amekrane, a close advisor to King Hassan.

⁴² S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.42.

⁴³ Is also known as the Special Committee on decolonization and is the United Nations entity exclusively devoted to the issue of decolonization; it was established in 1961 through the General Assembly Resolution 1514 (XV) of 14 December 1960 on the Declaration on the Granting of Independence to colonial Countries and Peoples with the purpose of monitoring the implementation of the Declaration.

from the point of view of the principle of self-determination of peoples. The Security Council has also intervened in the matter over the years on the basis of its competences in the field of peacekeeping and when international security was threatened⁴⁴.

While the Resolutions⁴⁵ adopted between the 1960s and the beginning of 1970s, which had no follow-up, incited Spain to organize the referendum by making arrangements with the interested parties, and thus formally involved Morocco and Mauritania in the issue, the Security Council is convened for the first time in 1975 by Spain⁴⁶, which invoked Article 35 of the Charter of the United Nations⁴⁷, following the announcement by King Hassan II that a march of 350'000 civilians would have taken place with the objective of obtaining the recognition of the right to national unity and territorial integrity.

With a Resolution dated October 22, 1975⁴⁸; the Security Council asked to the Secretary-General to initiate consultations with the parties involved and with those interested⁴⁹. Importantly, Resolution 377 did not explicitly ask Morocco to desist from the implementation of the March, as it was instead asked in the Draft resolution proposed by Costa Rica⁵⁰.

In the same year, the Security Council adopted two more Resolutions concerning the issue of Western Sahara: Resolution of November 2nd⁵¹ reaffirmed the previous one and is adopted by consensus⁵² following the convocation by Spain of the Council, since king Hassan II had announced that the Green March would have taken place on the 4th of November and “Urges all the parties concerned and interested to avoid any unilateral or other action which might further escalate the tension in the area”⁵³.

The Green March takes place on the 4th of November 1975 as announced, the Security Council is convened again on the night of the 5th of November and adopts the third Resolution of the year on Western Sahara, noting that the situation has further deteriorated⁵⁴.

⁴⁴ M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, p.12.

⁴⁵ See Resolution 2354 (XXII) of the General Assembly of 19 December 1967, on Question of Ifni and Spanish Sahara; Resolution 2428 (XXIII) of the General Assembly of 18 December 1968, on Question of Ifni and Spanish Sahara; Resolution 2591 (XXIV) of the General Assembly of 16 December 1969, on Question of Spanish Sahara; Resolution 2711(XXV) of the General Assembly of 15 December 1970, on Question of Spanish Sahara; Resolution 2983 (XXVII) of the General Assembly of 14 December 1972, on Question of Spanish Sahara; Resolution 3162 (XXVIII) of the General Assembly of 14 December 1973, on Question of Spanish Sahara.

⁴⁶ Letter dated 18 October 1975 from the Permanent Representative of Spain to the United Nations addressed to the President of the Security Council, UN Doc. S/11851.

⁴⁷ Article 35 of the Charter affirms that any Member may bring any dispute which is likely to endanger the maintenance of international peace and security to the attention of the Security Council or of the General Assembly.

⁴⁸ Resolution S/RES/377(1975) of the Security Council of 22 October 1975, on Western Sahara.

⁴⁹ *i.e.* Morocco and Mauritania as parts *involved* and Algeria as part *interested*.

⁵⁰ Draft Resolution of Costa Rica of 20 October 1975, UN Doc. S/11853.

⁵¹ Resolution S/RES/379 of the Security Council of 2 November 1975, on Western Sahara.

⁵² The poor incisiveness of the content can be explained by the reticence on the part of France and the United States to express a condemnation for Moroccan action.

⁵³ Resolution S/RES/379 of the Security Council of 2 November 1975, on Western Sahara.

⁵⁴ Resolution S/RES/380 of the Security Council of 6 November 1975, on Western Sahara.

Two missions are carried out in those days on the territory, the first sees the Secretary-General, Kurt Waldheim, having consultations with the parties. These led him to affirm that it seemed that Morocco and Mauritania were prepared to recognize the role of the United Nations in the search for an acceptable solution.

During the second mission, the Secretary-General's Special Envoy, André Lewin, held consultations with Morocco, Mauritania, Spain and Algeria in order to provide them with suggestions and in order to understand the positions expressed by the consulted States. The Special Envoy noticed that Morocco took distances from his suggestions since it had expressed the wish of a trilateral agreement between the interested States; Mauritania followed the Moroccan position despite being willing to accept the suggestions proposed by the Secretary-General and Algeria affirms its adherence to the principles regarding decolonization and therefore accepts the suggestions of the Secretary-General. Finally, Spain expresses the desire that colonization should take place as quickly as possible and through peaceful methods⁵⁵.

2.2.1 The Madrid Accords and their legal value

After the tripartite agreement, desired by Morocco, was announced, it took place on the 14th of November 1975 in Madrid⁵⁶. Despite being of a secret nature, the terms of the agreements were revealed through a declaration of principles signed by the contracting States and made public.

Spain reaffirmed its determination to decolonize the territory; it could not, indeed, fail to keep the promises made to the international community, and agreed to proceed establishing an *ad interim* administration jointly with Morocco and Mauritania and in cooperation with the *Yema'a*, through which the will of the Saharawi people would have been heard.

The agreement, however, kept certain clauses secret and these were revealed only two years later. According to the secret clauses, the rights of each State related to the resources of the territory were determined: the richest part of the territory would have been occupied by Morocco, which would have granted to Spain the right to fish with 800 boats for 20 years and the transfer of public goods of the area through indemnifications; furthermore, the establishment of Hispanic-Moroccan companies for the research and exploitation of mineral resources in the region was envisaged⁵⁷.

The legal value of the Madrid Accords has been discussed on several occasions, both because the process of decolonization planned by the UN was disregarded and because the Accords themselves are totally invalidated by the application of Art.103 of the Charter of the United Nations. From this article it is clear, in fact, that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the

⁵⁵ Report of the Secretary-General in pursuance of Resolution 379 of the Security Council of 8 November 1975, on The situation concerning Western Sahara, UN Doc. S/11874, par.8.

⁵⁶ The text of the agreements was signed by the Head of the Spanish government Carlos Arias Navarro, the Moroccan Prime Minister Ahmad Utman and the Mauritanian foreign minister Hamidiy wald Maknas.

⁵⁷ F. BRIONES, *Sahara: Cien Años Sin Libertad*, Alicante, 1993, p.53.

present Charter shall prevail”⁵⁸. This is applied in adherence to Art. 53 of the Vienna Convention, according to which all the agreements concluded in violation of a *jus cogens* norm are considered null⁵⁹.

The agreements, moreover, were signed by Spain, which was not holder of any sovereignty over Western Sahara or its population despite being the administering power; *Spain did not, therefore, had the right to transfer to third States the responsibility and the administrative power it exercised*.

In this context, is important to underline that Spain's behavior in the Western Sahara issue was far from correct: it violated the obligations of international treaties, did not respect the principle of decolonization and encouraged a new occupation of the territory by Morocco and Mauritania. Many have argued that the behavior of Spain in that circumstance was dictated by the fact that the State was facing a very critical moment: it could not handle a military battle against Morocco, being Franco, the then Head of State, on the verge of death⁶⁰.

The President of the Decolonization Committee of the UN, on November 24, 1975, condemned the Madrid Accords as they were violating the right of the Saharawi people to self-determination.

A few days after the signing of the agreements, the forces of the Polisario found themselves fighting against those of the Moroccan army from the North and those of the Mauritanian army from the South.

Immediately after the beginning of the conflict, a large part of the civil population fled to Algeria where it finds refuge in the desert near Tindouf, starting what will be a very long exile in the neighboring country; Algeria, indeed, offered a part of its South-West territory to host the Saharawi Refugees⁶¹.

2.2.2 From the formation of the SADR to the construction of the walls

From this moment the threat to peace is more than evident but, despite this, the Security Council will not intervene in the matter until 1988, therefore not taking any initiative to restore order and thus leaving the dispute in the hands of the General Assembly. The latter continued to support the cause of the Saharawi people, which had organized the resistance against the Moroccan-Mauritanian occupation.

The Madrid Accords foresaw that the Spanish presence on the territory would have ceased from February 28, 1976. The last contingent left the territory two days in advance and, immediately, the Polisario proclaimed the Saharawi Arab Democratic Republic (SADR). This served mainly to create a legal barrier against the occupation of Mauritania and Morocco: the territory risked being considered *terrae nullius* if there were no other alternatives than Morocco and Mauritania to the Spanish administration.

The first provisional government of the SADR was formed on March 5 in Tindouf, the Algerian city which hosted the Saharawi refugees. After the proclamation of the newly formed State, Morocco accused

⁵⁸ Art. 103, UN Charter.

⁵⁹ Art. 53, Vienna Convention on the Law of Treaties.

⁶⁰ As Jaime de Pienés, ex Spanish Ambassador to the UN declared some years later, S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, pp.162.

⁶¹ Throughout Chapter 4 we will see how the Moroccan government has convinced the civil society that the refugee camps in Tindouf are actually an instrument in the hands of Algeria. By denying, among the other things, the existence of violations of human rights by the Moroccan government on the Saharawi people.

Algeria of having created a “ghost State”⁶² and threatened to interrupt the diplomatic relations with all the countries that would have recognized the SADR.

The conflict has had several implications at the regional level from the beginning, including the increased antagonism between Morocco and Algeria; the camps of Tindouf still are home to 50’000 Saharawis who fled in 1975 to escape Moroccan and Mauritanian armies.

During the meeting of the Council of Ministers of the OAU (Organization of African Unity) of 1976⁶³, the Saharawi Arab Democratic Republic was proclaimed legitimate⁶⁴ and recognized by many States including Algeria, Madagascar, Burundi and Kosovo. When, in 1982, the SADR became a member of the OAU, Morocco left the organization, thus making impossible any attempt of dialogue among the parties.

After the formation of the SADR, the Saharawi people began its struggle for liberation: to face two enemy armies at the same time would have been difficult for the Saharawi People's Liberation Army⁶⁵, so it was decided to concentrate the forces on the weakest link: the objective of the commander of the ELPS was to attack beforehand Mauritania.

Despite being a small army, the Saharawi People's Liberation Army had the advantage of perfectly knowing the hostile desert of Sahara; it was able to fight armies which more than doubled it, also thanks to the Algerians which were providing significant amounts of military equipment and economic support.

The attacks towards Mauritania were punctual and targeted, they generated the belief, in Mauritanian public opinion, that it was useless and unpleasant to fight a war against a brotherly people, from which the Mauritians are united by ethnic ties. Following a first refusal to enter into a peace agreement, the attacks intensified and reached the capital and the presidential palace; therefore, Mauritania decides to sign an agreement with Morocco. Despite the aid received from the Moroccan contingents, in Mauritania an internal war among the ethnic groups which constitute the country was growing stronger. In July 1979, the Peace Agreement was finally reached between Mauritania and Polisario.

In the Agreement, Mauritania recognizes the right to self-determination of the Saharawi people and is committed to no longer interfere with colonial claims on the territory of Western Sahara⁶⁶. Nine days later, Morocco occupies the part of the territory just freed from Mauritania and announces its annexation. From this moment on, *a face-to-face war begins between Morocco and the Saharawi people.*

⁶² S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.72.

⁶³ R. WEEXSTEEN, *La Question du Sahara Occidental*, in *Annuaire de l'Afrique du Nord*, Paris, 1976, p.126.

⁶⁴ Report presented by the President of the Council of Ministers in the XXVI Session of the Council of Ministers of the OAU, of February 23 - March 1, 1976.

⁶⁵ The Army, also known as ELPS (*Ejército de Liberación Popular Saharawi*) was founded in 1973 and constitutes the Polisario's army, but is also integrated into the SADR; its higher capability of armed unites in times of war has been of 20’000 men.

⁶⁶ M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, p.16.

Initially the Polisario was able to face the largest Moroccan army arriving to control up to three quarters of the territory⁶⁷, until the interventions of Moroccan allies arrived⁶⁸. The United States supported the army by land while France, in addition to making financial contributions, provided the Moroccan army with air forces. Starting in 1980, a new defense strategy suggested by the allies was undertaken: the construction of defense walls⁶⁹. This strategic move greatly disadvantaged the Polisario, circumscribing its field of action.

During the 1980s the Organization of African Unity dealt with the resolution of the crisis, especially following the XIX Summit of Addis Ababa in 1983. Following the abandonment of the organization by Morocco in 1984⁷⁰, however, mediation efforts were interrupted.

At the end of the construction of the walls, in 1987, a favorable moment for resolution occurred because Morocco, on the one hand, realized that even though the walls were limiting the action of the ELPS, they did not prevent the attacks nor discouraged the Saharawi people. The latter, on the other hand, wanted a direct negotiation with Morocco. It was evident, therefore, after years of struggle, that the military solution would not lead far, and peaceful solutions were envisaged under the guide of both the international organizations involved: the Organization of Africa Unity and the United Nations.

The UN-OAU Settlement Plan of August 1988 consisted in the implementation of a ceasefire and the organization of a referendum that would have allowed the people of Western Sahara to exercise their right to self-determination by choosing between autonomy and annexation to Morocco⁷¹.

The parties initially accepted the proposals received⁷², this leads the Security Council to readdress the issue. From this moment on, the Security Council will act in accordance with Art. 12 of the UN Charter, which provides that “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

⁶⁷ M. DE FROBERVILLE, *Sahara Occidental. La Confiance Perdue*, Paris, 1996, p.83.

⁶⁸ The involvement of third States and the impact of the conflict on the international political arena is further analysed in Chapter 4, par. 4.3.1; nevertheless, at this stage, is important to take into account that Morocco had two important allies in the Western Sahara dispute: France and the United State. France had an historical alliance with the North-African State from the end of colonization, while the US addressed the issue under the Cold War perspective, branding Polisario a Soviet ally.

⁶⁹ From 1980 to 1987 six walls have been built , for an extension of about 2720 km. They are made of sand, surrounded by barbed wire and about 3 meters high, inside there are military fortifications equipped with radar, surveillance systems and artillery; there is a guard post every 5 km.

⁷⁰ Which, important to recall, was caused by the admission of the SADR within the OAU.

⁷¹ Report of the Secretary General of the UN of the 18 June 1990, on the Situation Concerning Western Sahara, UN Doc. S/21360, par. 1.

⁷² *Ibidem*, par. 2.

Nevertheless, the General Assembly continues to analyze the issue acting in accordance with the Rapport of the Special Political and Decolonization Committee⁷³. Despite having met several times⁷⁴ during the end of the '80s, thanks to mediation effort made by the two organizations, the parties continued to face each other militarily.

2.3 MINURSO

Coming to an agreement between the two parties seemed impossible: Morocco had shown itself favorable to grant the Saharawi people a relative autonomy, but was not willing to concede, instead, a complete independence; on the other hand, the *frente* Polisario was not willing to give up his total independence in favor of an annexation.

The urgency of a referendum was increasingly felt and, for this purpose, on April 29, 1991, the Security Council adopted a Resolution⁷⁵ through which it created the *MIssion de Nations Unies pour l'Organisation d'un Referendum au Sahara Occidental*: the MINURSO peacekeeping mission.

The mission's mandate would have consisted in monitoring a ceasefire and the confinement of both Moroccan and Polisario's troops within the respectively designated areas, in tracking the progression of the release operations of political prisoners and Saharawi detainees, in the implementation of the relative program of refugees repatriation, in the identification and registration in the electoral lists of those entitled to vote, in the implementation of the referendum and in the announcement of the final result⁷⁶.

Fifty countries contributed to the MINURSO, it was established with a budget of 200 million dollars and was made up of 1700 soldiers and 800 policemen⁷⁷. The peace plan including the mission consisted of 5 phases:

Phase 1: June 1991 - 6 September 1991	<ul style="list-style-type: none"> • Agreement to the ceasefire⁷⁸; • Update by the MINURSO Identification Committee of the census carried out in 1974 by the Spanish administration, which comprised 74,000 people.
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⁷³ Every year the General Assembly dedicates a Resolution to the issue, which begins with reference to the General Assembly Resolution 1514 (XV) of 14 December 1960, on the Declaration on the Granting of Independence to Colonial Countries and Peoples. Nevertheless, is important to notice that Western Sahara does not constitute a colonized territory, but rather an occupied one.

⁷⁴ On 4 January 1989, a delegation of Polisario was received by King Hassan II, this was the first of three meetings, the last of which took place only with the King's collaborators.

⁷⁵ Resolution S/RES/690 of the Security Council of 29 April 1991, on the situation concerning Western Sahara.

⁷⁶ M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, p.35.

⁷⁷ S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.72.

⁷⁸ The ceasefire takes place on September 6, 1991.

Phase 2	<ul style="list-style-type: none"> • Confinement of the Moroccan armed forces in the designated areas; • Exchange of prisoners of war under the auspices of the Red Cross; • Publication of the final electoral lists.
Phase 3	<ul style="list-style-type: none"> • Transfer of refugees from Tindouf to safe areas within the territory of Western Sahara; • Sending of international observers on the field to supervise the electoral campaign.
Phase 4	<ul style="list-style-type: none"> • Three weeks of electoral campaign.
Phase 5	<ul style="list-style-type: none"> • Referendum.

Very soon, the difficulties in realizing the referendum became evident: a few days after the ceasefire, the Moroccan aviation destroyed all the infrastructures destined to host the Saharawi population, as well as the soldiers and the civilians employed in the mission⁷⁹. On September 15, 1991, King Hassan II sent a letter to the UN Secretary-General in which he declared that he did not agree anymore to use the 1974 census as the basis for the referendum, unlike it was envisaged by the MINURSO plan, and signaled the presence of 170,000 Saharawis in the Moroccan territory who would have taken refuge in the Northern provinces during the Spanish occupation, which the Moroccan government would have deployed at his own expense in order to make them participate to the referendum⁸⁰.

From this moment, no phase of the Peace Plan followed the course that was supposed to follow as originally planned, this brought the Special Representative of the Secretary-General, Johannes Manz, to resignation.⁸¹

The Polisario, for its part, refused to enlarge the electoral basis by including the 170,000 ‘Saharawis’ residing on Moroccan territory. In the following years, MINURSO's mandate will be postponed, through subsequent resolutions by the Security Council, year after year⁸². The Plan for the referendum brought forward by the Secretary-General Pèrez de Cuèllar, thus, proved to be unsuccessful despite the major efforts of the Special Representative for the Western Sahara.

⁷⁹ S. LAGDAF, *Una Colonizzazione Irrisolta il Sahara Occidentale dalla Spagna al Marocco*, Rome, 2011, p.92.

⁸⁰ Letter sent by Hassan II to the Secretary General of the UN, Javier Pèrez de Cuèllar, on 15 September 1991.

⁸¹ A few months later, a scandal broke out involving Pèrez de Cuèllar, he was hired by the ONA Group: a finance group controlled by Hassan II.

⁸² The principles of peacekeeping operations have been formulated since 1953 by the then Secretary-General of the United Nations, Dag Hammarskjöld. A peacekeeping operation represents a temporary action which must be carried out with impartiality and which requires the consent of the host State. In some cases, the principle of temporariness could not be respected as is demonstrated by the case of MINURSO, which has continued since 1991. Important to mention, in this context, is also the peace mission in Cyprus, UNFICYP, which continues since 1964.

There were no further improvements neither during the term of the Secretary-General Butrus Ghali even though he tried to suggest another method to assess participation to the referendum based on tribal affiliation: he proposed that if any member of a Sahrawi tribal subfraction (*i.e.* family group) was present within the Territory at the time of the 1974 Spanish census, he should be allowed to proceed to the next stage of the eligibility process laid out by Pèrez de Cuellar in his report dated 19 December 1991⁸³.

However, the Polisario was skeptical to almost any proposal made during Butrus Ghali's mandate, mainly because of the appointment of Sahabzada Ya'qub Khan as Special Representative for the Western Sahara, who had an alleged pro-Moroccan view⁸⁴.

In the following years, demands for the identification of persons not residing on the territory of Western Sahara who asked to participate in the referendum continued to arrive from the Moroccan Government. Since 1999, at the end of the identification process, the role of MINURSO has been limited to the observation of the ceasefire and, for the time being, it is the only United Nations peacekeeping operation without a monitoring system for human rights abuses.

2.3.1 The Impasse

When Kofi Annan assumed the role of Secretary-General, he made it clear that the issue of Western Sahara constituted a priority for him. With the aim of reviving the situation, he appointed James Baker III as his Special Envoy for Western Sahara⁸⁵. In 1997, Baker was able to bring about direct talks between the parties which were held in Houston and of which the final round became known as the 'Houston Accord', the Settlement Plan of 1991 was reconsidered mainly as concerns the process of identification according to balanced criteria.

Following the discontent of the parties related to participation to the referendum, Baker tried two more solutions to the conflict through the plans known as the 'Baker Plan I' and the 'Baker Plan II'. The Baker Plan I, or Framework Agreement, was rejected by Polisario as it was deemed too favorable for Morocco: it granted the territory a transitory autonomy until the referendum was held.

In 2001 the United Nations Secretary-General stated that, with the exception of the ceasefire that was observed from September 1991, none of the main provisions of the Settlement Plan were followed⁸⁶. The

⁸³ Y. H. ZOUBIR, A. G. PAZZANITA, *The United Nation's Failure in Resolving the Western Sahara Conflict*, in *Middle East Journal*, Vol.49 N.4, 1995, p. 614- 628.

⁸⁴ See J. DAMIS, *The U.N. Settlement Plan for the Western Sahara: Problems and Prospects*, in *Middle East Policy*, vol.1, no. 2, 1992, pp. 41-42.

⁸⁵ James Baker III had been the Secretary of State of the United States under Bush presidency, he played a key role during the Gulf War and allowed negotiations between Israel and the PLO (Palestine Liberation Organization) to begin; the choice of the Secretary-General was probably motivated by his understanding that the Western Sahara issue needed US support to move forward.

⁸⁶ Report of the Secretary-General of the Security Council of 27 June 2001, S/PRST/2001/17.

conclusions contained in Resolution 1359 of 2001 show a strong disappointment and both the Secretary-General and its Special Envoy seem to be not very confident in a definitive solution.

Following the rejection of all the proposals, the Secretary-General makes one more attempt proposing the Peace Plan for Self-Determination for the People of Western Sahara, or Baker Plan II, which provided for the participation of the persons belonging to the list of identification realized by the MINURSO Committee in 1999 plus all the people who resided permanently on the territory of Western Sahara from September 30, 1999.

This second proposal was rejected by Morocco, with astonishment of the international community, and accepted by Polisario with even greater astonishment. The Baker II plan, indeed, granted the vote to the Moroccan settlers residing in the territory and would have granted the Moroccan government a considerable advantage. In June 2004, the Secretary-General's Special Envoy, James Baker III, resigned claiming to have done everything he could in order to find a solution to the issue⁸⁷.

In 2007 the Secretary-General received from the two parties some documents which illustrated the respective positions that, nevertheless and after so many years, remained unchanged and apparently unconcealable: Polisario considers the Western Sahara issue as a matter of decolonization that should be solved through the principle of self-determination, while Morocco continues to put forward proposal of an autonomous statute for the Western Sahara region⁸⁸ while not considering independence as a practicable option. At the same time Morocco has successfully encouraged thousands of its citizens to immigrate to Western Sahara through subsidies and benefits; Moroccan settlers, already in the 1990s, had outnumbered the indigenous Saharawis by a ratio of more than two to one⁸⁹.

In 2009, under the guidance of the new Special Envoy, informal meetings are convened with the aim of building trust between the two parties, but no progress was shown on the issue: there have been protests, instead, that have further tightened the relations between the parties. For more than 40 years, thus, the United Nations have been trying to solve the Western Sahara dispute considering it a matter of incomplete decolonization, nevertheless the pressure from within the UN made by the allies of the Kingdom of Morocco has pushed the idea that Western Sahara was not an occupied territory, but rather a 'disputed' one. This designation would no longer target as illegal the transfer of settlers and the exploitation of natural resources by Morocco.

With the exception of recognition of the SADR by more than 80 States from 1976 to nowadays, there has not been any relevant progress in the situation over the last 10 years: the state of affairs remains unchanged.

The 2004 letter from the Republic of South Africa to Morocco's king explaining the reasons lying behind the

⁸⁷ Letter of 11 June 2004 from the Secretary General to the President of the Security Council, S/2004/491.

⁸⁸ Report of the Secretary General to the Security Council of 13 April 2007, S/2007/202.

⁸⁹ S. ZENUS, *Western Sahara, resources and international accountability*, in *Global Change, Peace and Security*, volume 27, issue 3, New York, 2015, p.285-299.

decision of recognizing the Saharawi Republic, shows the commitment of the members of the international community to the cause of recognition⁹⁰.

The international community, indeed, has for long tried to mediate between the two parties in order to reach a definitive solution proposing the arrangement of a compromise constituted by a ‘third way’ between independence and integration, but the Polisario is unwilling to give up its ambitions related to self-determination and Morocco has been able to resist its international obligations through the support of France and the United States from within the Security Council.

Considering the possible ways which could be explored in order to get out of the *impasse*, it is important to notice that the United Nations Charter offers several prescriptions. Hans Corell, the former Legal Counsel of the United Nations, noticed that the available possibilities comprise: (i) the transformation of MINURSO into an operation endowed with overall responsibility for the administration of the territory, empowered to exercise legislative and executive authority⁹¹; (ii) to ask Spain to resume its responsibility as administering Power; (iii) recognition of Western Sahara as a Sovereign State by the Security Council⁹².

However, the problem with the first two options is that they require, now or later, the realization of a referendum, the implementation of which, we have seen, has been on the agenda for four decades and has not been realized yet.

The last option concerning recognition of the Saharawi Arab democratic Republic is the most radical and probably it would be the more effective one, nevertheless there are many security risks linked to it, including the possibility of creating a failed State.

⁹⁰ In a letter dated 1 August 2004, the President of the Republic of South Africa, Thabo Mbeki, writes to Morocco’s king Mohammed VI that “For us not to recognize SADR in this situation is to become an accessory to the denial of the people of Western Sahara of their right to self-determination. This would constitute a grave and unacceptable betrayal for our own struggle, of the solidarity Morocco extended to us, and our commitment to respect the Charter of the United Nations and the constitutive act of the African Union”.

⁹¹ In such a case MINURSO would assume the form of an administration very close to the United Nations Transitional Administration in East Timor (UNTAET).

⁹² H. CORELL, *The Responsibility of the UN Security Council in the Case of Western Sahara*, in *International Judicial Monitor*, 2015.

3 International law's implications

As we have seen, the Western Sahara conflict constitutes a very intricate issue full of implications, most of them related to the application of international law. In the previous chapter, the importance of the efforts made by the Organization of African Unity and by the United Nations altogether has emerged; however, the complexity of the situation lies also in the many different juridical norms to which it is subject.

If since the departure of Spanish troops the territory was indeed subject to regulations governing colonization, now it constitutes a territory occupied by a foreign State which claims its right over it, and is thus affected by norms regulating occupation.

Moreover, the Saharawi people claims its right to self-determination, which is analyzed here in a comprehensive manner, since it constitutes the core principle of international law involved in the conflict. Furthermore, assessing the issue, it is easy to recognize that many other legal implications arise, and is necessary, in order to have a clear overview of the topic, to evaluate each one of them. For this purpose, several nuances of international law involved in the conflict are hereby explored.

3.1 The principle of self-determination

Self-determination is a fundamental principle of international law and constitutes a general principle rather than a specific norm; the International Court of Justice has referred to self-determination as an *erga omnes*⁹³ principle in the East Timor Case of 1995 and, furthermore, that the principle of self-determination of peoples is to be considered among the rules of *ius cogens*⁹⁴ is widely supported in doctrine⁹⁵; yet, despite being an important principle, its contents remain less than clear⁹⁶.

There are some problems, indeed, with the principle of self-determination; the first, and most complex one, is *who owns the right* to it. Furthermore, we have to consider that self-determination is also intrinsically linked to secession: even though it does not necessarily imply that a different Statehood is formed -it can,

⁹³ *i.e.* an obligation of a State toward the international community as a whole, fundamentally different from the obligations existing *vis-à-vis* another State.

⁹⁴ The imperative norms of *ius cogens* constitute a particular category of customary norms endowed with a greater obligatory force with respect to the other norms of the order, these are even capable of causing the nullity of incompatible norms, to a violation of them would follow a regime of responsibility that could be defined 'aggravated'.

⁹⁵ Article 53 of the Vienna Convention on the Law of Treaties states that *ius cogens* norms are generally accepted and recognized by the community of States as a whole as rules to which no derogation is permitted. The States will have to manifest not only an *opinio iuris*, but also the conviction that the specific norm is mandatory. What is lacking in order to consider the principle of self-determination a *ius cogens* norm is the due recognition of the practice and of the reinforced jurisprudence. Furthermore, the failure to specify the aspects of the normative content of the principle itself that should be considered imperative constitutes an obstacle in this sense.

⁹⁶ J. KLABBERS, *International Law*, Cambridge, 2017, p.129.

indeed, also take the form of association or integration with another State-, sometimes it leads existing States to brake-up; and international law is reluctant to fractures within the Nation-States.

Relations among States of the international community are regulated by the Charter of the United Nations, which states that Nations must conform to the principle of self-determination according to the 1970 General Assembly Declaration on Friendly Relations and Co-operation among States⁹⁷.

The international legal system applies a procedure for the promulgation of the principles by which they are derived inductively from general rules; however, the process of constitution of the principle of self-determination has been reversed: it has been formally stated before being consolidated as a legal rule. The principle has thus acquired positive value through the practice of judicial procedures after its introduction into the Charter.

The origins of the concept of self-determination of peoples can be traced back to the American Declaration of Independence of 1776; it was then reaffirmed during the French Revolution⁹⁸ which led the concept to be proclaimed in the Constitution of 1793 and had an echo during the XVIII century in the process of affirmation of Nation-States.

Initially, the principle of self-determination had the character of a political principle and did not constitute a norm of international law; it became such through an articulated process which began with the enunciation of the principle in the Charter of San Francisco in 1945.

The Charter states in Art. 1 par. 2, that equality of rights and self-determination of peoples are the principles on which the friendly relations between Nations, whose development is one of the goals of the United Nations, must be founded. The principle is mentioned again within Art. 55, contained in the chapter dedicated to cooperation in the economic and social fields. However, the Charter of San Francisco does not define the principle itself; to understand its meaning is therefore necessary to interpret the provisions of the Charter.

It might be useful to mention, for this purpose, that within the provisions a distinction between self-government and self-determination emerges: is clear that the first must be promoted in the context of colonized territories, therefore it would seem that, originally, the principle of self-determination is intended to operate only with reference to populations subjected to external force by another sovereign State.

This, however, is not sufficient to define the principle; it is necessary to refer also to the judicial practice which followed its adoption, *i.e.* the one implemented by the contracting States within their institutional bodies⁹⁹.

⁹⁷ See Resolution 2625 (XXV) of the General Assembly of 24 October 1970 on the Declaration of Principles of International Law concerning the Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, hereinafter: Declaration of the General Assembly of 24 October 1970 on Principles of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With the Charter of the United Nations.

⁹⁸ A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, Cambridge, 1995, p.11.

⁹⁹ According to Art. 31(3) (b) of the Vienna Convention on the Law of Treaties, in the section dedicated to the interpretation of treaties is recognized that ‘There shall be taken into account, together with the context: (...) (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.

As mentioned before, the principle is located in the Charter within the chapter related to relations between States; nevertheless, as concerns its application, it will be invoked mainly by the General Assembly operating with regard to decolonization.

In the first Resolution in which the General Assembly deals with the principle, it refers to self-determination of peoples as intimately linked to the objective of maintaining international peace and security¹⁰⁰. With Resolution 1514 of 1960, the General Assembly extends the principle of self-determination of peoples to the colonial context¹⁰¹. The Resolution, indeed, overcomes the distinction envisaged by the Charter between non-autonomous territories and territories subject to trust administration and provides for the transfer of all powers to the peoples of those territories without any conditions or reservations. According to the text of the Declaration, the exercise of the right of self-determination of peoples involved the achievement of independence of the colony from the colonizing State.

This interpretation of the principle, however, is denied by Resolution 1541, which specifies that a “Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State”¹⁰².

The General Assembly, thus, is the organ which allowed for the principle of self-determination to be extended to neo-decolonized states; in the context of decolonization, indeed, is interesting to observe that it assumed specific competences not explicitly provided for by the Charter, using the powerful tool of resolutions¹⁰³. The United Nations Bill on Human Rights of 1966 further contributed to extend the legislation of the principle to the colonial context¹⁰⁴, this instrument as well was adopted through General Assembly’s Resolution¹⁰⁵.

The exercise of self-determination involves not only the definition of the governmental and political structure of peoples, but also the pursuit of their own economic, social and cultural development¹⁰⁶.

¹⁰⁰ See Resolution 545 (VI) of the General Assembly of 5 February 1952, on the Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination.

¹⁰¹ Resolution 1514 (XV) of the General Assembly of 14 December 1960, on the Declaration on the Granting of Independence to colonial Countries and Peoples.

¹⁰² Resolution 1541 (XV) of the General Assembly of 15 December 1960, on the Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 of the Charter, what is made evident from this resolution through this and the subsequent principles, is that however the autonomy of the territory is constituted, the relevance lies in the fact that the decision must be the result of ‘free and voluntary choice by the peoples of the territory concerned’.

¹⁰³ See G.J.E. GOURAIGE, *The United Nations and Decolonization*, in *The Black Scholar*, vol.5, n.7, 1974, p.16-23.

¹⁰⁴ Paragraph 3 of Art.1 of the International Covenant on Civil and Political Rights of 16 December 1966 declares that “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”.

¹⁰⁵ The International Covenant on Civil and Political Rights was adopted through Resolution 2200A (XXI) of 16 December 1966 and is part, together with the Universal Declaration on Human Rights adopted in 1948 and the International Covenant of Economics, Social and Cultural Rights adopted in 1966, of the International Bill of Human Rights adopted through Resolution 217 (III) of the General Assembly of 10 December 1948.

¹⁰⁶ As further discussed in chapter 4 par. 4.2.

Importantly, the principle can be said to have *two dimensions*: an *internal dimension* related to intra-state relations and thus to the right of peoples to govern themselves without interference by outsiders; and an *external dimension* concerning inter-state relations and the right of the peoples to be free from domination by alien domination¹⁰⁷.

3.1.1 The internal dimension of the principle

The principle of self-determination has been promoted through the insertion of an article dedicated to it in the Human Rights Treaties that have been negotiated within the United Nations and which were meant to preserve peace internationally.

During the negotiations of the Covenants, two different vision emerged: on one hand, the socialist countries aspired to a deep understanding of the anti-colonial character of the principle, thus enhancing its *external dimension*; on the other hand, Western countries initially argued that a collective principle would have not found room in an agreement which concerned individual principles, only later they began to put forward a vision of the principle aimed at guaranteeing to every people the right of choosing their own rulers and form of government freely, thus highlighting the *internal dimension* of the principle rather than the external one¹⁰⁸.

At the end of the negotiations, the socialist countries, supported by those of the Third World, obtained that an article related to the right of self-determination appeared in both the Covenants; however, the wording of Art. 1 common to the Covenant of Civil and Political Rights and to the Covenant on Economic, Social and Cultural Rights, approaches the dimension advocated by Western States:

“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 principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. 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”¹⁰⁹.

¹⁰⁷ H. HANNUM, *Legal Aspects of Self-Determination in Encyclopedia Princetoniensis*, 2019.

¹⁰⁸ A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, Cambridge, 1995, p.45-46.

¹⁰⁹ International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966.

The principle of self-determination, as contained in the 1966 United Nations Covenants, seems indeed to mirror mainly the *internal dimension* of the principle: emphasis is placed on the free choice by the people of the governing apparatus, rather than on their political status at the international level.

The General Assembly Declaration of 1960 was to be interpreted differently from the one contained in the Covenants, the substantial difference lies in the fact that while in the first case reference is made to a status on the inter-state level (*i.e.* being able to choose whether to constitute a separate State or to associate or integrate to another State), in the second case, being the principle located within a treaty related to the protection of individual rights, it is interpreted according to its *internal dimension*.

In order to be able to interpret the right to self-determination as a right of every population to choose both their rulers and how to be governed, it is necessary to establish a relationship between the principle itself and other rights that the individual members constituting the people have.

From the comment to Article 1 adopted in 1984 by the Committee established by the Covenant on Civil and Political Rights, emerges that respect for self-determination would allow the protection of the rights of the individuals who are part of it and not *vice versa*; furthermore, the Comment explains that the specific object of the article in question is not the right of the population of a State to be governed democratically, but the right of each people to determine the political status and the social economic and cultural development that would distinguish it as such¹¹⁰.

In the context of subsequent practice within the United Nations, Art. 1 is not subject to a uniform and standardized assessment; however, a process of progressive definition of the principle started after the 70s mainly because of developments within the European context during the Cold War¹¹¹.

As concerns the activity of the United Nations related to the promotion of the internal dimension of self-determination, it is relevant to mention the final Declaration of the 1993 Conference on Human Rights in Vienna, which states that the right to self-determination of peoples cannot be understood in a way such that it undermines the principle of territorial integrity of States only if the States act “in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinctions of any kind”¹¹². This disposition suggests

¹¹⁰ General Comment N° 12 of the Human Rights Committee of 13 March 1984, Comment to Article 1 on The Right to Self-determination of People, HRI/GEN/1/Rev.9 (Vol. I).

¹¹¹ The evolution to which reference is made, concerns the relations between Eastern and Western Europe which followed the Helsinki Final Act: relevant, to our purpose, is the adoption of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, in which emerges the ‘principle of democratic legitimacy’ that has the will of the people as its basis. The latter does not only manifest its intentions at the polls, but rather through a constant and active participation to the decision-making process and is allowed to change its mind on the candidates to governmental functions. Later on, the principle of self-determination faced further developments following the juridical processes which allowed the formation of new states in Europe through the adoption of guiding principles for their recognition.

¹¹² Vienna Declaration and Programme of Action of the World Conference on Human Rights of 12 July 1993, UN Doc. A/CONF.157/23, par.2

reference to the safeguard clause contained in the Declaration on Friendly relations and Co-operation among States¹¹³.

As regards the Security Council, this body has interpreted its function of promoting the principle of democratic legitimacy in the sense of being able to intervene in the event of an interruption to the process of democratization or of an attempt to annul the results of a popular referendum organized with the UN support¹¹⁴.

Finally, The principle of internal self-determination does not seem to have taken on the dimension of a customary international standard; but, thanks to legal practice in Europe and within the United Nations, there has been a progress related to the consideration of the principle in the consciousness of States, which, nevertheless, are inclined to consider the management of power towards the governed people as a matter of essentially internal competence.

However, even though authoritarian States, in the international community, are States notwithstanding the democratic ones, the latter tend to adopt measures encouraging non-democratic leaders to embrace democracy. Thus, if within the contractual framework the principle of self-determination is interpreted through the *internal dimension*, on the consuetudinary framework the *external dimension* has a considerable relevance.

3.1.2 The external dimensions of the principle

As anticipated, the principle of self-determination found application within the United Nations mainly through its internal dimension related to intra-state relations. Nevertheless, in the UN charter the principle is destined to be applied in relations between sovereign States and is mentioned as fundamental for the purposes of civic relations between them. Therefore, also the *external dimension* of the principle, which is the one *related to inter-state relations*, must be taken into consideration.

Importantly, par. 1 of the principle is formulated, according to some scholars, in such a way that the expression ‘all peoples’ actually refers to all peoples¹¹⁵; thus including not only colonial or foreign-dominated people but also people living within Sovereign States¹¹⁶. During the XX century, it was established that occupation of a foreign territory should be considered as an exclusively transitory situation and the duties of the occupant, as well as the rights of the occupied, were outlined¹¹⁷.

¹¹³ The safeguard clause is important because it introduces an alternative application to the principle of self-determination, apart from the internal and external dimensions.

¹¹⁴ As it is with the implementation of MINURSO.

¹¹⁵ M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, Turin, 2017, p.95.

¹¹⁶ According to this interpretation, every people within every State shall have the right to self-determine itself.

¹¹⁷ Occupation in international law is regulated by Article 42 of the 1907 Hague Regulations and by common Article 2 of the four Geneva Conventions of 1949.

Furthermore, it is generally agreed that the violation of the external dimension of self-determination¹¹⁸ constitutes an infringement of the norms regulating the use of force between States¹¹⁹. The practice of States, indeed, reveals that the occupation of foreign States or territories belonging to other States must be considered not only a violation of the rule prohibiting the use of force in inter-state relations, but also as a violation of the principle of self-determination of peoples. As a violation of the prohibition of the use of force, the context should fall within the competence of the Security Council; but the intervention of the General Assembly, in these situations, appears sometimes more decisive¹²⁰.

Having defined the external dimension of the principle of self-determination of peoples as the one referred to the political status of a people within the international scenario, it is important to notice that, again, the applicability of the external dimension is threatened by the principle of territorial integrity: giving the possibility to any people to choose whether to constitute a separate legal entity would clearly menace the stability of the existing world-system in which every Power has a specific gravity.

3.2 Territorial integrity and secession in international law

As we have seen, the landmark for the establishment of the principle of self-determination has been the Resolution of the General Assembly of 24 October 1970 on the Declaration of Principles of International Law concerning the Friendly Relations and Co-operation among States. Important, and relevant to our purpose, is the fact that within the Declaration, the principle of self-determination related to Non-Self-Governing Territories and the principle of territorial integrity coexist:

“(6) The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

(7) Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-

¹¹⁸ A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, Cambridge, 1995, p. 99: ‘The right to external self-determination is thus, in a sense, the counterpart of the prohibition on the use of force in international relations. In many cases, the breach of external self-determination is simply an unlawful use of force looked at from the perspective of the victimized people rather than from that of the besieged sovereign State or authority’.

¹¹⁹ Reference is made here to the regime of the *ius in bello* elaborated in the Geneva Convention 1949.

¹²⁰ In this context it is important to mention the position adopted during the Cold War by the UN in the cases of Cyprus, of Cambodia and Afghanistan; the General Assembly urged the USSR, as responsible State, to respect sovereignty, independence and territorial integrity of the occupied State, showing attention to the compliance with the right to self-determination of the people subject to foreign control. Actually, the General Assembly did not always mention the principle of self-determination: sometimes, the controversies are located in the context of protection of human rights, thus reflecting that a universal conception of the principle has emerged.

determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color”¹²¹.

If par. 6 outlines that colonies and Non-Self-Governing Territories shall enact the right to self-determination, par. 7 highlights the importance and the oblige to not infringe the right to territorial integrity. The question, thus, concerns whether, wanting to put the principles in a hierarchical order, the principle of self-determination is to be located above or below the one of territorial integrity.

While, on one hand, is generally agreed that the principle of self-determination is not to be considered a reason of delegitimization of territorial integrity and neither, consequently, as a legitimation of secession; on the other hand, again in the 1970 Declaration, we can find a clause which can be interpreted as an exception to the established hierarchical order among the two ‘contrasting’ principles, this is the so-called ‘safeguard clause’¹²².

However, as we have seen, territorial integrity represents a fundamental principle of international law and, for this reason, secession is not usually spoken of favorably in the international community: a neutralist approach is adopted, especially after that the International Court of Justice, in 2010, has come to the conclusion that secession is nor lawful nor unlawful according to international law, since there are no customary norms that foresee it, nor that permit it¹²³.

To our purpose, it is relevant to determine whether the so-called ‘neutral’ approach that has characterized the international community in relation to secession can also be extended to minority groups existing within sovereign States; accordingly, it is important to define and analyze the *safeguard clause*.

3.3 Minority rights and the ‘safeguard clause’

In the 1970 General Assembly Declaration, as we have seen, emerges that, if a contraposition between the principle of territorial integrity and the principle of self-determination arises, the former is chosen to prevail. Nevertheless, recalling the wording of the Declaration, we can observe that paragraph 7 claims that “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of

¹²¹ Declaration of the General Assembly of 24 October 1970 on Principles of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With the Charter of the United Nations, par. 6-7.

¹²² The safeguard clause is extremely relevant to our purpose, indeed, par. 3.3 is dedicated to it.

¹²³ This is suggested by the Advisory Opinion of the International Court of Justice of 22 July 2010, in Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo. This conclusion seems to go hand in hand with yet another decision, the Judgment of Canadian Supreme Court of 20 August 1998, Case 25506, *Reference re secession of Quebec*. According to the Court, in fact, the right to self-determination in international law offers an opening to the right of external self-determination in the case of the former colonies and of the oppressed peoples, such as peoples subject to foreign occupation, or in the case in which, to a defined social group, is refused effective access to government such as to compromise to its political, economic, social and cultural development.

peoples as described above and thus *possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*¹²⁴.

The relevance of this paragraph is related to the fact that the sentence in italics seems to allow for a third case in which the principle of self-determination shall apply: self-determination would be up to those racial, religious or ethnic groups that, within a sovereign State, cannot participate in the exercise of government to the same degree as the rest of the population. The clause legitimates populations that cannot take advantage of internal self-determination to exercise the right to external self-determination, and thus involves minority rights.

Although with the advent of the United Nations the issue of protection of ethnic minorities has become a subject of interest to all States, this principle still sometimes comes up against territorial integrity¹²⁵. During the 1990s, the theme found expression at universal level through both United Nations and European instruments¹²⁶ and affirmed itself as fully integrated to the legislation which regulates human rights.

The idea of human rights is based on the sacred character of every human being possessing an “inherent dignity”¹²⁷ and implementation of the principle of self-determination is an essential condition for the guarantee, observance, promotion and strengthening of those rights¹²⁸.

The safeguard clause was inserted in the Declaration precisely to comply with the will of some States to guarantee the right to self-determination not only to separate, geographically distinct people, but rather to population already inhabiting sovereign States. Nevertheless, since it would favor and allow secession, the practice which followed the issuing of the Declaration does not seem to have introduced the safeguard clause into international customary law¹²⁹.

¹²⁴ Declaration of the General Assembly of 24 October 1970 on Principles of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With the Charter of the United Nations, par. 7, italics added.

¹²⁵ Importantly, the tension between the two principles re-emerged in the occasion of the dissolution of the States of the Soviet union and of former Yugoslavia in the early 1990s.

¹²⁶ *i.e.* the 1992 General Assembly Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1994 General Comment of the Human Rights Committee on the interpretation of Article 27 of the Covenant on Civil and Political Rights, the 1992 OSCE adoption of the High Commissioner on National Minorities, the 1992 European Charter for Regional and Minority Languages and the 1995 Council of Europe Framework Convention for the Protection of National Minorities.

¹²⁷ M.J. PERRY, *The Idea of Human Rights: Four Inquiries*, Cary, 1998.

¹²⁸ As emerges clearly from the General Comment No.12 to Article 1 of 13 March 1984 on the Right to Self-Determination.

¹²⁹ In this context it is essential to mention three situations in which the safeguard clause is involved, in order to understand the reasons for the assertion according to which the clause would not have affirmed itself as a norm of customary international law. These are the dissolution of the former Yugoslavia, the Declaration of Independence of Kosovo and the detachment of Crimea from Ukraine. If in the case of the dissolution of the former Yugoslavia the safeguard clause would seem to have been applied, since the members of the European communities intervened dictating, in 1991, the guidelines on the recognition of new States. The example of Kosovo confirms, on the other hand, the neutralist approach adopted by the international community towards secession: although to the people of Kosovo was denied the right to internal self-determination, and although this was subject to discrimination by Serbia, the International Court of Justice pronounced itself as shown in the footnote 105, and thus nor appreciating nor discriminating secession. Finally, the separation of Crimea from Ukraine and Resolution 68/262 of the General Assembly of 27 March 2014 titled ‘Territorial Integrity of Ukraine’ constitutes a further example in which territorial integrity takes precedence over self-determination.

It is necessary to observe that the problem that arises is essentially related to the distinction of self-determination from that of protection of minorities; there is indeed an incongruity caused by a sort of non-communication between the two regimes which causes a significant gap: it is complex to determine when the issue related to minority group rights shall cease to be valued from the minority rights regime to start being implemented through self-determination.

International law, currently, does not contain a norm clearly affirming the existence of a right to secession by minority groups constituting part of the population of a sovereign State.

3.4 The doctrine of *uti possidetis*

Having seen that attempts to totally or partially break the national unity of a country's territorial integrity are incompatible with the principles of the United Nations, must be noticed that the reasons behind this general principle lies in the will of the international community which, after the two World Wars, wanted to avoid further conflicts between and within decolonized neo-states¹³⁰. The latter, nevertheless, in some cases, as we have seen, obstacles the principle of self-determination; this makes even more necessary to give a clear definition of the peoples who are entitled to it.

During decolonization the concept of *uti possidetis iuris* emerged and affirmed itself; according to it, the newly formed States would have acquired sovereignty over the territories subject to colonial domination without objecting on the boundaries of the administrative subdivisions defined by the colonial powers and existing at the time of decolonization. This implies that the borders, despite usually not taking into account the ethnic and cultural ties between the populations inhabiting the territories, remained pre-established from the time of colonization in order to avoid creating further debates.

Actually, the cases in which the rule of *uti possidetis* has been applied are few and exceptional; among these it is important to mention the case of the enclaves: territorially delimited areas colonized by a different State than the one that dominated the surrounding territory. In this case the surrounding territory tends to absorb the enclave in the new independent State. An example of this is given by Tarfaya which was rendered by Spain to Morocco in 1969. Furthermore, Spain still has control over the enclaves of Ceuta and Melilla, in the North of the Moroccan territory. These two cases constitute a further peculiarity to the decolonization process¹³¹.

¹³⁰ This emerges mainly from paragraph VI of Resolution 1514 (XV) of the General Assembly of 14 December 1960 on the Declaration on the Granting of Independence to colonial Countries and Peoples.

¹³¹ With the Treaty of Angra de Cintra of 1 April 1958, Spain had returned to Moroccan control the Southern zone of its protectorate, nevertheless this was a Spanish protectorate on the North of Sakiet-el-Hamra, thus it did not properly constitute a Spanish colony. With respect to Ceuta and Melilla, it is important to say that the two cities are still source of dispute between Spain and Morocco, nevertheless these two territories are too important for Spain to give up easily to them since they allow the Spaniards to control migrations from Africa.

Another case in which there is a deviation from the smooth running of the process concerns the dismemberment of territories previously subject to the domination of a single colonizer¹³²; in this kind of cases, the existence of two distinct populations within a single Nation led the United Nations to take considerably into account the will of the distinct communities.

A different attitude from the United Nations was adopted with reference to ethnic minorities present on territories that have achieved independence in the form of multinational States¹³³: while in the first example self-determination prevailed, in this case territorial integrity was enhanced¹³⁴.

The *uti possidetis* doctrine is relevant to our purpose because it would allow Western Sahara to affirm itself as an independent state. As the historical background shows, while Western Sahara was controlled by Spain, Morocco was controlled by France, therefore they shall constitute two separate entities according to the doctrine. The Western Sahara dispute, indeed, 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*.

Nevertheless, the ICJ in its advisory opinion on Western Sahara of 1975¹³⁵, did not set the basis of its decision on the principle of *uti possidetis*, nor did it mention it. According to Ratner, this is because the principle “does not bar post-independence changes in borders carried out by agreement”¹³⁶. Thus, the Western Sahara issue should be approached in this line: it cannot be addressed on the basis of a conservative approach on decolonization, but rather through negotiations between the parties¹³⁷.

¹³² Significant is the case of Ruanda-Burundi -former Belgian colony and which was then divided respectively the autonomous States of Rwanda and Burundi- and the case of the British Cameroons: two territories which, following two separate referendums, have chosen to be annexed respectively to Cameroon and to Nigeria.

¹³³ Key examples are the province of Katanga in the State of Congo, Biafra in the State of Nigeria and the Kurds on the territory of Iraq.

¹³⁴ According to T.M. FRANCK, *People and Minorities in International Law*, Boston 1993, p.3, “Post-World War Two Decolonization proceeded on a doctrinal synthesis between territorial integrity and self-determination”.

¹³⁵ See Advisory Opinion of the ICJ of 16 October 1975: *Western Sahara, Nature of Legal Ties and their Relation to Decolonization and Self-Determination*.

¹³⁶ S.R. RATNER, *Uti possidetis and the Borders of New States* in *The American Journal of International Law*, vol.40, n.4, 1996, p.590-600.

¹³⁷ The conservative approach is hard to apply in this context also because of the nomadic nature which for long time has characterized the peoples who inhabited the territory, which we referred to in Chapter 1.

4 The application of international law to the context of Western Sahara

As emerges from the previous chapter in which the notions of international law related to the question are analyzed, it is evident that the Western Sahara conflict presents many facets both on a practical and on theoretical level. In this concluding chapter, the notions previously detailed and analyzed throughout Ch. 3 will be applied to the specific case of the conflict in all its passages as outlined in Ch. 2, connecting the dots between what happened on the practical and on the theoretical level in order to understand what caused the current situation of immobility and to hypothesize how to get out of it.

From a legal point of view, the question is, in some respects, full of ambiguities which must be clarified. To understand this statement it is sufficient to think that the classification of the status of Western Sahara is itself subject to debate. First of all, indeed, is still argued whether the classification of the territory shall go under the notion *colonized*, *occupied* or *disputed*.

As concerns decolonization, it is widely known that many scholars consider Western Sahara as Africa's last colony¹³⁸ and the responsibility of Spain is still called into question also concerning the occupational standpoint: does Spain validly consented the establishment of Moroccan and Mauritanian troops through the signing of the Madrid Accords?

A territory is considered *occupied* under International Humanitarian Law when it is invaded and placed under the authority of the hostile army¹³⁹ or when it is placed under such authority without the involvement of actual hostilities; the latter is also known as 'bloodless occupation'. Importantly, in doctrine and practice, what actually defines occupation as such is the lack of valid *consent*¹⁴⁰; if consent was to be given, thus, the legal implications deriving from the occupational status would fall.

The hypothesis according to which Spain has provided consent to Moroccan and Mauritanian occupation is refused by supporters of the application of Art. 52 of the Vienna Convention to the signing of the Madrid Accords: since a treaty is void due to coercion if "its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations"¹⁴¹, and since Moroccan military incursions and threats to Spanish domination intensified during 1975; it is argued that Morocco was acting through coercive measures and thus the Spanish consent must not be considered valid.

With regard to the *disputed* hypothesis, which is the one backed by Morocco and its supporters, it is important to notice that to define Western Sahara as a *disputed* territory would considerably reduce the responsibilities and duties of the State claiming its right over it.

¹³⁸ In this regard, we must take into account that the Special Committee on Decolonization created in 1961 monitors the state of the colonized territories -which currently are 17- and Western Sahara is among them the only one on the African continent.

¹³⁹ Hague Regulations concerning Laws and Customs of War on Land of 18 October 1907, Article 42.

¹⁴⁰ As emerges from the Expert Meeting of the International Committee of the Red Cross of 21 March 2012 on Occupation and Other Forms of Administration of Foreign Territory.

¹⁴¹ Art. 52 of the Vienna Convention on the Law of Treaties.

Even if the legal status of Western Sahara was clear, there are many other implications which, applied to the issue, cause the emergence of questions related to the classification of it. For example: in relation to which respects does the Saharawi people entail the right to self-determination? This point is also debated.

4.1 The right to self-determination of the Saharawi people

A vast majority of scholars agree that *the right to self-determination belongs to the Saharawi people both as concerns its internal and its external dimension*; nevertheless, many human rights advocates also argue that the discriminatory policies pursued by Morocco to the disadvantage of the Saharawi population puts the latter in the positions of exercising *external self-determination as it falls within what we have defined as the 'safeguard clause'*.

The internal dimension of the principle of self-determination is applied to Western Sahara as subject to colonial domination: a rigorous application of the principle of self-determination of peoples in the context of decolonization would entail the benefit of the population allocated on the territory as bordered by the colonial power. In other words, after the ICJ assessed that the territory did not constitute *terrae nullius* and that Spain had started to exercise control over it after the stipulation of agreements with the tribes, the application of *uti possidetis* entails the constitution of an autonomous State in the territory previously occupied by the colonizer¹⁴².

The main reason why internal self-determination was not applied to the case of Western Sahara as it should have been, is mainly due to the false steps taken by the General Assembly during the first attempts to resolve the dispute. The fact that in the Resolutions of both the General Assembly and the Security Council of 1975 Morocco and Mauritania were mentioned as *interested parties* and that Spain was asked to find a solution by negotiating with them, has in a certain sense 'legitimized' the claims of these States on the territory¹⁴³.

As we know the withdrawal of Spain has not led to the achievement of internal self-determination by the Saharawi population, but rather to a situation of further denial of the principle. The opposition and armed resistance on the part of Polisario shows that if the population had been consulted as it should have happened at the time of ending colonial domination, the will to gain independence and to configure the SADR as a sovereign State would have emerged.

The ownership of the right to self-determination by the population previously subjected to colonial rule deprives the claims of the neighboring States of any foundation; nevertheless, Morocco took control over the territory and consolidated its position ignoring its responsibility as an occupying State but rather

¹⁴² Thus, the Saharawi Arab democratic Republic should constitute itself as a State in light of the fact that Spain had colonized only it and not it and Morocco, which instead was colonized by France.

¹⁴³ It is important to recall that Moroccan claims were already legitimized, according to its government, by the fact that Spain had entered into agreements with the Sultan at the time of establishing colonization; thus a further recognition of Moroccan involvement by the United Nations enhanced the demands over the territory.

behaving as if it actually detained Sovereignty over the territory. However, the occupation pursued by Morocco at the conclusion of Spanish colonization, confers the Saharawi people the *external* right to self-determination given that it is subject to foreign domination.

The notions contained in the Charter, as well as subsequent jurisprudence and practice, make it clear that the Saharawi people deserves the right to freely decide for its political status without interference by third States. However and again, the principle has not been implemented neither through its internal application mainly because the choice of the United Nations to not coercively impose the realization of the referendum, but rather to negotiate a solution with the *interested* parties, turned out to be fateful for the Saharawi people.

Finally, as concerns the application of the safeguard clause to the context of Western Sahara, it is important to recall that it applies to peoples who lack a proper governmental recognition without discrimination of any kind. To assert that the Saharawi people have the right to self-determination according to the safeguard clause, is equivalent to asserting that the Moroccan government *discriminates* the Sahrawis.

Actually, there is a lot to mention in this regard: human rights abuses have for long been deplored not only by NGOs operating in the field and by human rights associations¹⁴⁴ close to the Saharawi people, but also by the Human Rights Committee of the United Nations. The latter repeatedly asked Morocco to comment on the problems related to self-determination in Western Sahara and to report on the disappearance of a very large number of Saharans while answering to the question of whether human rights in Western Sahara are subject to any restriction¹⁴⁵.

¹⁴⁴ The Freedom House in its 2006 Country Report on Western Sahara reported that “Moroccan authorities tightly control press access to Western Sahara, journalists are welcome if they travel accompanied by government officials, (...) freedom to resemble or to form political organizations is restricted. Throughout the year, several other demonstrations were held against Moroccan control of the area, which resulted in detentions, beating, and other forms of harassment by Moroccan authorities, Sahrawis who reside in areas under Moroccan government control are subject to Moroccan laws and regulations. For decades, Sahrawis who have defied the Moroccan government have been arrested, killed, ‘disappeared’, and tortured”. Furthermore, Amnesty International and Human Rights Watch have for long criticized Moroccan behavior concerning the conduct of the government on the human rights issue.

¹⁴⁵ Report of the Human Rights Committee of 10 October 1991, UN Doc. A/46/40, par. 238: “Members of the Committee, asked the representative to comment on the problems relating to self-determination in Western Sahara in the context of the obligations assumed by the Kingdom of Morocco under Article 1, paragraph 3, of the Covenant. They also wished to know whether human rights and freedoms in Western Sahara were suspended or made subject to restrictions; whether there had been any displacement of population, what was the current demographic composition in the region, what was the legal statue accorded to the population of Western Sahara pending the outcome of the referendum and whether any distinction was drawn between population groups opposed to joining Morocco and those in favour of it; whether there were any plans to grant amnesty to persons sentenced to life imprisonment in the 1970s for having declared themselves to be in favour of a referendum what measures had been taken with regard to the reported disappearance of a very large number of Saharans, whether Saharans had exactly the same identity documents as other Moroccans and how the prohibition of statements expressing opinions different from those of the authorities relating to the statue of Western Sahara could be reconciled with Article 19 of the Covenant”.

Morocco, for its part responded that “the Saharan population was not treated differently from the rest of the Moroccan population since the Saharans formed an integral part of the Moroccan people”¹⁴⁶, thus demonstrating its unwillingness to recognize the external right to self-determination to the Saharawi people.

According to some scholars the safeguard clause would apply to the case also because the conduct of Moroccan authorities towards the Sahrawis residing in the occupied territory could integer crimes against humanity¹⁴⁷. The Rome Statute of the International Criminal Court indeed, recognizes as crimes against humanity “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population (...): (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons”¹⁴⁸.

Representatives of the Saharawi population and activists in the field of human rights defense have often reported several violations by Morocco. In 2006 some associations filed an appeal against many members of the Moroccan security services for alleged genocide and torture crimes committed since 1976. The resort has been declared admissible by the judge Baltasar Garzòn on the criteria of the penal universal jurisdiction existing in Spain; on the 9 of April 2015 an indictment was pursued for 11 suspects¹⁴⁹.

To proceed, the competent political authority should require the extradition of the subjects involved, however it is difficult to believe that Morocco would concede it. Furthermore, to open a proceeding before the International Criminal Court would necessitate a declaration of acceptance by Morocco, given the lack of ratification of the Statute by the State, -which is highly unlikely in the short term- or the drafting of a Resolution of the Security Council through which the situation is referred to the Court, this hypothesis also unlikely due to the need for the favorable vote of all the five Permanent Members of the Security Council.

4.2 The pursue of economic development and sovereignty over natural resources

The exercise of self-determination involves not only the definition of their governmental and political structure, but also the pursuit of their own economic, social and cultural development; in the contest of Western Sahara this turns out to be crucial due to the richness of the subsoil in Western Sahara.

¹⁴⁶ Report of the human Rights Committee of 10 October 1991, UN Doc. A/46/40, par. 239.

¹⁴⁷ For more informations see H. SANTHAYA, Y. LENNARTSSON HARTMAN, M.KLAMBERG, *Crimes against Humanity in Western Sahara: The Case against Morocco*, Stockholm, 2010, p.175-199.

¹⁴⁸ Rome Statute of the International Criminal Court, of 17 July 1998, Art. 7, par. (e),(h),(i).

¹⁴⁹ *Juzgado Central de instruccion n°5, Diligencias previas proc. Abreviado 262/2007 A*, Madrid, of 29 October 2007 in M. VALENTI, *La Questione del Sahara Occidentale alla Luce del Principio di Autodeterminazione dei Popoli*, Turin, 2017, p.179.

The two fundamental acts in order to define the pursuit of the economic development by the people benefiting from the principle of self-determination are the Declaration on permanent sovereignty over Natural Resources of 1962¹⁵⁰ and the Charter of Economic Rights and Duties of States of 1974¹⁵¹. The Resolutions, albeit differing in the fact that while the first refers to peoples, the second formally refers to States, are almost identical in sanctioning the free exercise of sovereignty over natural resources and economic activities on behalf of national development and of the wellbeing of the people of the interested State.

Another fundamental difference between the two declarations lies in the fact that while the former recognized a role for the norms of international law concerning the *limitation* of the exercise of the aforementioned sovereignty -mainly for the benefit of advanced States- in the latter the developing countries have insisted to cancel any reference to international law in relation to the regulation of restrictive measures adopted against foreign economic operators acting on their territory¹⁵².

Art.1, common to the two Covenants of 1966, dedicates a provision to the regulation of natural resources, it also implies the respect of the commitments assumed in the context of economic cooperation at the international level and introduces the obligation not to deprive people of their livelihoods¹⁵³.

The question which arises here, concerns the normative scope of the principle when the instruments mentioned so far are applied to peoples holding the right of self-determination, as in the case of the Sahrawis; this aspect remains undefined and international jurisprudence has not given a decisive contribution yet.

Nonetheless, with regard to sovereignty over natural resources, international law distinguishes the rights of people subject to colonial rule from the rights of people inhabiting occupied territories. In both the aforementioned cases the General Assembly demands to the administering powers to guarantee that economic activities carried out in non-autonomous territories under the administration of colonizing powers, do not affect the interests of the people but rather promote their development taking into account their desires and their will¹⁵⁴.

Nevertheless, it is difficult to assess whether the principle has been violated: how is it possible to guarantee that the will of the people is taken into account by the administering power? In particular, as concerns occupation, is hard to determine the concrete legal incumbencies faced by the occupying state.

¹⁵⁰ Resolution 1803 (XVII) of the General Assembly of the 14 December 1962, on the Permanent Sovereignty over Natural Resources.

¹⁵¹ Resolution 3281 (XXIX) of the General Assembly of 12 December 1974, Charter of Economic Rights and Duties of States.

¹⁵² While the 1962 Declaration envisaged, in case of expropriation and nationalization, that “the owner shall be paid appropriate compensation (...)”; the 1974 Charter provides to every State the right to nationalize or expropriate the foreign property “in which case appropriate compensation should be paid by the State adopting such measures”.

¹⁵³ Par.2, Art.1 common to the 1966 Covenants declares that “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 principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”.

¹⁵⁴ See Resolution 71\103 of the General Assembly of 6 December 2016, on Economic and other activities which affect the interest of the people of the Non-Self-Governing Territories, par.1.

Occupation is regulated by different norms of international law establishing what the occupying State can and cannot do over the territory controlled¹⁵⁵, mainly, it is regulated by the Hague Convention of 1907. It should be noticed that the Hague Convention dates back to an era in which occupation did not appear to be illicit; but since it is now forbidden to occupy a foreign territory by force¹⁵⁶, the exploitation of natural resources should be forbidden as well.

With the affirmation of the rule prohibiting the use of armed force in the relationship between States, the possibility of acquiring sovereignty over a foreign territory through, indeed, the use of force, is lost. If sovereignty over the occupied territory thus remains in the hands of the people of that given territory, the exploitation of natural resources should be carried out as well by the people subject to occupation.

However, the application of the norms banning occupation falls away because the occupying State declares that it is acting with the purpose of reacquiring sovereignty over a territory which it considers to be rightfully its own territory. The Western Sahara case constitutes an excellent example of this circumstance¹⁵⁷.

In practice, in these cases, the applicability of the norms regulating occupations meets some exceptions: the Hague Convention 1907 and the IV Geneva Convention of 1949 established that occupation is only a temporary situation and, for this reason, sovereignty over the territory is not acquired by the occupant; however, to leave undefined for a long time some political choices could be counterproductive for the interests of the population itself.

For this reason, the cases of *prolonged occupation*¹⁵⁸, constitute a special category in which a differential application of the regime is justified: the occupant is entitled to act in such a way as to avoid that the occupied territory remains underdeveloped and this includes the exploitation of economic and natural resources of the territory¹⁵⁹.

¹⁵⁵ These are, art 46-47 of the Regulation of the IV Hague Convention of 1907, Art. 27-33 and 47-48 of the Geneva Convention of 1949.

¹⁵⁶ The UN Charter provides, in Art. 2, par.4, for the prohibition of the use of force in relations among states; the Charter of 1945 is subsequent to the Hague Convention of 1907; thus, according to it, occupation of a territory by mean of the use of force is prohibited.

¹⁵⁷ Examples of this situation are also given by the Indonesian occupation of Timor Est and Israeli occupation of Palestinian territories.

¹⁵⁸ The relevant resolution in this context is Resolution 51/132 of the General Assembly of 13 December 1996 on the Applicability of the Geneva Convention relative to the Protection of the Civilian Persons in Time of War, of 12 August 1949, to the occupied Palestinian territory, including Jerusalem, and other occupied Arab territories.

¹⁵⁹ Furthermore, a new approach has been identified: the one of the *earned sovereignty*, which provides that certain functions of governmental power are devolved to a sub-state entity constituting a territorial entity over which control is exercised. According to the proposals of the projects inspired by the aforementioned theory, it is envisaged to grant the power of government to the sub-state entities leaving undefined the question related to sovereignty. In the case of Western Sahara, this kind of approach could be very dangerous since it could further enhance the ambitions of the occupant.

4.2.1 The obligation to not support a State impeding self-determination

From the principle of self-determination, derives the obligation for third States to not support a State which is impeding the application of the right to a given people; the issue is mainly related to the continuation of economic relations with the occupying State.

There is evidence that the interest which natural resources of Sahara generate¹⁶⁰, has been for years at the origin of the litigation; it is well-known that Morocco benefits annually of a large amount of revenues deriving from Western Sahara. The question that arises thus concerns whether the exploitation of natural resources in the territory by Morocco is reasonably conducted for the benefit of the local inhabitants. Assessment includes, for example, whether the revenues deriving from Moroccan investment are repatriated or whether they are expended for the realization of public goods and infrastructures in the region.

However, even if it was the case, in the occupied territory live approximately 400'000 people, 300'000 of which are Moroccan settlers¹⁶¹; the outnumbered Sahrawis are underrepresented in almost every labour sector and their human rights, in addition to not being monitored by the UN for Moroccan unwillingness, are reported to be severely violated¹⁶².

Morocco should in theory apply to the context of Western Sahara international law regulating occupation, which provides a high level of protection in the interest of the inhabitants of the occupied territory¹⁶³; however, since Morocco denies that it is the occupier, it denies that international law regulating occupation applies.

In this context, the Fisheries Partnership Agreement between the European Union and Morocco constitute an important example of the obligations of third parties deriving from foreign occupation of a territory. The Agreement concluded on July 26, 2006 allowed Community vessels to access Moroccan Atlantic fisheries; on the 14th of December 2011, a legislative Resolution of the European Parliament disapproved the Agreement itself.

Article 2 of the Agreement, indeed, defines the Moroccan fishing as “the waters subject to the sovereignty or jurisdiction of the Kingdom of Morocco”¹⁶⁴. This formula was considered too broad by some European parliamentarians since doubts regarding the sphere of territorial application derived from the situation of Western Sahara. Relevant data transmitted by the European Commission In 2009 revealed that the

¹⁶⁰ As detailed in ch.1, par.1.4.

¹⁶¹ B. SAUL, *The status of Western Sahara as occupied territory under international humanitarian law and the exploitation of natural resources*, in *Global Change, Peace & Security*, volume 27, issue 3, October 2015, p.301-322.

¹⁶² For more information, see R.F KENNEDY HUMAN RIGHTS, *Reported Human Rights violations*, July 1,2015 – December 31, 2015, available at <https://rfkhumanrights.org>.

¹⁶³ According to the Hague Regulations 1907 and to the Geneva Conventions 1949, for example, it is prohibited to destroy or pillage private or public property, to confiscate moveable private and public property, the capital of public property must be safeguarded and treated in accordance with the principle of trusteeship for the benefit of the inhabitants, the occupant cannot acquire or sell public assets, the principle of usufruct applies more strictly to non-renewable natural resources and must respect the laws in force at the time of occupying the territory.

¹⁶⁴ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco of 29 May 2006.

agreement had been applied precisely as some parliamentarians feared: the Moroccan authorities had granted licenses to EU fishing vessels in relation to the waters belonging to Western Sahara.

The second Opinion of the European Parliament explicitly asks that future agreements comply with international law: the European Community should have prevented the vessels from operating in the waters of Western Sahara.

The new Agreement was concluded on the 10 of December 2013 and, despite the fact that a majority was finally found to approve the conclusion, similar doubts to the previous ones arose and the Council adopted the decision to conclude also this protocol.

The reasons for the attitude held by the European Union in concluding the agreement with Morocco are due to the fact that, starting from its entry into the European community, Spain ceded its powers to the Community; within the European Union, States that have traditionally supported Morocco's economic interests, such as France and Spain, coexist with States which are most sensitive to the Saharawi cause, this possibly explains the ambiguity of the Commission's behavior: it is both a fervent supporter of the Agreement with Morocco and a convinced advocate of its compatibility with international law, but nevertheless runs a powerful humanitarian aid program towards Saharawi refugees in the Tindouf camps.

According to Enrico Milano "the main thesis presented is that the agreement is not *per se* contrary to international law as its text does not include Western Sahara; however, if its interpretation and practice should evolve to include Western Sahara in its geographical scope of application, as it occurred with previous EC-Morocco fisheries agreements, it may be considered invalid with regard to Western Sahara due to a manifest lack of legal competence of Morocco related to the Territory and contrary to international law, insofar as it does not keep into due account the will of the people of Western Sahara"¹⁶⁵.

Thus, It is clear that the conclusion of agreements such as that stipulated by the European Union, ends up integrating both the obligation of non-recognition and that of non-assistance towards the State responsible for the violation of a mandatory rule. The European Union becomes responsible by being accessory to the crime committed by Morocco if it does not protect the extent of the agreements.

By implication, any agreement of this kind should be considered illegitimate as such¹⁶⁶. Correctly, some States such as Norway and the United States, willing to maintain trade relations with Morocco, explicitly excluded the portion of sea relevant to Western Sahara from the scope of application. European Union's institutions probably shall, in the future, address the issue in a more conscious manner with a view to guaranteeing that all the relevant norms of international law are implemented.

¹⁶⁵ E. MILANO, *The new fisheries partnership agreement between the European community and the kingdom of Morocco: fishing too South?* in M. BALBONI, G. LASCHI (eds.), *The European Union Approach towards Western Sahara*, Brussels 2017.

¹⁶⁶ A comparable situation is given by the Occupied Palestinian Territories; in this context the European Union acted accordingly to international law by concluding two separate agreements with both Israel and the Palestine Liberation Organization, thus recognizing the latter as the political entity which represents the OPT. Nevertheless, in Western Sahara is not possible to conclude economic agreements with the *frente* Polisario because any economic activity is controlled by Morocco without the involvement of the Sahrawis.

4.3 Why the conflict is still unsolved?

Having analyzed all the relevant issues linked to Western Sahara conflict in the light of its international law's implications, a final step toward a full assessment of the argument consists in evaluating it through the point of view of both the direct protagonists and indirect attendees involved at this stage.

Among the direct protagonists, Morocco surely plays the leading role, being it the responsible State of impediment of the Saharawi self-determination. Actually, the situation is complex even if analyzed from a Moroccan standpoint: even though the population seems to apparently have a unified opinion in harmony with the one strongly brought forward by the government; Moroccan civil society is characterized by substantial discrepancies.

First of all the *makhzen*, namely the network of patronage which concretely manages the country, is capillarily integrated within the civil society and is able to diffuse its traditional values across all social strata. The King is able to control the *makhzen* and the people through the *makhzen*; even though Morocco is formally a democratic State, the gap between it and the Western democracies is more than evident. Freedom of expression and freedom of the press are barely unknown in Morocco, this is probably the reason why the media hardly deals with the Western Sahara issue: to collide with royal provisions is not allowed.

As a matter of fact, in addition to the economic considerations revolving around the issue, the King is unwilling to provide self-determination to the Sahrawis also because it could result in aspiration to independence by the other minorities which compose the society, this would constitute a serious threat for the monarchy which, despite the hindrance of the *makhzen*, is silently contrasted. The social conditions of the population are far from the idylls of the royal palaces: misery, analphabetism, lack of civil and social rights are just some of the challenges that Moroccan citizens face daily.

To a certain extent, is difficult to disclaim that there are no intersections between Moroccan people and the Sahrawis: many Moroccans feature ancestors which, having crossed the desert with the caravans, claimed themselves to have Saharan origins; young Moroccans grew up with the conviction of Western Sahara being part of their own Country and are totally against any claim to 'secession'.

In this respect the propaganda carried out by King Hassan II proved to be effective not only brainwashing the people persuading it that the Sahrawis are manipulated by Algeria, but also convincing many Saharans to surrender in order to benefit from the better conditions offered by Morocco.

Algeria in fact, despite having been a quite silent player in this analysis, has a relevant role in the issue since it is the State which, historically, has supported the Sahrawis in their fight for independence; providing the army with weapons and hosting the refugees. Its interest in supporting the Saharawi people was lying mainly in the will of protecting the South-East of the country from Moroccan broadening.

Even though Morocco keeps claiming the contrary, Algerian troops have never fought this battle and Algeria has never claimed the territory of Western Sahara. Nevertheless, before and during the 1960s, when

the *guerre des sables*¹⁶⁷ took place, Algeria was concerned about Moroccan ambitions and took the opportunity of standing alongside the Saharawi cause.

In May 1988 the re-establishment of diplomatic relations between Rabat and Algiers generated doubts on whether Algeria would have continued to support the SADR; clarifications about the issue were given by president Banjedid in September, who claimed that Algerian people believed that the Saharawi question was a just one and that “In no way, will Algeria ever renounce her fundamental principles regarding the defence of just causes and the right of people to self-determination.”¹⁶⁸.

Finally, it is impossible not to mention the role of the SADR and Polisario. Despite being in theory two different elements, in practice they overlap in the fight for independence of the Saharawi people; these two institutions have allowed for the develop of a significant cohesion within the society and of a solid grip on democracy. Furthermore, while the SADR has developed through the years a network of diplomacy with the States which recognized it, the Polisario has its diplomatic representatives in all the other diplomatically relevant States, being it recognized by the United Nations as a liberation movement.

As interesting as ambiguous, is the conviction that many Moroccans have about the Polisario: the King’s propaganda diffused the idea that the *frente* does not actually exist as a movement for liberation nor does the Saharawi People Liberation Army, but rather the forces fighting at the borders are composed of Algerian mercenaries.

This implications are useful to understand the Moroccan evaluation of the issue as a regional antagonism; indeed, from the various considerations of the issue, the regional dimension of the Western Sahara conflict emerges clearly, within this dimension Spain and Mauritania also have had for long their relevant position. Nevertheless, at the present stage, is useful to evaluate the dynamics which still significantly affect the matter, *i.e.* the international dimension.

4.3.1 The international effects of the Western Sahara Conflict

Nearly every territorial conflict comes along with an impact much broader than the borders of the dispute itself, involving major actors of the global political and economic scene.

As regards Western Sahara, there is a diffuse misperception which frames the issue as an extension of the West-East conflict. Actually the weaponry employed by the Polisario are mainly Soviet, at the same time it is known that the Kingdom of Moroccan is backed by the United States and France; however, to consider

¹⁶⁷ The War of Sands has been a conflict fought in 1963 from Morocco and Algeria for reasons linked to the borders, it is evident how the Saharawi opportunity happened to be for Algeria a buffer against Moroccan pretensions.

¹⁶⁸ *El Moudjahid*, 21 September 1988 cited by Y. Z. ZOUBIR, *The Western Sahara Conflict: Regional and International Dimensions* in *The Journal of Modern African Studies*, Vol. 28, No. 2, June 1990, p. 225-243.

the Western Sahara conflict a “Cold War relic”¹⁶⁹ seems a little out of context if we remind the local roots of the dispute and the dynamics which fuel the regional rivalries.

Nevertheless, extra regional and extra continental actors which provided support to the war efforts of the parties clearly influenced the destiny of the dispute. The motive lies mainly in the fact that, probably, a more decisive attitude of the international organizations towards the issue would have led much sooner to a resolution, but we have to recall that international organizations are composed by Member States which are likely to endorse their own position on this kind of issues.

On one hand, many scholars embrace the assumption that the Security Council has been far too influenced by Moroccan diplomacy and has blindly overlooked fundamental passages which might have been crucial. For example, there is wide criticism concerning the non-enlargement of MINURSO’s mandate to adopt safeguarding measures for human rights protection¹⁷⁰. As anticipated, it is the only UN peacekeeping mission without such a mandate and this, together with other missteps, might be due to key relations of Morocco with Western powers, particularly the United States.

In 2004, during the Bush administration, Morocco was designated a Major non-NATO ally by the USA government to reward the country and its new young King for the commitment shown in “combating terrorism”¹⁷¹. Mohammed VI succeeded to the throne after the death of his father, Hassan II, in 1999 and undertook several neo-liberal economic and political reforms which led Morocco to approach a higher democratic standard and to have firmer relationships with major democratic States.

Nevertheless, human rights violations in Western Sahara did not improve since the ascent of the new King and, even though his contemporary outlook led the country to achieve several improvements with regard to both social reforms and economic liberalization, Mohammed VI has preserved the attitude upheld by his father towards Western Sahara, rejecting any option outside Moroccan sovereignty for the occupied territory.

Long after the beginning of the dispute France and the United States continue to provide substantial aid to Morocco for economics, strategic and ideological reasons; thus it is hard to have confidence in a unilateral action by the United Nations on the issue in the short term, since two out of five of the Permanent Members of the Security Council openly support the pro-Western monarchy.

On the other hand, the United Nations and the two Moroccan allies are not the only having expressed their position on the issue: 84 States have formally recognize the SADR but many of them have withdrawn or

¹⁶⁹ THE NORTH AFRICA POST, *Sahara Conflict, a Cold War Relic Threatening Regional Stability*, in *The North Africa Post*, 7 April 2018, available at www.northafricapost.com.

¹⁷⁰ For more details, see Amnesty International Public Statement of 26 April 2019 on UN must monitor human rights in Western Sahara and Saharawi Refugee camps, index number MDE 29/0266/2019.

¹⁷¹ BBC News, *Us rewards Morocco for terror aid*, 4 June 2004, available at <https://www.bbc.com>.

suspended the recognition, a few States have not announced any position¹⁷² while others have frequently expressed controversial statements on the issue or have given their support for both Morocco and Polisario¹⁷³.

Finally, as regards other relevant international organizations, it is known that while the OAU supports the right to self-determination of the Saharawi people, the Arab League supports the right of the Moroccan territorial sovereignty without specifying its position in the conflict.

Conclusion

At the end of this analysis is clear that there are several implications which make a peaceful resolution of the Western Sahara conflict in the short term an expectation way too optimistic for several reasons.

First, the background of the dispute has proved to be filled with intersections among peoples within the region, so that legit and illegit claims over the territory are hard to be distinguished clearly.

Second, the underlying economic interest makes the territory a coveted one since it constitutes a valuable asset for the people having sovereignty over it, thus refrain from exploiting its natural resources is a high-priced decision from the financial standpoint.

Third, not only the economic cost has proved to be high, but also both the internal equilibrium of the parties involved and the stability of the region is jeopardized by shifts of power.

Fourth, the international dimension of the conflict made it even more complex because of the (non) resolute dynamics which derive from the involvement of extracontinental powers and international organizations.

Finally, very significant is the fact that the application of international law to the context itself results to be quite ambiguous from more than one perspective: some of the provisions involved are contradictory among them or so is their relationship with the principle of self-determination which in the dispute has shown to be central. An example is given by the principle of territorial integrity which appears to be hardly compatible with self-determination of people, but also the participating issues of *terrae nullius*, and *uti possidetis* apply to the dispute through a cumbersome process; furthermore there is still ambiguity about the classification of the territory itself as both decolonization and occupation, as well as non-self-government are all in this together.

However, despite the countless implications, the stake is essentially as to which principle will prevail in the third millennium: the right to freely chose, or the right to impose? If an answer to this question was given, not only the destiny of a small country would be determined, but the entire legal order regulating coexistence of Sovereign Nations would definitely redefine its mindset.

¹⁷² Through which, interestingly, figure both Israel and Kosovo, which have both been severely interested by the issue concerning self-determination.

¹⁷³ Among the superpowers, for example, Russia has for long favored Algeria as one of its major arms purchaser but at the same time has recently widened bilateral trade partnerships with Morocco and re-energize diplomatic relations with the kingdom, thus showing to have interests on both sides.

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Riassunto

Il Sahara Occidentale è un territorio dell'Africa Nord-Occidentale che costituisce, ormai da decenni, un vasto territorio di guerra conteso, attualmente, tra il *frente* Polisario e il Regno di Marocco. Le ragioni del contenzioso sono molteplici e affondano le radici nella storia sia della regione che dei popoli che l'hanno abitata nel corso dei secoli. Infatti, se da un lato il Sahara Occidentale, pur essendo un ambiente desertico, è ricco di risorse che lo rendono appetibile dal punto di vista delle possibilità economiche che offre, dall'altro lato, prima che queste venissero scoperte, la regione non ha permesso la fioritura di una civiltà socialmente ed economicamente dinamica per via del clima inospitale; ma è stata piuttosto una zona di transito per numerose tribù nomadi che attraversavano il deserto con le carovane.

Alla luce di ciò potrebbe risultare problematico determinare chi sia il popolo che detiene la sovranità sul territorio; se non vi fossero stati due significativi eventi storici -l'arrivo degli arabi nella regione e la colonizzazione spagnola- che hanno portato le tribù a sedentarizzarsi e a costituire un vero e proprio popolo: il popolo Saharawi.

L'arrivo degli Arabi nella regione ha generato legami di fedeltà tra le tribù del Sahara Occidentale e i sultani, oltre alla diffusione dell'Islam tra le varie frazioni delle tribù stesse. Questi legami hanno fatto sì che, con la formazione degli Stati-Nazione, le potenze della regione avessero motivo di rivendicare i loro diritti sul territorio.

La colonizzazione, invece, è avvenuta in maniera graduale attraverso la stipulazione di accordi da parte del governo spagnolo con i capi delle tribù e con i sultani arabi; questi ultimi, in assenza di altre entità politiche, si consideravano l'unico elemento che potesse detenere la sovranità sul territorio.

Durante la colonizzazione spagnola, vennero scoperte le risorse naturali del Sahara Occidentale: la pescosità delle coste, già evidente dai tempi dell'espansione verso le isole Canarie, divenne sfruttata a livello industriale e, soprattutto, i giacimenti di fosfati della regione furono rinvenuti ed accesero l'interesse dei colonizzatori. La miniera a cielo aperto di Bou Craa, infatti, estendendosi per 250 km², costituisce la più vasta fonte di fosfati al mondo. Oltre ai fosfati di calcio con una densità pari all'85%, la regione è ricca di ferro, gas e, potenzialmente, petrolio.

Il popolo Saharawi cominciò a consolidarsi e ad opporsi al dominio spagnolo già verso la fine degli anni '60: nel 1967 venne infatti fondato il *frente* Polisario, acronimo di '*Frente Popular de Liberación de Saguia el Hamra y Rio de Oro*', il quale cominciò sin da subito a rivendicare i diritti dei Saharawi sul territorio. La decolonizzazione del Sahara Occidentale avviene con un considerevole ritardo soprattutto per via dell'interesse generato dalla scoperta delle ricchezze del sottosuolo: non più soltanto la Spagna, ma anche Marocco e Mauritania avanzavano pretese sulla regione.

L'accresciuto dialogo tra gli Stati Nazionali voluto dallo sviluppo della comunità internazionale dopo la Seconda Guerra Mondiale ha portato alla nascita delle organizzazioni internazionali e ad una notevole spinta verso la concessione dell'indipendenza ai popoli sottoposti a dominio coloniale. Ciò indusse il Marocco e la

Mauritania a porre la questione della colonizzazione del Sahara Occidentale all'Assemblea Generale delle Nazioni Unite, affinché questa determinasse se il territorio costituisse *terrae nullius* all'epoca della colonizzazione e quali fossero i legami tra il territorio e la Mauritania da un lato e il Marocco dall'altro.

Con la Risoluzione 3292 del 13 Dicembre 1974 l'Assemblea Generale richiede il parere della Corte Internazionale di Giustizia, la quale determina che il territorio non era da considerarsi *terrae nullius* poiché la popolazione Saharawi, pur non essendo apparentemente dotata di un'entità legale, aveva un'autorità costituita dal 'Consiglio dei Quaranta' che la rappresentasse. Inoltre, al secondo quesito posto congiuntamente dai due Stati, la Corte risponde che, se con il Marocco vi erano relazioni di lealtà tra il sultanato e *alcune* tribù nomadi, con la Mauritania vi erano legami di tipo religioso, linguistico, culturale ed economico. In nessuno dei due casi, tuttavia, vi erano vincoli giuridici che legittimassero le pretese dei due Stati.

Nonostante le affermazioni della Corte andassero in direzione opposta rispetto alle aspirazioni di Marocco e Mauritania, Re Hassan II organizzò, il 4 Novembre del 1975, la 'Marcia Verde' a cui presero parte 350'000 civili. Questa ufficializzò le pretese dello Stato Nordafricano sul territorio, generando l'intervento del Consiglio di Sicurezza delle Nazioni Unite. L'intervento dell'Onu aveva come obiettivo il raggiungimento di un accordo che, tuttavia, non venne stipulato secondo i criteri fissati dalla comunità internazionale. Marocco, Mauritania e Spagna, infatti, firmarono in segreto gli 'Accordi di Madrid', questi prevedevano vantaggi per la Spagna dal momento in cui questa avesse decolonizzato la regione lasciandone il controllo a Marocco e Mauritania. Il valore legale degli Accordi di Madrid è stato contestato in più occasioni sia poiché gli Stati contraenti ne hanno proceduto alla stipulazione trascurando il corretto *iter* e ignorando i suggerimenti dell'Inviato Speciale del Segretario Generale, sia perché la Spagna, pur essendo potenza amministratrice non deteneva, e quindi non aveva il diritto di cedere, la sovranità sul territorio; ma soprattutto perché essi sono totalmente invalidati dall'art. 103 della Carta.

Nonostante l'invalidità degli Accordi, questi portarono la situazione a degenerare ulteriormente: quando nel 1976 le truppe spagnole lasciarono il territorio in seguito alle numerose pressioni della comunità internazionale, nella regione non fu sventolata la bandiera del nuovo Stato del popolo Saharawi, al contrario, le truppe del Marocco e della Mauritania occuparono immediatamente l'intera regione.

Dal momento in cui la decolonizzazione avvenne, migliaia di Saharawi scapparono e trovarono rifugio in territorio algerino presso Tindouf, dove il *frente* Polisario proclamò la Repubblica Democratica Araba dei Saharawi, al fine di creare un'entità politica che potesse contrastare e porsi come alternativa all'occupazione straniera. L'Esercito di Liberazione del popolo Saharawi cominciò la sua battaglia contro la Mauritania, che riteneva essere l'anello debole e, dopo 4 anni di attacchi puntualissimi e mirati, la Mauritania andava incontro ad una guerra civile tra i gruppi etnici che la compongono, fu costretta, perciò, a stipulare un trattato di pace con il Polisario in cui riconosceva il diritto all'autodeterminazione del popolo Saharawi.

La guerra faccia a faccia con il Marocco vide il *frente* fronteggiare bene il nemico nonostante le dimensioni dell'esercito marocchino fossero di gran lunga superiori, ma l'arrivo degli aiuti da parte degli

alleati del Regno mise in difficoltà i Saharawi, soprattutto dal momento in cui il Marocco cominciò a costruire muri di difesa nel deserto.

Il degenerare degli eventi portò l'Organizzazione delle Nazioni Unite e l'Organizzazione dell'Unità Africana ad ideare il 'Settlement Plan' nel 1988, questo prevedeva l'attuazione di un cessate il fuoco e l'organizzazione di un referendum, per la realizzazione del quale, nel 1991, la Risoluzione 690 del Consiglio di Sicurezza creava l'operazione MINURSO: la missione delle Nazioni Unite per la realizzazione del referendum nel Sahara Occidentale. La prima data fissata per il referendum fu per l'anno successivo, tuttavia, dal 1991 ad oggi, il Marocco e il Polisario non sono riusciti a trovare un accordo su chi fossero gli aventi diritto a prendere parte al referendum; la situazione è perciò in stallo da allora nonostante i numerosi sforzi di mediazione delle Nazioni Unite degli anni seguenti.

Le complicazioni che entrano in gioco nella questione e che rendono più complessa la possibilità di una risoluzione sono numerose; sul piano formale, attualmente, la disputa è incentrata sul quesito relativo a chi debba partecipare al referendum: il Marocco sostiene, da un lato, che tutti i residenti sul territorio abbiano il diritto a votare, tuttavia molti di essi sono marocchini trasferitisi nel Sahara occidentale in seguito all'occupazione, invogliati dagli incentivi messi in atto dal governo marocchino stesso. Dare loro il voto renderebbe altissima la probabilità di avere un risultato che favorisca il Marocco disavvantaggiando i Saharawi, i quali, dall'altro lato, rivendicano il loro diritto all'autodeterminazione.

L'autodeterminazione dei popoli è il principio del diritto internazionale attorno al quale verte la questione, è un obbligo di ogni Stato nei confronti della comunità internazionale (ovvero un principio *erga omnes*) e valorizza la considerazione dei diritti dei popoli in contrapposizione a quella degli Stati intesi come apparati di governo. Da un lato, il principio può essere concepito attraverso la sua dimensione *interna*, che enfatizza il diritto di un popolo di scegliere liberamente il proprio sistema di governo, dall'altro lato vi è la concezione di autodeterminazione *esterna*, incentrata sullo *status* politico di un popolo a livello internazionale.

Dall'enunciazione del principio di autodeterminazione come contenuto nella Dichiarazione dell'Assemblea Generale emerge anche la 'clausola di salvaguardia', questa conferisce il diritto all'autodeterminazione a tutti quei popoli che subiscono una qualche forma di discriminazione nel contesto dello Stato sovrano di cui fanno parte, e che perciò non possono partecipare all'esercizio di governo con lo stesso grado di coinvolgimento di tutti gli altri cittadini.

In dottrina è fortemente supportato il concetto secondo cui il principio di autodeterminazione dei popoli abbia carattere cogente, tuttavia vi sono degli ostacoli derivanti dalle difficoltà nel definire con chiarezza gli aspetti normativi del principio. Questo, infatti, tende ad essere ostacolato e talvolta a porsi in contrasto con il principio dell'integrità territoriale.

Per il diritto internazionale è vietato ostacolare l'unità dell'integrità territoriale di uno Stato e neppure il principio di autodeterminazione dei popoli è legittimato a favorire la secessione: la comunità internazionale tende a non favorire i fenomeni di rottura delle entità statali poiché queste tendono a causare dispute a livello

regionale che possono sfociare in conflitti più ampi; come è stato per le colonie nel contesto dei due conflitti mondiali.

Durante la decolonizzazione è emerso, con lo scopo di non creare ulteriori ragioni di dibattito, il principio dell'*uti possidetis iuris* secondo cui gli Stati neo-decolonizzati avrebbero dovuto mantenere i confini che avevano quando erano colonie.

Tutte le norme del diritto internazionale precedentemente menzionate, sono coinvolte nel conflitto del Sahara Occidentale. Dal punto di vista normativo infatti, la questione presenta numerosi punti bui che necessiterebbero un chiarimento per poter giungere ad una soluzione stabile della stessa.

Anche la classificazione del territorio è motivo di dibattito poiché, se da un lato il Sahara Occidentale è considerato, nell'ambito dalla Commissione Speciale per la Decolonizzazione, l'ultima *colonia* africana, dall'altro lato il territorio risulta essere *occupato* dal Regno del Marocco, il quale, tuttavia, nega lo stato di occupazione affermando che il Sahara Occidentale è da considerarsi un territorio *disputato*.

Per quanto riguarda l'applicazione dell'autodeterminazione al contesto del Sahara Occidentale, si osserva che al popolo Saharawi spetta l'autodeterminazione non solo concepita nelle sue note dimensioni di autodeterminazione interna ed esterna, ma anche secondo l'applicazione della clausola di salvaguardia. Questo deriva dal fatto che, dall'inizio dell'occupazione marocchina, sono state riportate numerose violazioni dei diritti umani da parte del governo nei confronti della popolazione Saharawi: risulta evidente la discriminazione della minoranza Saharawi all'interno dei territori occupati.

L'esercizio dell'autodeterminazione, inoltre, comporta non solo la definizione della struttura politica del popolo beneficiario ma anche il perseguimento dello sviluppo economico, sociale e culturale a vantaggio di quest'ultimo. In questo senso, i Saharawi non hanno mai potuto beneficiare delle ricchezze che il Sahara Occidentale possiede: l'attività economica è controllata dal governo marocchino che gestisce tutte le attività locali.

Ciò avviene perché, tra le norme che regolano l'occupazione, troviamo la categoria speciale di 'occupazione prolungata', ma anche perché il Marocco, negando lo *status* di occupazione, nega anche l'applicazione di tutte le norme del diritto internazionale ad esso relative. In questo contesto è interessante osservare il comportamento di Stati terzi in merito all'obbligo di non sostenere uno Stato che stia impedendo l'autodeterminazione; in particolare ha generato non poche polemiche l'Accordo sulla Pesca tra l'Unione Europea e il Marocco, quest'ultima infatti, nella prima versione dell'Accordo, non ha tenuto conto del fatto che tra le zone di pesca fosse inclusa la porzione di terra del Sahara Occidentale.

Analizzando tutti le componenti del conflitto nel Sahara Occidentale alla luce delle implicazioni del diritto internazionale coinvolte nella questione, si ha un quadro chiaro della complessità della stessa. Oltre che sul piano normativo, inoltre, vi sono implicazioni legate sia agli effetti regionali che a quelli internazionali che scaturiscono dal conflitto. Se, da un lato, infatti, la posizione del Marocco sembra essere irremovibile e il governo sembra aver svolto un'efficace propaganda in merito alla questione convincendo i cittadini del carattere regionale del conflitto inteso come una disputa territoriale contesa non tanto con il Polisario quanto

con l'Algeria, accusata di aver creato uno 'stato fantasma'; dall'altro lato vi sono implicazioni al di fuori dei confini del conflitto poiché ad essere coinvolti sono anche gli alleati del Marocco (Stati Uniti e Francia) e tutti gli Stati che si sono espressi sul riconoscimento della Repubblica Democratica Araba dei Saharawi.

Una soluzione del conflitto nel breve termine è difficile da immaginare per via della situazione di stallo permanente che continua da anni, ma anche per via della scarsa risolutezza del Consiglio di Sicurezza dell'Onu nell'affrontare la questione che deriva dalla presenza, tra i Membri permanenti del Consiglio, di Francia e Stati Uniti, storici alleati del Marocco.

Tuttavia, con gli anni, i Saharawi sono sempre più in svantaggio numerico rispetto ai Marocchini insediatisi nella zona; e far attendere altro tempo alla realizzazione del referendum potrebbe portare ad un esito che non tenga conto, ancora una volta, del volere della popolazione Saharawi che, finora, nel corso della storia, è rimasta fin troppo al di fuori delle decisioni politiche che la riguardano.