

Who still cares about the Western Sahara?

Legal reflections on self determination,
the European Union and the United Nations

Understanding MENA
Kingston University, 18 April 2018

Aziza Brahim
https://www.youtube.com/watch?v=g-_i0if61IA

The title



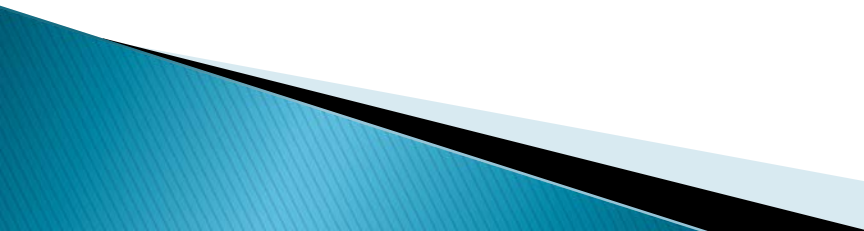
The Western Sahara



I / The problem

- ▶ Western Sahara = a non self governing territory occupied by Morocco + a wall separating the territory controlled by Polisario Front since 1991
- ▶ = A normalisation of the imperfect situation / *status quo*
- ▶ = a 'frozen conflict'
- ▶ 16 Years of conflict and 27 of failed peacemaking
- ▶ The lack of impact of the Arab Spring

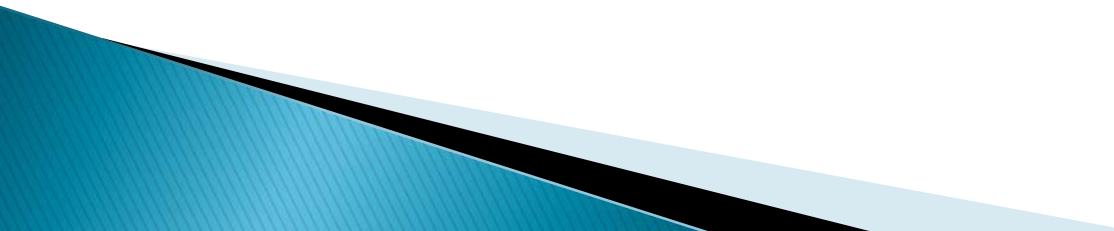
II / How did we get to that stage?

- ▶ Spanish Western Sahara = a Spanish Protectorate
 - ▶ 1974–6 Spanish desire to withdraw
 - ▶ 1974: Spain prevented by Mauritania and Morocco from holding a referendum
 - ▶ 1975–76: Spain ceded administrative control to Mauritania and Morocco (Madrid Accords). Morocco seizes two-thirds of Western Sahara .
 - ▶ + Polisario Front, declares the Saharan Arab Democratic Republic (SADR), a government-in-exile in Algeria.
 - ▶ + Sahrawi refugees flee to camps in Algeria (Tindouf).
 - ▶ 1984: Mauritania recognised the SADR
- 

How did we get to that stage? (2)

- ▶ 1991: UN-monitored ceasefire (UN SC res 621 & 690):
- ▶ BUT wrangling over a proposed referendum on the future of the territory.
- ▶ Let the people decide: BUT which people?
- ▶ Disagreement over the eligibility of voters (Identification Commission)
- ▶ Issue: Western Sahara = nomadic populations + unwritten culture
- ▶ NOW: 80–85% territory controlled by Morocco = its southern provinces, Polisario Front controls the 'liberated territories'

III / The International Actors

- ▶ The UN: ICJ, SC & Peacekeeping Mission : MINURSO The United Nations Mission for the Referendum in Western Sahara .
 - ▶ The OAU/AU : accepted SADC membership
 - ▶ The EU : the CJEU
 - ▶ France, a strong Moroccan ally
 - ▶ Algeria : the other regional hegemon / rival
- 

—

IV / The legal context under international law

A/ Morocco's *de facto* annexation / conquest

Are annexations or conquest lawful?

- ▶ Previous annexation attempts:
 - East Timor (Indonesia 1975) & Crimea (Russia 2014) = controversial
 - The colonial enclave theory: Goa (India 1961) AND Ifni (Morocco 1969)
- ▶ **BUT** acquiring territory through force is not a lawful method under contemporary PIL
- ▶ = conquest

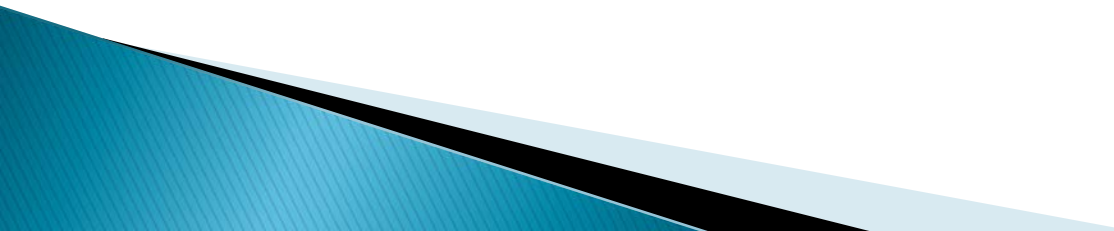
B/ Non self governing territories

- ▶ UN Charter , art. 73: the WS
- ▶ Definition: a Territory ‘whose people have not yet attained a full measure of self–government.’
- ▶ = under administration by another state
- ▶ Currently: 17 in the world
- ▶ WS = only one in Africa
- ▶ Aim= the ‘well being of the people’
- ▶ + ‘to develop self–government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions’

NSG territories

- ▶ Independence is not automatic:
- ▶ In general: independence within the colonial boundaries : *uti possidetis* principle
- ▶ & also present in the OAU 1964 Declaration
- ▶ GA res 1541: options: a sovereign independent state or integration into an existing state
- ▶ It is the will of the people that counts :
 - E.g. 1958 French Africa had a choice: larger autonomy or independence
 - E.g. Mayotte v Comoros Islands
 - E.g. East Germany

What happened in practice at the time?

- ▶ 1975–6 : Final African decolonisation by Spain (end of Franco regime)
 - ▶ Previous ones Spanish Morocco (1956) & Equatorial Guinea (1968)
 - ▶ Around the same period : Portuguese decolonisation process : Angola, Mozambique, Cap Verde, Guinea Bissau
 - ▶ ALL leading to independence
- 

C / The Main PIL issue

- ▶ **Squaring a circle:**
- ▶ SD = rights for a 'people'
- ▶ BUT
- ▶ PIL = rules regulating relations between States – States = main subjects of PIL: rights and obligations
- ▶ + PIL = based on consent of states
- ▶ States can determine by what PIL rules they are bound: expressly or implicitly
- ▶ = for a people : statehood = the wholly grail : full rights
- ▶ Final problems relating to enforcement

D / The ultimate aim by Polisario: Independence

- ▶ To be independent, you need to be recognised as a state

Conditions for statehood in PIL:

- ▶ 1933 Montevideo Convention (and customary international law):
 - Territory
 - Population
 - A government in control
 - Capacity to enter into external relations with other states

The trickier condition: State Recognition

- ▶ **‘When is a state a state? You’re a state when other states say you’re a state, even if you’re just a van in a car-park.’
(Tom Young)**

E / The dominating PIL principle: the right to self determination

- ▶ ‘Commonly used, the term "self-determination" still represents the moral principle that all peoples have the right to be free from tyranny and to determine their own destinies.’ (Hanauer)
- ▶ The 1975 ICJ Western Sahara Advisory Opinion
 - Did the historical / cultural links between Morocco and Mauritania with WS provide them with territorial claims?
 - No: there was no ethnic-historic entitlement because of an affinity with its people
 - = The right to self determination should apply
 - The principle of self-determination was defined by the Court as 'the need to pay regard to the freely expressed will of peoples'

SD

- ▶ SD is a right leading to independence applicable in the colonial context (i.e. 'white Europeans exercising rights over non white peoples and their territory' (Castellino))
- ▶ Recognised by GA res. 1514 (Declaration on the Granting of Independence to Colonial Countries and Peoples) & CIL
- ▶ NOT a general right to all people
- ▶ Fear: balkanisation effect: states being unravelled by smaller groups within their territory
- ▶ Territorial integrity and intangibility of frontiers
- ▶ PIL values territory and stability / status quo

For a State to create a Nation , not for a Nation to create a State

- ▶ ‘The Sahrawis barely constitute a distinct "people" or a "nation“ since they share many elements of their culture, language, religion, and ethnic heritage with neighboring peoples, and did not develop a supratribal national consciousness (Hanauer)
- ▶ *Uti possidetis*: what matters is the territory, not the people

F / 2011 and after: a missed opportunity?

Some recognition of a bottom up democracy:

- Arab Spring
- Some demonstrations in WS in March–May 2011 but local issues, little connection to the regional movement
- South Sudan independence
- The 2014 Scottish referendum , Brexit
- Kosovo & Palestine (UNESCO, ICC) moving closer to full recognition

G / The direct international influence

▶ **The African Union :**

- African Commission on peoples' and human rights :
Fact Finding Mission 2012 Report: 'The African Union should place the issue of the self-determination of Western Sahara as one of its priority agenda items and spur international efforts towards resolving the issue speedily and equitably in order that the aspirations of the Sahrawi people could be realized;'

The direct international influence

- ▶ **The EU:**
- ▶ 2 important judicial decisions :
- ▶ 10 Dec. 2015, General Court of the EU:
 - Polisario successful in challenging a trade agreement between Morocco and the EU which included the WS without Polisario approval + recognition of extraterritoriality of HRs (quashed by the ECJ)
- ▶ 27 Feb 2018, CJEU preliminary reference:
 - Trade Agreement with the 'territory of Morocco' or 'Moroccan fishing zone' should not include the Western Sahara territory

H / *A status quo*: for how much longer?

- ▶ *Plus ça change...*
- ▶ ‘For most of the actors – Morocco, Algeria and the Polisario Front, as well as Western countries – the status quo offers advantages a settlement might put at risk’ (International Crisis Group)
- ▶ A zero sum game
- ▶ A new conflict resolution dynamic needed (International Crisis Group)
- ▶ Will a multipolar world be more beneficial?