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ARTICLES

Placing International Law: White Spaces on a Map

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Abstract

Focusing particularly on the moment of decolonization, in this article I look at the paradoxes attending the endurance of the statist framework in conceptualizing territorial self-determination as well as in curtailing it. A range of protagonists in the decolonization drama, from the departing colonial powers to Third World nationalists to international jurists, have all clung to the modern nation-state as the means through which self-determination is to be realized. Against the enduring hold of the state, this article tries to foreground the ways in which the statist paradigm prematurely forecloses the self-determination options available to the nomadic communities of Western Sahara, and cramps debates about boundary and *uti possidetis* in Burkina Faso and Mali. In this vein the received categories of the territorially bounded state reach into the postcolonial imagination to discipline, codify, and produce 'independence'. At the same time, however, the difficulties confronted by the boundary delimitation process in Burkina Faso and Mali suggest that the reach of the territorially bounded state is limited. It is limited by the sub-national and transnational complexities of people's lives, but also by the indeterminacy of cartographic documentation and the complexities of colonial and postcolonial bureaucracies. Rather, it is argued that international law has a contradictory relationship with decolonization, desiring the self-determination of the former colonies, while also harnessing the decolonization project to fulfil its own desires, 'to reproduce the law's assumptions regarding the ends of freedom'.[1]

Key words

International Court of Justice; self-determination; territory; *terra nullius*; *uti possidetis*

1. INTRODUCTION

The literary critic Benita Parry reads Marlow, the central character in Joseph Conrad's *Heart of Darkness*, as having 'two voices speaking in counterpoint, one . . .

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1. I am indebted to Doris Sommers for this formulation.

denouncing imperialism's means and goals ... the other a utopian dimension to its apocalyptic ambitions'.[2] I suggest that the jurisprudence of the International Court of Justice (ICJ) in the postcolonial context often has this same character; it too both 'exposes and colludes' in international law's mystifications, its own condemnation of the colonial legacy conveyed through the deployment of colonialism's tropes. This essay attempts to surface these immanent contradictions through a close reading of the principle of *terra nullius* that emerges in the ICJ's *Western Sahara Advisory Opinion* of 1975,[3] and the principle of *uti possidetis* in the 1986 ICJ ruling on the case concerning the *Frontier Dispute between Burkina Faso and the Republic of Mali*.[4] These principles figure as tropes structuring the territorial imagination of self-determination in cases that mark different moments of decolonization. I suggest that there is something of a Conradian sensibility that has resonance with the Court's discussion in these cases, and read these opinions alongside Conrad's 1924 essay, *Geography and Some Explorers*.[5]

The state is, perhaps, the supreme icon of postcolonial modernity. A range of protagonists in the decolonization drama, from the departing colonial powers to Third World nationalists to international jurists, all clung to the modern nation-state as the means through which self-determination was to be realized. In this vein the received categories of the territorially bounded state reach into the postcolonial imagination both to produce and to discipline 'independence'. I argue that statehood emerges as the 'natural' institutional form for self-determination in international legal discourse; in doing so, it prematurely forecloses the self-determination options available to the nomadic communities of Western Sahara, just as it cramps the debate around the doctrines of *terra nullius* and *uti possidetis* respectively. At the same time, however, the difficulties confronted by the boundary delimitation process in Burkina Faso and Mali suggest that the reach of the territorially bounded state is limited. It is limited by the sub-national and transnational complexities of people's lives, but also by the indeterminacy of cartographic documentation and the complexities of colonial and postcolonial bureaucracies. Thus while I want to denaturalize the statist framework and to foreground the way in which it has stifled the pursuit of self-determination, I do not want to condemn statism as *necessarily* detrimental to the pursuit of self-determination. In fact the analysis that follows tracks the differing political valence of the different doctrinal principles shaping sovereignty, including self-determination, *terra nullius* and *uti possidetis juris*. Relatedly, this essay also argues against any fixed map of political positions that attaches to specific doctrinal principles regulating territory.

1.1. Joseph Conrad and the passion for territory

Some readers may be more familiar with the substance of the essay, *Geography and Some Explorers*, through its partial reincarnation in the early pages of Conrad's novel,

2. B. Parry, *Conrad and Imperialism: Ideological Boundaries and Visionary Frontiers* (1983), 38.
3. *Western Sahara*, Advisory Opinion of 16 October 1975, (1975) ICJ Rep. 12.
4. *Frontier Dispute* (*Burkina Faso v. Republic of Mali*), Judgment of 22 December 1986, (1986) ICJ Rep. 554.
5. J. Conrad (1946).

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Heart of Darkness. I find this essay rich and productive on a number of fronts. As an impressionistic history of geography and Western explorers, the essay was useful in thinking about how international law maps history onto territory and vice versa, particularly the history of the colonial encounter. I also find that the paradoxes attending Conrad's own passion for geography, and his reflections on how the passion for territory has led to exploration and imperial conquest, resonate with how certain territorially grounded conceptions of self-determination are grappled with in the ICJ opinions that I examine in this paper. Most powerfully, for instance, Conrad's essay indicates how the territorial preconceptions of cartographers, explorers, and seamen like himself were then projected onto or constructed the territories that they then mapped, explored, and 'discovered'; thus exploration turns out to be as much about introspection, our vision of the other a portrayal of our own anxieties and passions.[6] Similarly, international law has a contradictory relationship with decolonization, desiring the self-determination of the former colonies, while also being interested in harnessing or directing the decolonization project to fulfil its own desires.

Let me begin by making a few comments on the title of this article, because I think that it will give you a sense of both the theoretical preoccupations and the methodology that informs it. I have given to this article the title 'Placing International Law: White Spaces on a Map'. The reference to 'placing' international law represents several ideas: first the notion that this article is concerned with how international law thinks about 'place', how it theorizes territory. However, in addition I want to also 'place' or locate international law in relation to something else, namely colonialism; so here 'placing international law' is about looking not only at the place of international law in the history of colonialism but also at the place of colonialism in contemporary understandings of international law. Finally, I also want to bring together the word 'place' in the first half of the title and the word 'space' in the second half of the title. If the idea of place connotes the domestic or local territory and the idea of space connotes abstract or global territory, I am interested in both how this duality is produced and how this duality can be unpacked. Where international law produces itself as a space for abstract and universal norms and laws, I am interested in the very particular places[7] from which those norms and laws are produced as universal or abstract and, moreover, the attendant ideas of local and domestic that are constructed concomitantly. Here I also want to flag the idea that the gendered and racialized tensions of the domestic order[8] remain in place, inhabiting international law, just as the international law's tensions rework the domestic.[9] The gendered and

6. As Edward Said has noted, 'The Orient was ... not Europe's interlocutor, but its silent other'. E. Said, 'Orientalism Reconsidered', in Francis Barker, Peter Hulme, Margaret Iverson and Diana Loxley (eds.), *Europe and Its Others* (1985), 14–27.
7. Here I want to point to those places as inhabiting the interior space of the self as much as the exterior geography of territory. *See also* Johnson and Garber (1987).
8. Also conveyed through the more tangential connotations of 'placing' through allusions to the domestic setting, to placing table settings, laying out place mats.
9. Note the following as just a few of the many discussions of the relationship between race, gender, and empire: C. Achebe (1978) 'An Image of Africa', *Research in African Literature*, (1978) 9, 1–15; A. Blunt and G. Rose, 'Women's Colonial and Postcolonial Geographies', in A. Blunt and G. Rose (eds.), *Writing Women and*

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racialized dualisms that permeate narratives of territory and geographical passion remind us again how the vocabulary of international is also a vocabulary about the domestic: the frontier is at the edge of the Sahara, but it is also at the edge of the ghetto; colonial exploration is also about the construction of masculinity and femininity in particular domestic locales.[10]

It is in this context that I see that the phrase 'white spaces on a map' is not only a reference to the use of Conrad in this paper, but also to how Conrad both invokes dualisms and then also rearranges their inherited meanings. Here the racialized dualism of white/dark is famously exemplary, where the familiar positive moral connotations of white in relation to black are invoked in one page, and reversed in the next.[11] Moreover, the transition from white spaces on a map to the heart of darkness is not just (although it is inescapably that too) an allusion to a continent of black people, it is also an allusion to white spaces on a map that are filled up by the darkness of imperialism and all the brutality and plunder associated with it. As I said earlier, international law also inhabits and unsettles the dualisms of our normative maps by speaking in counterpoint, where its ideas about territory are internally heterogeneous ideas about its relationship to the racialized, colonial other, at once emancipatory and exclusionary.

The ICJ has had occasion to adjudicate territorial questions in a number of contexts, ranging from competing claims to territorial parcels, decolonization, jurisdiction disputes and so on. There are invocations of territory that are sharply divergent, but they are always invoked as if uncontested, as if there was some 'plain meaning' attached to territory. As Doreen Massey suggests regarding invocations of the spatial, 'Buried in these unacknowledged disagreements is a debate which never surfaces; and it never surfaces because everyone assumes we already know what these terms mean.'[12] Part of the project of this paper is surfacing these differences in the *Western Sahara* and *Frontier Dispute* opinions.

The two cases discussed in this paper foreground questions regarding the colonial experience in addressing questions of self-determination and sovereignty in the postcolonial context. I work from the starting assumptions that people's visions of colonialism and decolonization are imagined territorially as much as historically. As Judge Ammoun says in his separate opinion to the *Western Sahara* case, 'Those peoples did not live suspended between sky and ground', but this is so not only

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Space (1994); A. JanMohammed, 'The Economy of Manichean Allegory: The Function of Racial Difference', in Henry Louis Gates, Jr (ed.), *Colonialist Literature. 'Race,' Writing and Difference* (1986); E. K. Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (1985); M. L. Pratt, *Imperial Eyes: Travel Writing and Transculturation* (1991); M. Torgovnick, *Gone Primitive: Savage Intellects, Modern Lives* (1990).

10. The tropes and metaphors of colonialism have an uncanny accuracy in describing the gendered, racialized classed battles at home. In fact the 'othering' of the colonial world has itself involved the transference of domestic tensions and vice versa. For instance, there has been a lot of concrete historical work on how struggles over gender and sexuality at home then informed and shaped the character of colonial intervention, and similarly how the notions of manhood developed in the racialized and polarized colonial encounter were pulled back home to shape and inform the domestic debates. See Sedgwick, Pratt, Torgovnick etc., *supra* note 9.

11. For instance the evil associated with the whiteness of the ivory trade and so on: see Parry, *supra* note 2.

12. D. Massey, 'Politics and Space/Time', in Michael Keith and Steve Pile (eds.), *Place and the Politics of Identity* (1993), 141–61.

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materially but also discursively, that people constitute memory and aspiration through space and place, indeed that these are mutually constitutive. The discussion that follows does not read the opinions for the merits of the cases, but rather as a text conveying competing narratives about territory in the postcolonial condition. I offer a close reading of two cases, and particularly of the territorial principles of *terra nullius* and *uti possidetis*, in interrogating and exploring the work of a submerged territorial imaginary.

Before I go further, I want to illustrate what I mean by submerged territorial imaginaries by tracking the way in which the *Western Sahara* opinion discusses the scale of territory, from the local to the national to the regional. In examining the plural and shifting measures of territory deployed in the case we find that every invocation of Western Sahara is itself a negotiation of questions of identity and difference, of sovereignty and community. The territory of Western Sahara is not prior to those struggles, not merely a space onto which we impose those struggles; rather, Western Sahara is itself constituted through those struggles.

1.2. Scale and nation: shifting units of territory

The *Western Sahara* opinion invokes territory at multiple scales, including the regional, the national, and the local. Scale emerges as an analytical frame through which legal, political, and cultural relationships, modern and historical relationships, are read, and layered laterally across territory. We follow the Court's search all over Western Sahara, Burkina Faso and Mali for territorial sovereignty, only to find that territorial sovereignty has emerged in The Hague, as the very optic through which the ICJ conducts its search.[13]

I offer a fuller description of the Western Sahara case later in this article. For the moment, in this brief and introductory treatment tracking the operation of scale, it is sufficient to know that much of the case is concerned with conflicting accounts of the legal, political, and cultural ties between Morocco, Mauritania, and Western Sahara, and most specifically, conflicting accounts of whether or not these ties were

13. This doubling-back quality of scale is not unique to the *Western Sahara* opinion. The operation of scale as a shifting optic in the architecture of international law has been looked at in Annalise Riles's discussion of nineteenth-century international lawyers for whom 'scale was a fundamental ... aspect of the disciplinary project' where 'the international lawyer's task ... was to transform "local" disputes into matters of global importance', A. Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law', (1995) 6 *Law and Critique* 39 at 41. Just as Riles has pioneered the discussion of scale in international law, Neil Smith has been very influential in the theorizing of scale in critical geography and planning; see Neil Smith, 'Geography, Difference and the Politics of Scale', in Joe Doherty, Elspeth Graham and Mo Malek (eds.), *Postmodernism and the Social Sciences* (1992), 57; Neil Smith, 'Homeless/Global: Scaling Places', in Jon Bird *et al.* (eds.), *Mapping the Futures: Local Cultures, Global Change* (1993), 87; Neil Smith and Dennis Ward, 'The Restructuring of Geographical Scale: The Coalescence and Fragmentation of the Northern Core Region', (1987) 63 *Economic Geography*, 160. Other interesting theorists of scale include Andrew Jonas, 'The Scale Politics of Spatiality', (1994) 12 *Environment and Planning D: Society and Space* 257; and Agnew in J. Duncan and D. Ley (eds.), *Place, Culture and Representation* (1993).

Riles's paper offered an insightful discussion regarding how the local v. global scale was invoked to define some problems as global and pull them into the jurisdiction of international law or, conversely, to resist international law and claim that something was of purely local significance. In the *Western Sahara* opinion the basis on which the stakes are laid is the scale of the national. In that sense it occupies a particular postcolonial problematic where the 'national' is mobilized as both the scale of colonialism and the scale of resistance to colonialism.

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constitutive of sovereignty at the moment of Spanish decolonization. While Spain argues that they were not, Morocco and Mauritania argue that they were; in this way each of the protagonists map relations between local rulers, communities, and locales onto different accounts of the nation. There is a constant shifting back and forth in speaking of scale in the same register, or at least invoking the same discursive context of international law and the idiom of 'sovereignty', and speaking of scale in ways that convey a dissonance between different units of measure. The inquiry into scale conveys both the shared privileging of the national scale, and divergent interpretations of how we give content to the national.

On the one hand, the modern nation-state and its unilinear scale of sovereignty is posited as the natural and universal measure of territoriality. The scale of the nation (and particularly statist conceptions of the national scale) emerges as the archetype for territorial self-determination. It is the overarching lens through which past ties gain legitimacy as legally recognized territorial relationships. Throughout the opinion we see distinctions between cultural and religious relationships on the one hand and administrative relationships on the other. While the former are deemed relationships that convey social ties, only the latter function as legal ties relevant for consideration of self-determination. The question is framed such that the scale that is appropriately legal is identified with administrative functions of the nation-state – powers of taxation, powers of protection, granting of amnesty to foreign prisoners, and so on. For instance, against the view that the Moroccan state extended to the Bled Siba, it is said that 'what characterized the Bled Siba was that it was not administered by the Makhzen; it did not contribute contingents to the Sherifian army; no taxes were collected there by the Makhzen' and so on.[14]

Yet if we expect that the scale of the nation will give us a stable optic with which to read interventions in the case, we will instead encounter a contested and shifting map. In fact, we find that the scale of the nation does not even sit squarely as a centralized administrative framework. For instance, the Mauritanian delegation's citation of decentralized quasi-confederate political associations provides an alternative mapping of territorial community that can be contrasted with the centralized administrative model. Similarly the Moroccan government's claim that the Moroccan state was constituted by two kinds of relationships with its constituents, more centralized in some territories and more decentralized in others, offers the scale of the nation as itself internally heterogeneous, with asymmetrical relations between the sovereign and different constituencies.

In all the interventions in the case, the scale of the national produces itself by defining itself against notions of the local and the regional, mapped as sub-national and supra-national scales respectively. The particular characteristics that it attributes to each of these scales shift and vacillate through the opinion, but the categories themselves persist as a mutually defined relational ontology through which we can classify territorial relationships. In other words, the scale itself, the taxonomic differentiation of the national from the local on the one hand, and the

14. *Western Sahara*, *supra* note 3, at 36.

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national from the regional on the other, frames intelligibility onto the 'territories' invoked in the opinion. Different protagonists in the case operationalize different relationships of scale in setting the terms of the inquiry, an inquiry that is itself presented, however, as merely identifying the nature of relationships on a universal and shared scale, like a science of topography.

Debate over what is signified by the relationship between local rulers in Western Sahara, and the sultan of Morocco is illustrative. The Moroccan intervention argues for an account of scale collapsing the national and the regional, defining the local only through that broader entity. Thus, for instance, Morocco says that the sultan's asymmetric administrative relationships with different territorial units, the 'Bled Makhzen' area, and the 'Bled Siba' area, are appropriately considered as political and legal ties that accord with sovereignty, precisely because of the expansive scope of cultural solidarity: 'Because of a common cultural heritage the spiritual authority of the Sultan was always accepted.'[15] The reach of a cultural authority enables internal differentiation in legal ties; the scales of the national and the regional collapse into each other precisely, enabling the local scale to accommodate a plurality of 'legal' ties.

> Thus the difference between the Bled Makhzen and the Bled Siba, Morocco maintains, did not reflect a wish to challenge the existence of the central power so much as the conditions for the exercise of that power; and Bled Siba was in practice a way of effecting an administrative decentralization of authority.[16]

According to this view, if there is a lag between, on the one hand, the cultural nexus merging these scales and, on the other, the political and legal ties that differentiate them, this is merely the result of colonialist-run interference.

> In general it is urged that Western Sahara has always been linked to the interior of Morocco by common ethnological, cultural and religious ties, and that the Sakiet El Hamra was artificially separated from the Moroccan territory of the Noun by colonization.[17]

On this account decolonization constitutes returning political and legal authority to the legitimate ordering of scale that was distorted by colonialism.

For Spain the title 'caid' conferred by the Moroccan central authority on local sheikhs is merely an honorific title, a formality suggestive perhaps of shared interests or culture at the regional level, but not of a political or legal authority that was indicative of territorial sovereignty. It is argued that these were 'sheikhs already elected by their own tribes' and that they were '*de facto* independent local rulers'.[18] These local sources of political authority and legitimacy serve as the measure against which we then identify the lack of national ties of sovereign authority. Thus Spain suggests that regional ties can serve as a countermeasure to sovereignty, indicative of the lack of national ties of allegiance. Here we see that the scale of the local in relation to the national is parallelled by a scale of the national in relation to

15. *Ibid.*
16. *Ibid.*
17. *Ibid.*, at 37.
18. *Ibid.*, at 38.

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the regional. Thus even when there were political ties between the sultan and a local authority in Western Sahara such as the Ma ul-'Aineen, we are urged to distinguish between regional ties that we can think of as 'alliances' and ties of allegiance that were properly indicative of state sovereignty. For example, in the case of the Ma ul-'Aineen, 'his relations with the Sultan were based on mutual respect and a common interest in resisting French expansion from the south; they were relations of equality, not political ties of allegiance or of sovereignty'.[19] On this reading, it appears that it is the designation of some ties as more organically 'political', and others as arising from the contingency of shared 'interest', that scales the latter on to the regional rather than the national. In sum, we see the simultaneous invocation of strong political ties situated on a local scale that squeeze out political space for supra-local political ties of a national scale and of looser political ties situated on a regional scale that is too thin for them to be understood as sub-regional ties of a national scale. The local scale and the regional scale pull in from both directions to demonstrate the lack of political ties that can be scaled as national.

Pulling the Spanish intervention and the Moroccan intervention together we note that each of the protagonists in the debate invokes the scale of territory as pre-discursive, the universality and trans-historical valence of the category given. The concrete codification of scale is understood as an objective fact to be unearthed by an empirical inquiry into administration and boundary drawing. These interventions posit scale as the object of the inquiry. Instead, however, it seems to double back as already presupposed in the framing of the inquiry, a shifting and contested optic through which positions are asserted and defended. The conflicting measures of scale deployed in this debate suggest that scale is in fact the articulation of difference, rather than merely a plane onto which difference is mapped. In the interstices of this articulation we see the regime of scale through which territorial sovereignty emerges as fundamentally contested; it is not something already defined that we will then either find or not find in the relationships between Western Sahara, Morocco, and Mauritania.[20]

I trust that the above discussion of scale has illustrated the way in which territorial narratives convey a struggle over alternative visions of community, politics, and history, rather than their being naturalized as simply always already there to be declared rather than constituted by international law.[21] The invocations of scale

19. *Ibid.*

20. The dissonance between the formal positing of scale as the object of inquiry and the deployment, negotiation and contesting of scale through the process of inquiry is not unique to ICJ adjudication of the territorial disputes of the *Western Sahara* case. For instance, in *Case Concerning the Temple of Preah Vihear* (Merits) we see an administrative and centralized conception of sovereignty defined through the opposition of the national to the local. The Court argues that Thai local administrators' acts of sovereignty over the temple area cannot 'negativate' the acts of the Thai central government; thus even if the former evidenced acts of sovereignty, if the latter did not then territorial sovereignty is denied. *Temple of Preah Vihear* (*Cambodia v. Thailand*), Merits, Judgment of 15 June 1962, (1962) ICJ Rep. 6.

21. Even when disputes call for recourse to principles of equity, these are accommodated and brought in conformity with a declaratory rather than constitutive analysis of rules governing territory in international law: 'A structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a Court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate'. R. Jennings.

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here, and the invocations of *terra nullius* and *uti possidetis* in the rest of this article, articulate submerged conceptions of territory; I say 'submerged' because although references to territory spill out all over the text, territory is itself seldom theorized explicitly, and is often treated as simply the abstract ground onto which law is applied. To paraphrase Henri Lefebvre, in these ICJ opinions 'the idea of space' is 'conspicuous by its absence', and this despite 'the fact that space is mentioned on every space'.[22]

The narratives of territory operative in the territorial principles discussed in the *Western Sahara* and *Frontier Dispute* opinions, reference neither natural organizations of space, nor free-floating constructs, but can instead be situated in a concrete historical context. The gaze of territory alluded to in these different moments of decolonization involves what Felix Driver has called 'a vision of modernity' that itself emerges from a very particular space with very particular time–space coordinates, 'a space located not within the salons of European culture and civilization but in the colonial encounter between Europe and the rest of the World'.[23] In working through my close reading of these cases, I return to Conrad as a reference point because he is similarly concerned with the production of geographical spaces, and particularly with the way in which the white spaces on the map that intrigued him so much as a child were filled up through that colonial encounter, not just militarily, or through legal possession but also ideologically, where claims to knowledge and information produced that claimed trajectory from white spaces to dark.

2. The *Western Sahara* advisory opinion

I will quickly review the basic context in which the *Western Sahara* case came before the ICJ. The date of Spanish colonization was set at approximately 1884, when Spain claimed a protectorate over Rio de Ore.[24] Western Sahara, with Morocco to the north and Mauritania to the south, was itself populated by nomadic communities who traversed north-west Africa. The *Western Sahara* case emerged in the context of the broader process of African decolonization in motion from the 1950s on; the actual decolonization process was administered by the United Nations and was subject to many debates in the General Assembly. By 1975 the General Assembly had decided that it would hold a referendum in Western Sahara and let the Saharwi people decide whether they wanted to become an independent state, assimilate into an existing state, or get into some legal relationship with an existing state. In addressing these questions, the United Nations faced competing proposals by Spain, Morocco, and Mauritania, all of which were in favour of decolonization but had different visions of what it would mean in practice. Their competing proposals were grounded in competing claims regarding the status of Western Sahara at the time of the Spanish conquest in the late nineteenth century. In contrast to Spain's claim

22. H. Lefebvre, *The Production of Space* (1991).
23. Felix Driver, 'Geography's Empire: Histories of Geographical Knowledge', in Stephen Daniels and Roger Lee (eds.), *Exploring Human Geography: A Reader* (1996).
24. *Western Sahara*, *supra* note 3, at 39.

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that decolonization meant independent statehood, the Moroccan and Mauritanian interventions suggested that decolonization meant redrawing national boundaries to reunite what colonialism had ruptured. Thus it appeared to the General Assembly that clarifying the legal status of Western Sahara at the time of colonization would be pertinent for determining the form of decolonization. The General Assembly had submitted two questions to the ICJ: first, to determine whether, as the Spanish government claimed, Western Sahara was *terra nullius* at the time of conquest – a territory belonging to no one; second, to determine the character of the legal ties between Western Sahara, Morocco, and Mauritania respectively. In the following pages, I will refer to the first question as 'the *terra nullius* question' and the second question as 'the legal ties question'. In regard to the *terra nullius* question, the Court concluded that Western Sahara was not *terra nullius* because it was inhabited by politically and socially organized tribes.[25] In regard to the legal ties question, it argued that while there were some legal ties between Western Sahara, Morocco, and Mauritania, these were not ties of sovereignty. My discussion below begins with the whole issue of how and why the Court approached the *terra nullius* question in the way in which it did.

2.1. *Terra nullius*: space for a different heroism

The mapping of the territory of Africa itself emerges from another territory, namely the territory of modern European geography. The time of the Spanish conquest in Western Sahara also saw the institutional consolidation of geography in Europe.[26] In fact Felix Driver notes that the late nineteenth century was a particularly striking moment in the history of modern geography's relationship with colonial expansion.[27] It was a moment when the 'discipline found itself embroiled in a world of contracting spaces and expanding ambitions'.[28] Much of the world had already been carved up and claimed by the colonial powers, yet there was a persistent longing for a yet unknown and unclaimed frontier, a *terra nullius*. Thus the sweeping mapping of the world in the colonial context produced the taxonomic categorization of territory through determinate boundaries and settled frontiers, while at the same time there was a nostalgic longing for a virgin territory that was as yet unmapped, still awaiting the cartographer's pen and the explorer's gaze. As Driver notes, this

25. *Ibid.*
26. Felix Driver traces the institutionalization of geography during the late nineteenth century; see Driver, *supra* note 23.
27. Yet the penchant for mappable territory, for determinate boundaries and fixed categories is not unique to the colonial experience. It is, I suggest, part of a broader approach that enables, and emerges from, an administrative paradigm of territory. Thus in the *Case Concerning Sovereignty Over Certain Frontier Land* the ICJ seeks again to pinpoint territorial classification at the time of the boundary commission. The answer has to be either the Netherlands or Belgium: the 'facts' sought by the inquiry already presupposes that they will reveal that it is one of the two but not both. Similarly, in the *Legal Status of Eastern Greenland* case, the Court had to decide between the Danish and Norwegian claim rather than give legal recognition to the fact that the region had historical ties to both countries, PCIJ 1933. In adjudicating between the United States (which was ceded title to Spanish territories in 1898 by the Treaty of Paris) and the Netherlands in the 1928 *Island of Palmas* case, the Permanent Court of Arbitration had to negotiate a similar problem in determining the claims of Spain and the Netherlands respectively, 2 UN Rep. Int'l Arab Awards 829.
28. Driver, *supra* note 23, 343.

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ambivalence is conveyed in Joseph Conrad's representation of the history of European geography through three periods. Conrad offers an impressionistic and evocative account. The narrative begins with the 'fabulous phase' of 'extravagant speculation', strange and spectacular pictorial cartography recording 'imaginary kingdoms' and fantastic creatures. 'Geography Fabulous' was replaced with 'Geography Militant',[29] 'whose only object was the search for truth';[30] the endeavours of Captain Cook and other explorers are said to be characterized by 'the rigorous quest for certainty about the geography of the earth'.[31] Geography Militant was replaced by Geography Triumphant: 'where white spaces succumbed to the dominion of science, the mystery faded'.[32] The shift between these latter two periods is pregnant with the ambivalence I alluded to earlier; it is a shift that marks the irreversible closure of open spaces; the end of an era of unashamed heroism. 'Later explorers are condemned to make [their] discoveries on beaten tracks. The days of heroic travel are gone.'[33]

I suggest that this nostalgia for action creeps into the psyche of the *Western Sahara* opinion[34] and that the Court's discussion of *terra nullius* becomes a mode of heroic travel. Confined to act for ever against the backdrop of the colonial legacy, the Court, like Conrad, is seeking a terrain for heroism, and in this opinion, Western Sahara emerges as precisely such a terrain. This is not the 'triumphant' heroism of a Cortes or Columbus, but the 'responsible' heroism that Conrad attributes to Cabeza de Vaca, who in Conrad's words was 'high minded and dealt humanely with the human nations'.[35]

My reading emerges out of the Court's discussion and interpretation of the *terra nullius* question. Given the specific issue at hand, it seems to make sense to construe the substance of the *terra nullius* question as gesturing in the same direction as the legal ties question, namely the inquiry into the legal relationships of Morocco and Mauritania in Western Sahara in 1884.[36] The theoretical and historical investigation into the validity of Spanish conquest would have been relevant only if the

29. Conrad, *supra* note 5, 250.
30. *Ibid.*, 254.
31. Driver, *supra* note 23, 340.
32. *Ibid.*
33. *Ibid.*, 340–41, 342.
34. This may be suggestive of a thread running through international law more generally. For instance, it is telling that most cases of territorial dispute that come to the ICJ are cases about the frontier, the border, the boundary, the continental shelf, the island, the polar region. On the one hand this may emerge from the broader dynamic on the part of international law to relegate all ambiguity to the border; the core remains settled, fixed, determinate. On the other hand, this also reflects a romance with the frontier. The uncertainty of the frontier is a source of energy and vitality for international law, giving it space for its projects, a place for its exploratory gaze.

    In fact, perhaps Conrad's geographical vision has particular resonance with public international law because of its aspiration for intervention: what Conrad says of geography as a discipline could often be said of international law: 'Of all the sciences, geography finds its origin in action, and what is more in adventurous action of the kind that appeals to sedentary people who like to dream of arduous adventure in the manner of prisoners dreaming behind bars of all the hardships and hazards of liberty dear to the heart of man.' Conrad, *supra* note 5, 247.
35. *Ibid.*, 249.
36. In his Separate Opinion Judge de Castro says that given the very concrete problem that was posed to the Court (at 132), their interpretation should have harnessed the two questions together (at 133), especially given that the three countries all harness the questions together, *Western Sahara*, *supra* note 3, at 132–4.

decolonization process was an issue, and the validity of Spanish title had bearing on the specific process of decolonization in ways that were not addressed by the legal ties question. Yet here Spain is fully committed to the decolonization process, and the only outstanding problem is one that situates decolonization in relation to the claims of Morocco and Mauritania, and the legal ties question goes directly to this problem. In fact, as conveyed in the separate opinions of many of the judges, much of the Court had urged against answering the *terra nullius* question on precisely this reading.[37] They argued that the *terra nullius* question gains meaning only if assimilated into the legal ties question, only if interpreted as inquiring not into the abstract and academic question[38] of whether there were socially and politically organized tribes in Western Sahara,[39] but more pointedly the question of whether Western Sahara was under the ambit of Moroccan and/or Mauritanian sovereignty at the time of Spanish conquest. On this score, these judges state that they would have preferred the Court to have refused to answer this question because it had no relevance for the specifics of the decolonization process with which the General Assembly was grappling.[40]

In this context, the majority's insistence on answering the *terra nullius* question, and moreover, interpreting it independent of the specific practical issue at hand may appear an academic exercise, without any practical effect. However, we shall have a better grasp of the work done by the *terra nullius* discussion, if we do in fact abstract from the specific questions that the General Assembly is grappling with. I suggest that *terra nullius* appears to the Court as a 'white space on a map', in that it is evocative of the possibility of heroic action. The formulation and discussion of the *terra nullius* question constitutes a terrain for action, an occasion for

37. As Judge Petron says in his Separate Opinion, 'The question of whether the territory was *terra nullius* at the time of colonization is thus without object in the context of the present case.' Then he says again, 'In view of the foregoing, I find it pointless and consequently inappropriate for the Court to answer the first of the two questions put'. *Ibid.*, at 113, 114.

38. On this score Antonio Cassese suggest that the Court 'simply took a stand between the two schools of thought that fought a ... battle at the beginning of this century in the legal literature. They first espoused the view that the so-called colonial protectorates that applied between colonial power and the indigenous population were international treaties proper. As a consequence, the legal title of the colonial power could not be classified as original by virtue of conquest or occupation but was derivative from the agreement establishing the protectorate. The second school of thought argued that colonial protectorates were merely legal fictions designed to camouflage the reality of colonial conquest, which constitutes the sole and veritable title to territorial sovereignty over dependent peoples.' A. Cassese, 'The International Court of Justice and the Right of Peoples to Self-determination', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996), 360.

39. In fact in his Separate Opinion, Judge Gros says as much: 'Since the Court decided to rely to this question in the very terms in which it has been put, I took the view that the question was not a legal one, that it was purely academic and served no useful purpose.' *Western Sahara*, *supra* note 3, at 74. 'With regard to a territory in respect of which the concept makes no appearance in the practice of states, it is a sterile exercise to ask the Court to pronounce on a hypothetical situation; it is not for Court to inquire into what would have happened in 1884 if States had relied on this concept, but into what did happen. If the real question put by the General Assembly in the thinking of those who drafted it, was what was the legal status of the territory under international law at the time, it duplicated the second question, to which the Court has, almost unanimously agreed to reply. Having said that, since the Court has decided to give a reply to the first question, and since our rules do not permit an abstention, I have voted with all my colleagues that the Territory was not Nullius before colonization'. *Ibid.*, at 74–5.

40. Judge Gros criticizes the Court for replying to 'problems which it raises itself rather than to that which is submitted to it', *ibid.*, at 77.

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the Court to convey its commitment to the decolonization process. It is pulled into making a clear and unequivocal statement for self-determination by the appeal of that responsible heroism of which Conrad speaks. The Court's extensive discussion of the law of self-determination[41] constituted by the decolonization process lends credence to this interpretation.[42] As Judge Dillard remarks, any doubts about the appropriateness of the Court answering these questions is 'based on the assumption that the Court was strictly confined to a literal reading of the two questions. Wisely, however, the Court, as revealed in paragraph 52, did not so confine itself but instead located the two questions in the total context of the decolonization process.'[43] Thus for instance Antoni Cassese interprets the Court's *terra nullius* discussion as 'aimed at enhancing, even retrospectively, the role and importance of indigenous peoples. In other terms, the Court once again projected into the past the significance of self-determination and the underlying notions that peoples are not mere pawns in the hands of sovereign states, but conglomerates of individuals whose wishes and aspirations must be taken into account and given legal force as much as possible.'[44]

Thus while the concept of *terra nullius* may be situated as a paradigmatic trope of colonialism's imprint on international law,[45] here it has a function that belies those colonial origins. *Terra nullius* moves the Court to make a determination not just on the particular questions at issue, but to make a broader statement regarding the territorial and historical reach of self-determination. This is one sense in which the Court speaks in counterpoint, deploying colonialism's tropes against colonialism's legacy. As we shall see again and again in these cases, there is no formulaic correspondence between the historical origins of particular legal principles such as *terra nullius* or *uti possidetis* and their contemporary political valence. A close reading of the specific discursive terrains referenced by these different legal principles problematizes attempts to chart easy lines of continuity; questions of historical origins are unsettled and remapped onto contemporary landscapes.

2.2. The Sahara as the Heart of Darkness

For Conrad nostalgia about the filling up of white space on the map is, as I have discussed, a nostalgia for a certain kind of heroism, a heroism linked with scientific

41. *Ibid.*, at 31–33.
42. Judge Dillard commends the majority opinion for making a definitive legal statement about the right to self-determination saying that 'the present opinion is forthright in proclaiming the existence of the right in so far as the present proceedings are concerned'. *Ibid.*, at 121.
43. Judge Dillard's Separate Opinion urges that 'there is nothing in the jurisprudence of the Court which can support the proposition that it would be presumptuous on its part to so interpret the questions as to give them a contemporary legal significance by invoking the larger context in which they are framed. By so locating the questions in the contemporary setting of the decolonization process the Court has thus, in my opinion, countered the view that the question invited an answer of a purely "academic" or historical character.' *Ibid.*, at 117.
44. Cassese, *supra* note 38, 360–61.
45. Judge Ammoun elaborates on the problematicness and colonial embeddedness of *terra nullius* as a concept and as a historic legacy. He sums up by saying, 'In short, the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned'. *Western Sahara*, *supra* note 3, at 85–86.

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exploration of the earth's territory. This is a heroism that he takes pains to distinguish from the triumphant heroism of imperial profit and plunder. His image of heroic action, he says, is not one of 'striding over deserts and leaping over valleys never trodden by the foot of civilized man'.[46] Rather it is 'the fascination of the first hazardous steps of a venturesome, often lonely explorer jotting down by the light of his camp fire the thoughts, the impressions and toil of the day'.[47] An alternative representation of geographic passion is further illustrated in Conrad's description of an episode in the life of Mungo Park as evocative of his image of the Western Sudan. In this mapping of the world, the image of the Western Sudan 'means for me', Conrad says, 'the vision of a young, emaciated, fair-haired man, clad simply in tattered shirt and worn-out breeches, gasping painfully for breath and lying on the ground in the shade of an enormous African tree (species unknown), while from a neighbouring village of grass huts a charitable black-skinned woman is approaching him with a calabash of pure cold water, a simple draught which, according to himself, seems to have effected a miraculous cure'.[48]

In this telling, the heroism embedded in this image of geographical exploration contrasts sharply with that of the explorer who is 'striding over deserts and leaping over valleys' with a triumphant heroism. The gender subtext to the narrative of exploration also maps onto two alternative narratives of geographic passion.[49] The more familiar or stereotypical gender narrative of imperial passion as male penetration into the territory of a feminized 'other' resonates with the heroism that Conrad criticizes.[50] In this traditional story the gendered and racialized overtones to colonial occupation celebrate the rough violence of metropolitan power, a rape narrative even, over a passive and submissive Africa. In contrast, Conrad's mapping of the Western Sudan in terms of the figure of the charitable black woman approaching the fair-skinned man suggests a narrative of exploration through the invitation of the other, the invitation functioning as a motif of cross-cultural exploration. This encounter is expressive of humanist values, where the travel encounter is not predicated on the skewed power relations of imperial hegemony. In fact, power is displaced in this telling of the story.[51]

Here Conrad is quite effective in conveying the heterodox motives and worldviews that informed geographical exploration in the West. Yet I think the richness of Conrad's writing is such that even as his text conveys this complexity and internal

46. Conrad, *supra* note 5, at 247.
47. *Ibid.*
48. *Ibid.*, at 258.
49. See generally A. Roberts (ed.), *Conrad and Gender* (1993).
50. Sexuality is not merely a metaphor of imperial passion. In fact colonial exploration was often accompanied by a certain sex tourism as well; Robert Wai suggests that this sexualized travelling is captured in the familiar image of se(a)men traveling from port to port across the world.
51. Note that these two narratives are not exhaustive of modes of heroic travel; for instance, even the colonial era saw extensive travel by women in a variety of roles: free-spirited adventurers seeking to escape the confines of home and hearth, women seeking spiritual fulfilment from 'eastern mysticism', Christian missionaries, philanthropists, doctors, nurses, teachers, companions and spouses of male colonial administrators, prostitutes selling their services in different ports of call, early feminist internationalists, peace activists, advocates of socialist internationality, etc. See A. Blunt, *Travel, Gender and Imperialism: Mary Kingsley and West Africa* (1994); K. Jayawardena, *The White Woman's Other Burden: Western Women and South Asia During British Rule* (1995); M. L. Pratt, *Imperial Eyes: Travel Writing and Transculturation* (1991).

multiplicity, it also unpacks the claimed distance between these alternatives. Thus Conrad himself finds it difficult to keep these two alternative modes of heroic action apart; while they are distinct, there is also a slippage between the two. Triumphant heroism is about translating geographical passion into territorial possession of a feminized, exoticized other. Yet there is also something of a narrative of possession, and a narrative of gendered exoticization that is part of that 'other' heroism, part of the backdrop to that meeting of the fair-skinned man and the African woman in Conrad's image of the Western Sudan. Here the iconic juxtaposition of the white man and the generous black woman speaks of colonial intervention in terms of the fantasy of invitation, perhaps even an undercurrent of the racialized fantasy of the black woman as always wanting 'it'.

The internal ambivalences of this particular story of territorial passion is suggested in the ICJ opinion. It is suggestive of the complexities of *who* is the subject of the desire (for self-determination) that is articulated in the opinion. Independent of whether or not the Court's paean to self-determination is speaking to the emancipatory desires of the colonized, the discussion of self-determination is expressive of the Court's desire to lay out its own normative commitments by pulling Western Sahara into the normative and jurisprudential framework of international law, a statist or administrative framework of territory.[52] Moreover, it achieves this goal not in the name of imperial power, but in the name of humanist values of democracy and equality. There is, in this sense, a narrative of possession that underlies the Court's treatment of the discourse of self-determination.

If this narrative of possession situates Western Sahara in international law's ambit, it is accompanied by another narrative of imperial passion, a narrative of gendered exoticization. The Court's articulation of the desire for Western Sahara's self-determination moves back and forth between these two narratives. On the one hand, Western Sahara is actively engaging an international discourse of self-determination. On the other hand, it is that discourse that is reaching out across normative and legal cultures and engaging Western Sahara, which has itself hitherto been 'other' to the ontological terrain of that discourse. On the one hand, the *terra nullius* discussion speaks of Western Sahara as the terrain for making a commitment to the self-determination of the African people in response to their own anti-colonial struggles. On the other hand the Sahara itself, the great Sahara desert, emerges as the terrain of the feminized, exoticized other: wild, mysterious, harsh. In contrast even to Morocco and Mauritania, the Sahara remains a white space on the map, needing the Court's proactive intervention to bring it into fold of international society. In constituting Western Sahara as the object of the Court's desire for self-determination and heroic international action, the particular portrayal of Western Sahara through a narrative of gendered exoticization suggests that that desire may itself be constitutive of its object.

Let us examine this with attention to the Court's sociological and environmental descriptions of Western Sahara, descriptions that then support a particular mode of

52. I refer to a channelling of the discursive landscape so as to look to administrative relationships as the locus for meaningful territorial relationships.

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international legal intervention. The majority describes Western Sahara as 'a territory having very special characteristics'. It is a 'territory that forms part of the great Sahara desert'. Moreover, 'The area of this desert with which the Court is concerned' had such harsh unfavourable conditions that it was occupied 'almost exclusively by nomads ... It may be said that the territory, at the time of its colonization, had a sparse population that, for the most part, consisted of nomadic tribes the members of which traversed the desert on more or less regular routes dictated by the seasons and the wells or waterholes available to them.'[53] In many ways the landscape dictated the conditions of existence, its constraints and its challenges. 'The sparsity of resources and the spasmodic character of the rainfall compelled all those nomadic tribes to traverse wide areas of the desert.'[54] In fact the patterns of social life were perhaps linked to the harshness of the landscape. Thus the Court says that 'according to the information' it had, 'another feature of the region ... was that inter-tribal conflict was not infrequent'.[55] 'Tribes were in constant movement' and 'armed incidents between these tribes were frequent'.[56]

Judge Gros in his separate opinion argues that even this, the 'vision of the Saharan desert' given in the majority opinion, 'is an idyllic vision of what was a harsh reality'. The Court is intervening in even more treacherous and difficult terrain. Thus he goes on to say that

> At the time, the Saharan desert was still the frontierless sea of sand used by the caravans as convoys use an ocean, for the purposes of a well-known trade; the desert was a way of access to markets on its periphery. The relation between the territory and human beings was affected by these aspects, and the organization of the populations of the desert reflects these special conditions of life: caravans, the quest for pastures, oasis, defense or conquest, protection and submission between tribes ... [A]n extremely hierarchical society ... The political situation, in the broadest sense of the term, of the tribes of the desert is that of independence asserted by arms ... the Saharan desert and its tribes ... sporadic contacts or relationships with the outside world did not affect the peculiarity and exclusivity of their way of life. If the desert is a separate world, it is an autonomous world in the conception of its relationships with those who have a different way of life.[57]

This very separateness offers the rationale for self-determination.[58]

The allure of a distinct and separate world is itself resonant with the history of exploration; Conrad himself confesses that his geographical interest was captured by either the 'frigid' zones of the polar regions or the 'torrid' zones of Africa.[59] The provocative appeal of such separate worlds is exemplified by how boundaries and frontiers work in the Court's deliberations over Western Sahara's self-determination.

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53. *Western Sahara, supra* note 3, at 41.
54. *Ibid.*, at 41–42.
55. *Ibid.*, at 41.
56. *Ibid.*, at 43.
57. *Ibid.*, at 76.
58. However, 'separateness' does not translate into a denial of ties with Morocco and Mauritania. Note the Separate Opinion of Judge Forster, who says that there were ties analogous to ties of sovereignty and that actually the difficulty of access to the Sahara desert is proof not refutation of those ties 'because in that context you would expect its actual outside signs to be more attenuated'. *Ibid.*, at 103.
59. Conrad, *supra* note 5, at 257.

The Sahara's 'otherness' emerges both from the fact that it is boundless, extending into a vast unbounded interior, as well as from the fact that it is sharply bounded from everywhere else, with distinct boundaries marking it as 'other'. Judge de Castro describes Western Sahara as geographically or topographically isolated with something of a 'natural frontier' separating it from Morocco.[60] 'It is a veritable wall pierced with embrasures or defiles, it is the line of the R'negats. In these defiles are mountain oases, halts or staging-posts of which the name always begins with the word "foum" (mouth [Fr. *bouche*]). This line joins up the points by which Morocco debouches on to the Sahara. It is at the "foum" (mouth) that one passes from one world onto another. This change is very marked not to say abrupt. It is shown by innumerable signs ... The existence of the Pre-Sahara zone calls for special mention. It is constituted by "successive forms" of transition between life of the men of the North and of the South ... After the pre-Sahara zone, one finds Western Sahara, of which we are told that it has an incontestable individuality.'[61]

In the emphatic articulation of this 'individuality' we see the Court as analogous to Conrad's explorers of Africa 'attacking from North and South and East and West, conquering a bit of truth here and bit of truth there, and sometimes swallowed up by the mystery their hearts were so persistently set on unveiling'.[62] Thus the individuality of the Sahara emerges in their discussion as environmental in the fullest sense, from the character of its topography to the character of its people.[63] Thus Judge Castro also describes the tribes of the Sahara as 'engaged in continual struggle among themselves, with the resulting razzias, wars, robberies and feuds ... each tribe taking no account of the others'.[64] While even Morocco or Mauritania may be intelligible to the outside gaze, with boundaries that can be determined, with legal ties that can be identified, the Sahara is cloaked in an environment that makes it both distinct and elusive. In his discussion of mapping, he asserts the extensive cartographic information on the coastal areas of Africa, yet he also asserts that there was in the interior of Africa 'a *Terra incognita*'[65].

Through the Court's deliberations 'Africa', the Africa of Western Sahara, 'got cleared' of the known and 'replaced by exciting space of white paper. Regions unknown!'[66] It is in this sense that desire constitutes its own object; here the desire for international legal action constitutes Western Sahara. Thus even as the opinion

60. Judge de Castro says that 'the Sahara was inhabited by tribes considered "wild" by the Moroccans'. He refers to the 'poor and difficult territory of the Sahara' and says that 'life in the Sahara was too hard for the Moroccans'. *Western Sahara*, *supra* note 3, at 147.
61. *Ibid.*, at 149.
62. Conrad, *supra* note 5, at 256.
63. Geographical science and environmental determinism have had a symbiotic relationship. In the context of Africa, this was overlaid on the broader ideological legitimation, technologies of knowledge and power that was a part of the imperial enterprise. Peet notes that the European geographers of that period, such as Semple, Mackinder and Ratzel, did 'legitimate the expansional power of the fittest' through that marriage of environmental determinism and geographical science (see Peet quoted in of Driver, *supra* note 23, 344). Naturalizing 'nature' and indeed, flattening community into 'nature', they advanced the idea that 'nature' determined the bounds (including territorial boundaries) of community and even the character of community.
64. *Western Sahara*, *supra* note 3, at 164.
65. *Ibid.*, at 153.
66. Here Conrad is celebrating the explorers of Africa who 'in a scientific spirit' recorded 'the geographical ignorance of its time'. Conrad, *supra* note 5, at 256.

argues that Western Sahara is not a *terra nullius* on legal grounds, it becomes the ground for another *terra nullius*.[67] Its own arguments for the self-determination of the Saharan people on the grounds of their distinctiveness becomes the discussion of the Saharan people as irreducibly 'other' in ways that invite international intervention.[68] In the quest for heroic action, 'How much preferable a region of storms where man and ship', the Court and the international legal apparatus, 'can put up a fight'.[69] Here, through that battle, that region of storms is assimilated into international law's own vocabulary of nation, state, and society.

The international intervention entailed here presents itself through what may be called an 'administrative paradigm', a loose umbrella category conveying statist representations of territory. Against the backdrop of Western Sahara as a terrain inhabited and crossed by nomadic communities, the Court engages with and produces territorial relationships in ways that empower a statist model as the predominant model of territorial sovereignty and community. This is most pointedly expressed in the very framing of the options for self-determination as independent statehood, integration with an existing state, or free association with an existing state.[70] A state-oriented model emerges moreover as the focus according to which decolonization is conceived more generally in international law. We find singular exception to this in General Assembly Resolution 2625, where the language cites the possibility of non-state avenues for self-determination: 'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into *any other political status* freely determined by a people constitutes modes of implementing the right of self-determination.'[71] Tellingly, however, the possibility of 'other political status' is left unexplored, and the Western Sahara court cites this resolution to emphasize the fact that status is to be 'freely chosen'. The argument suggested here, however, is that such choices of political status are circumscribed by the fact that the menu is limited to alternatives that are state-centred.

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67. Some recognition of this is hinted at in Judge Forster's Separate Opinion. He says that if Africa were required to be a 'carbon copy of European institutions, ... on that basis the entire African continent would have to be declared *terra nullius*', *Western Sahara*, *supra* note 3, at 103.
68. The portrayal of the Saharan people as irreducibly 'other' evokes another dimension of the gender subtext in Conrad's image of the emaciated white man and the black woman. Is the emaciated white man gesturing to a stereotype of the gay man who has no desire for women? Is the woman in this story so irreducibly other that an actual meeting is unlikely? This is perhaps the stance of Conrad himself, whose own distance from the other is intricately related to the fact that he was able to resist the impulse towards booty and plunder. He seems to intimate that intimacy with the other can make you lose your 'self'; the boundaries are blurred and crossed, and in this sense intimacy is the precondition for brutality towards self and other. I am reminded here of Parry's discussion of *Heart of Darkness* and Marlow's criticism of Kurtz for having too much intimacy with the other; a heroism that is 'high-minded' and deals 'humanely' with the other is one that retains its sense of self, and can maintain a healthy distance. Marlow, like Conrad, retains that distance; Kurtz, on the other hand, becomes so immersed in the other through his sexual relationship with a native woman, but also his desire for ivory, that he loses his grip on that distance. He loses himself and spirals headlong into his passion for possession. In this context the narrative of exoticization, of the colonized as irreducibly 'other', can actually constrain the appeal of the narrative of possession, while in other cases exoticization may entice one towards possession (see also J. W. Griffith, *Joseph Conrad and the Anthropological Dilemma* (1995), where he discusses similar issues regarding 'going native').
69. Conrad, *supra* note 5, at 250.
70. *Western Sahara*, *supra* note 3, at 32.
71. *Ibid.*, at 36 (emphasis added).

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The Court's description of the political situation in Western Sahara as anarchic and turbulent offers a crucial stage against which the region can be pulled into international law. Ironically, in determining the Sahara as 'other', it becomes assimilated into international law's own elaboration and expansion of self, its own vocabulary of nation, state, and sovereignty. As in Conrad's description of Balboa's discovery of the Pacific in all its 'deadliness' and 'unfathomable' character, Western Sahara becomes, in these opinions, 'an immense theatre ... for the missionary labours' of international law.[72]

2.3. Self-determination 'after' colonialism: Judge Ammoun and the double bind

If I began in section 2.1. by examining how Western Sahara emerged as a terrain for anti-colonial statement through engagement with the tropes of colonialism, that is, the principle of *terra nullius*, it is also worth examining how easily the opinion slips into colonial imagery through engagement with the tropes of decolonization, that is, the principle of self-determination. Judge Ammoun in his separate opinion criticizes the majority for undervaluing the ties between Morocco and the Sahara in their treatment of the legal ties question. In articulating a principled expression of Third World nationalism this argument for the territorial integrity of Morocco and the Sahara is often read as offering a searing critique of the majority. However, Ammoun's critique of the majority does not undermine the grammar of statist territory as such, but argues instead that the relationship between Morocco and Western Sahara meet the criteria of statist territory.[73] Ammoun's opinion is fraught with the complexities and contradictions inherent to the harnessing of territorial integrity and decolonization. Territorial integrity is a cornerstone of modern statehood that was itself forged through the colonial encounter. Territorial integrity is internally split, the dual legacy of this encounter.[74] First, it is the legacy of centralized colonial administration which brought together disparate regions in producing entities such as 'India' or 'Nigeria' or 'Brazil' as territorially coherent units for colonial governance.[75] It is also the legacy of Third World nationalism that mobilized in anti-colonial resistance across disparate regions in producing entities such as 'India' as territorially coherent units.[76]

In harnessing self-determination and territorial integrity conceptions of post-colonial statehood emerge from these murky hybrid histories not as a footnote

72. Conrad sees Vasco Nuñez de Balboa's discovery of the Pacific Ocean 'while crossing the Isthmus of Panama' as opening up 'an immense theatre' for 'Protestant churches', Conrad, *supra* note 5, at 250, 251.
73. Judge Ammoun on the other hand says that 'In any case, if the Western Sahara found itself cut off from external political power, this would certainly seem to be the effect of colonization ... This was generally the policy of colonization.' Ammoun goes on to elaborate on the commonality between the Saharwi and their Moroccan compatriots. *Western Sahara*, *supra* note 3, at 84, 85.
74. Territorial integrity is not the only motif of modern statehood that inhabits the problematic terrain of this dual legacy; later in this article I discuss how boundaries, the compulsive mapping of lines delineating territory, carry a similar burden in conceptualizing statist conceptions of territory. Some of the themes discussed here are revisited and elaborated in that context. See section 3.1.2.
75. See M. H. Edney, *Mapping an Empire: The Geographic Construction of British India, 1765–1843* (1997); D. Ludden, 'History Outside Civilisation and the Mobility of Southern Asia', (1994) 17 1 *South Asia*, 1.
76. See P. Chatterjee, *Nationalist Thought in the Colonial World: A Derivative Discourse?* (1986).

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to colonialism as yesterday's taint, a preoccupation with the problem of origins. Instead, Judge Ammoun's opinion offers an exemplary instance where statist representations of territory continue to be visited and revisited, repeated and transformed, as an ongoing problematic of postcolonial nationhood. It is trapped in the double bind of aspiring to a clean break with colonialism through forms of reading the nation that have unfolded through our ongoing negotiation of the colonial experience. Thus although the territory of Western Sahara is not thought to have constituted a sovereign state at the time of the Spanish conquest, the statist imagination of territory forged through the colonial encounter serves as a regulative lens in the postcolonial moment. It extends its reach back through history, structuring our collective gaze in the retroactive reconstruction of the political and legal status of territory at the moment of colonization . . . in ways that then frame the terrain of options made available in decolonization.

In this articulation of a statist representation of territory, Judge Ammoun and the majority are not two voices in opposition but two voices in counterpoint.[77] On the one hand, Ammoun and the majority are both committed to decolonization. Territorial integrity emerges here as a statist spatial representation intelligible to international law, and posited as indispensable to the self-determination of the postcolony. On the other hand, Ammoun's dilemma emerges in his insistent quest to wipe the colonial slate clean and start anew. Judge Ammoun's conceptualizing of self-determination through statist models of territorial integrity may be read as yet another visiting of the colonial encounter, yet another expression of the double bind that complicates our effort to break from colonialism.

The double bind that characterizes Ammoun's passionate appeal to the principle of self-determination resonates with the ambivalence and disquiet that characterizes Conrad's territorial aspirations. In the following passage Conrad recounts his own experience in following through with his boyish romance with the white spaces of Africa.

> One day, putting my finger on a spot in the very middle of the then white heart of Africa, I declared that some day I would go there. My chums' chaffing was perfectly justifiable. I myself was ashamed of having been betrayed into mere vapouring. Nothing was further from my wildest hopes. Yet it is a fact that, about eighteen years afterwards, a wretched little stern-wheel steamboat I commanded lay moored to the bank of an African river.
>
> Everything was dark under the stars. Every other white man on board was asleep. I was glad to be alone on deck, smoking the peace pipe after an anxious day. The subdued thundering mutter of the Stanley falls hung in the heavy night air of the last navigable reach of the Upper Congo, while no more than ten miles away, in Reshid's camp just above the Falls, the yet unbroken power of the Congo Arabs slumbered uneasily. Their day was over. Away in the middle of the stream, on a little island nestling all black in the foam of the broken water, a solitary little light glimmered feebly, and I said to myself with awe, 'This is the very spot of my boyish boast.'

77. This follows Parry's reading of Kurtz and Marlow in *Heart of Darkness*. While it is undoubtedly true at one level that Ammoun intends and is very plausibly read as offering a searing critique of the majority, it is also true that his conceptualization of territory goes hand in hand with the majority opinion.

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> A great melancholy descended on me. Yet this was the very spot. But there was no shadowy friend to stand by my side in the night of the enormous wilderness, no great haunting memory, but only the unholy recollection of a prosaic newspaper 'stunt' and the distasteful knowledge of the vilest scramble for loot that ever disfigured the history of human conscience and geographical exploration. What an end to the idealized realities of a boy's daydreams! I wondered what I was doing there, for indeed, it was only an unforeseen episode, hard to believe in now, in my seaman's life. Still, the fact remains that I have smoked a pipe of peace at midnight in the very heart of the African continent, and felt very lonely there.[78]

Conrad's melancholy regarding exploring Africa after the brutality of colonialism is, I think, reflected in Judge Ammoun's melancholy about the principle of self-determination in the *postcolonial* context. If Judge Ammoun's opinion is a passionate search for a terrain for responsible action, it is a search that is made fraught by the very context that this is an era of Geography Militant, when every action takes place against the history of colonialism. Although 'Colonization is now condemned to die out', as Judge de Castro says, 'First of all there was colonization'.[79] The melancholy lies in the fact that even in our discussion about the options of self-determination, even in condemning colonialism as destined to death, we are confronted with the double bind that 'first of all there was colonialism'.

Is there a space for responsible international action after colonialism, for 'poetry' after colonialism? Some may say in response to Adorno that the only poetry that persists after Auschwitz is a poetry that narrates and renarrates Auschwitz so that we will never forget. In that sense I suggest that the dissenting opinion of Judge Ammoun should be read as working at precisely this renarration of colonialism. However, the reach of the double bind is such that while at one level we may forget, at another renarration we may sanitize it, naturalize it. Where we constantly appeal to international law's repertoire of solutions as reparation for colonialism we may begin to believe that such reparation is indeed possible, in this case, locating statehood in a trajectory of ethico-political closure.

Reading Ammoun and the majority as two voices in counterpoint, these opinions convey both the persistent search for 'space' for responsible heroism, and the despair that that space is already always colonized by colonialism. Ammoun's statement against colonialism becomes both a license for action (since it argues for self-determination as critical of colonialism), but also a stumbling block to action (because its very enunciation conveys that it is engaged in a revisiting of colonialism). Here Ammoun is condemned perhaps to a troubled 'passion' that persistently inspires and frustrates an aspiration to being a man of heroic action, 'a great explorer'; instead he remains 'a restless wanderer refusing to go home any more'.[80]

78. Conrad, *supra* note 5, at 259.
79. *Western Sahara*, *supra* note 3, at 169.
80. Conrad himself is speaking of the fate of David Livingstone, who was condemned by a different kind of 'passion', 'his heart's unappeased desire for the sources of the Nile'. He speaks of Livingston as perhaps the 'the most venerated' figure in his 'early geographical enthusiasm'. Conrad, *supra* note 5, at 258–9.

3. The *Frontier Dispute* case

Burkina Faso and the republic of Mali brought this case for adjudication to the ICJ when talks between them sponsored by the Organization of African Unity (OAU) had reached a stalemate. Approximately two-thirds of their common frontier[81] had already been successfully delimited by agreement between the parties. The significant feature of this frontier dispute for our purposes is that, in the Court's words, 'both states derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years'. I shall quote from the Court record to give a brief history of their emergence into statehood in 1960. 'Their territories and that of Niger were formerly part of the French colonies which were grouped together under the name of French West Africa (AOF). Considering only the situation which prevailed immediately before the accession to independence of the two States, and disregarding previous administrative changes, it can be said that Burkina Faso corresponds to the colony of Upper Volta, and the Republic of Mali to the colony of Sudan (formerly French Sudan).'[82] The French shifted the boundaries between the *cercles* (the administrative units) that made up French West Africa, grouping and regrouping them like pieces of a puzzle. French Sudan was carved out by 'decree of the President of the French Republic and eventually became the Republic of Mail at independence'.[83] Upper Volta was declared into existence by decree of Paris in 1919. This was rescinded in 1932 and Upper Volta became incorporated into French Sudan, Niger, and Ivory Coast. Upper Volta was reconstituted in 1947 and eventually gained independence in 1960, taking the name Burkina Faso in 1984.[84]

Uti possidetis juris functions as the governing doctrinal principle in the case, against this historic backdrop of continually shifting frontiers.

3.1. Territorial inscription: technologies of the visual

3.1.1. The legacies of modern geography

> Late in 1616 Dirck Hartog of Amsterdam and his ship, the *Eendracht*, were blown on to the northwest coast of Australia. The skipper commemorated his involuntary landing on a pewter plate, which he affixed to a post. The island where Hartog landed was named after him; the adjoining mainland was called the Land of Eendracht. In 1697, another Dutchman, Vlamingh, also blown off course, found Hartog's memorial. He had Hartog's inscription copied on to a new pewter plate and appended a record of his own visit. In 1699, the English seaman, William Dampier, also visited this coast. He let the island retain its Dutch connection but renamed the country to the east Shark Bay. Then, in 1801, one Captain Emmanuel Hamelin discovered a pewter plate 'of about six inches in diameter on which was roughly engraven two Dutch inscriptions . . . ', and named the place Cape Inscription . . .

81. The total frontier was approximately 1,300 km long.
82. *Frontier Dispute*, *supra* note 4, at 554.
83. *Ibid.*, at 569.
84. *Ibid.*

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> Cape Inscription, the name ... a striking figure of speech ... a pointer ... indicates, concisely and poetically, the cultural place where spatial history begins: not in a particular year, not in a particular place but in the act of naming ...[85]

The production of places through the fixing of boundaries and the naming of names is an enduring legacy of colonial exploration and appropriation of territory. This is strikingly true in the *Western Sahara* case, where the ICJ discussion sought to 'map' territory in the colonial period. The colonial experience, not just the Spanish conquest, but also the travel logs of explorers such as Bonelli and Captain Cervera, maps drawn by European military cartographers, contractual documents of the British North-West African Trading Company, all these have inscribed the territory of Western Sahara. As Fabian says, 'Colonial expeditions were not just a form of invasion; nor was their purpose just inspection. They were determined efforts at *in-scription*. By putting regions on a map and native words on a list, explorers laid the first, and deepest, foundations for colonial power. By giving proof of the "scientific" nature of their enterprise they exercised power in a pure subtle form, as the power to name, to describe, to classify.'[86] The Court itself recognizes territorial boundaries as colonial inscriptions that did not correspond to precolonial representations of territory. In fact, it says that 'The migration routes of almost all the nomadic tribes of Western Sahara, the Court was informed, crossed what were to become colonial frontiers.'[87] Through reference to the cartography of the period and the testimony of travellers and explorers,[88] the Court delineated the boundaries of Western Sahara. Thus it presented its holding as an objective mapping, where the facts are 'established' by the materials and information presented to the Court.[89] All of this is summed up in Judge De Castro's spectacular conclusion that 'The knowledge and objectivity of the cartographers of Africa are not in doubt.'[90]

In the frontier dispute between Burkina Faso and Mali, the colonial legacy of territorial inscription manifests most prominently in the principle of *uti possidetis*.[91] Emerging first in Latin America, the principle was intended to stay territorial competition between colonial powers, demarcating the power to possess. By freeze-framing a particular mapping of colonial possessions, the principle of *uti possidetis* held off

85. P. Carter, 'Spatial History', in B. Ashcroft, G. Griffiths and H. Tiffen (eds.), *The Post-Colonial Studies Reader* (1995), 375.
86. Quoted in J. Duncan in Duncan and Ley, *supra* note 13, 49–50. The work referred to here is J. Fabian, *Language and Colonial Power: The Appropriation of Swahili in the Former Belgian Congo: 1880–1938* (1986).
87. *Western Sahara*, *supra* note 3, at 64.
88. *Ibid.*, at 44.
89. *Ibid.*, at 68.
90. *Ibid.*, at 145.
91. The principle of *uti possidetis* is itself linked to the denial of the possibility of *terra nullius*. In a 1992 boundary arbitration between Colombia and Venezuela, the chamber noted these links: 'This general principle offered the advantage of establishing an absolute rule that there was not in law in the old Spanish America any *terra nullius*; while there exist many regions which have never been occupied by the Spaniards and many unexplored or uninhabited by non-civilized nations, these regions were reputed to belong in law to whichever of the Republics succeeded to the Spanish province to which these territories were attached by virtue of the old Royal ordinances of the Spanish mother country. These territories, although not occupied in fact were by common consent deemed to be occupied in law from the first hour by the new Republic'. UNRIAA, Vol. I, p. 228; see also L. Henkin, O. Schacter and H. Smit, *Basic Documents. Supplements of International Law* (1993), 332–3.

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ongoing attempts by one or the other colonial power to encroach on or contest land controlled by another. Carving up the earth into bounded territorial parcels, they 'kicked the very earth to pieces', as Marlow said of the results of Kurtz's exploits in Africa.[92] Kurtz was motivated by the desire both for colonial plunder[93] and for establishing his relative social ranking among the Europeans he had left at home.[94] Similarly, *uti possidetis* gave fixity of title to colonial territorial holdings, while also establishing the ground rules for improving relations between European powers.

Despite this colonial lineage, the principle of *uti possidetis* persisted in the post-colonial context,[95] although now under the rationale that it would stay territorial disputes among postcolonial nation-states by freeze-framing the map operative at the moment of decolonization.[96] The principle gained hold under the fear that considering frontiers open-ended and determined by ethnos, nationhood, or some other more 'subjective' factor, would constitute an invitation to anarchy, with disruptive and potentially violent consequences. 'Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of administrative power.'[97] Following the *Frontier Dispute* case the principle has been interpreted as going beyond the classical decolonization context to the attaining of independence more generally. The majority described it as a 'general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs'.[98] Accordingly, in the break-up of the Socialist Federal Republic of Yugoslavia the European Community Arbitration Commission ruled that the principle gave legitimacy to the pre-breakup frontiers of the constituent entities, barring any pre-existing agreements between the relevant countries from laying out alternative ground rules.[99]

In this particular case the principle is seen as applicable to the states concerned, through their own pronouncements and through statements made by the OAU in 1964 pledging 'to respect the frontiers existing on their achievement of national

92. Conrad, *Heart of Darkness*, 143, Signet Classic edition of 1902 as represented in the electronic University of Virginia edition (at http://etext.lib.virginia.edu/).
93. His rapacious desire to possess is recall in that famous passage from Heart of Darkness that Marlow recounts: '"my intended, my ivory, my station, my" – everything belongs to him', *ibid.*, 116.
94. Arendt has argued that men like Kurtz were 'superfluous men' spat out by their own societies by the institutions and social dynamics of capitalism at home; H. Arendt, *The Origins of Totalitarianism* (1951), 69. Their colonial exploits may have figured as a route back into European society, dreaming as Kurtz dreamt of coming back to Europe and having kings meet him at railway stations'. *Heart of Darkness*, 148. See also H. Hawkins, 'Conrad and the Psychology of Colonialism', in R. C. Murfin, *Conrad Revisited: Essays for the Eighties* (1985), 80–81.
95. In the postcolonial context too, the dual goals of *uti possidetis* persist, i.e., it defines relationship to territory, as well as relationships between alternative contenders to territory. In his Separate Opinion, Judge Abi-Saab describes this dual purpose as 'first, a defensive purpose towards the rest of the world, in the form of an outright denial that there was any land without a sovereign (or *terra nullius*) in the decolonized territories, even in unexplored areas or those beyond the control of colonizers; secondly, a preventive purpose: to avoid or at least minimize conflict occurring in the relationships among the successors, by freezing the carved-up territory in the format it exhibited at the moment of independence.' *Frontier Dispute*, *supra* note 4, at 565, 661–2, para. 13.
96. M. N. Shaw, *The British Yearbook* (1996), 74.
97. *Frontier Dispute*, *supra* note 4, at 565.
98. *Ibid.*
99. See Henkin *et al.*, *supra* note 92, 255, 327.

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independence'.[100] Thus the frontier delimitation between Burkina Faso and Mali is basically an effort to ascertain the status quo at the moment of independence from France, namely in 1960. The maps drawn by the Geographic Service of West Africa or the French Institut Géographique National gain particular importance.[101] Through 'the application of the principle of *uti possidetis*' colonial 'administrative boundaries' are 'upgraded' or 'transformed into international frontiers in the full sense of the term'.[102]

Not surprisingly, as the Court itself recognizes, neither the principle nor its underlying rationale is uncontested.[103] Thus the majority note that since *uti possidetis* renders legitimacy to colonial borders, 'at first sight this principle conflicts outright with another one, the right of peoples to self-determination'.[104] To an extent the question animating the *Western Sahara* debate is revisited here: should aspirations for self-determination emerge against the territorial configurations received from colonialism, or should we instead conceive of self-determination as making a sharp break with colonialism and starting completely anew? If it does reference historically received territorial representations these are representations unearthed by digging under the colonial legacy to the precolonial status quo. In this case, the Court concludes that, even taking into account self-determination concerns, *uti possidetis* is a desirable means of fixing frontiers. In sum, they suggest that *uti possidetis*, colonial legacy notwithstanding, melds pragmatism regarding the stability of borders with a principled adherence to conditions promoting self-determination. In this vein, they argue that the long-term 'maintenance of the territorial status quo in Africa' is in fact the most effective way to respect self-determination and 'preserve what has been achieved by people who have struggled for their independence'.[105]

Against this position, critics have argued that rather than preserving stability, reliance on colonial administrative boundaries is actually disruptive of postcolonial nationhood. For instance, while not disputing the applicability of *uti possidetis*, Judge Abi-Saab in his separate opinion says that he would have preferred more attention to questions of equity that were sensitive to the distribution of water in the region.[106] Others suggest that the potential for disruption lies in the fact that *uti possidetis* legitimates boundaries that do not track 'real' community. Makau Mutua and others have argued for doing away with the straitjacket of boundaries inherited from colonialism. Many of these commentators have suggested various alternative criteria for 'drawing a better line'.[107]

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100. OAU Res. 16(1); also quoted in opinion of *Frontier Dispute*, *supra* note 4, at 564, 565.
101. *Frontier Dispute*, *supra* note 4, at 584.
102. *Ibid.*, at 566.
103. The Court inquires into how the principle of *uti possidetis* 'has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law'. *Ibid.*, at 566–7.
104. *Ibid.*, at 567.
105. Thus they go on to say that 'The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African states judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples'. *Ibid.*
106. *Ibid.*, at 662.
107. See S. R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', (1996) 90 *American Journal of International Law* 590.

Here the question of how to draw territorial boundaries resonates with a duality of modern geography that persists in the opinion. The history of geography has its roots in science and mathematics, as well as in the politics of statecraft, militarism, and colonial expansion. Thus Conrad contrasts the notion of geography as 'a science of facts whose only object is the search for truth' with more instrumentally motivated geographical explorations such as those 'prompted by an acquisitive spirit'.[108] Thus as a discipline, geography had two divergent senses of self: on the one hand mapping was about the accurate representation of space in the name of scientific methodology, and on the other it was about the strategic determination of boundaries. On the one hand its representations were naturalized as an objective mirroring of territory, on the other hand it was about instrumental representation in aid of particular goals.

Conrad's own effort is often directed at saving the discipline of geography from its instrumental motivations, and representing it as a science.[109] However, even in his own narration of the history of geography the two motivations are not always easy to keep apart[110] and are perhaps better understood as a persistent tension internal to geography's own self-conception. I should like to suggest that these two senses of self also permeate international law's conception of territory through boundaries. On the one hand, international law calls for already defined and bounded territory, even in the articulation of the criterion of statehood; here we see international law representing its project as a scientific mapping akin to that tradition of geography. In fact, with reference to mountain ranges, rivers, and valleys, boundaries are often doubly naturalized through the invocation of nature.[111] ICJ jurisprudence settles charged territorial disputes on the objective, the empirical ... the facts. On the other hand, however, it continues its romance with the project of defining territory more instrumentally. Here it speaks of the rationale behind particular doctrines of territory and boundary, the contexts which it must be attentive to, and so on. With the consolidation of the postcolonial nation-state in twentieth-century international law, these two senses of self are forged together, and accurate mapping is said to be in aid of territorial sovereignty and decolonization.[112] In this light the mapping and analysis of territory emerges as not being an apolitical scientific project, but an insistently political enterprise.

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108. Conrad, *supra* note 5, at 254, 253.
109. Thus he condemns those instrumentally minded 'pertinacious searchers of El Dorado who climbed mountains, pushed through forests, swam rivers, floundered in bogs, without giving a single thought to the science of geography'. *Ibid.*, at 249.
110. For example note his discussion of Talisman, who despite carrying 'the taint of an unscrupulous adventurer' is lauded for his contribution to geography, who mapped '8,000 miles' of what we now call New Zealand. *Ibid.*, at 252–3.
111. This emerges with clarity in the *Western Sahara* case (see section 2.2 above). However even in the deliberations in the *Frontier Dispute* case there is a return to such topographic factors.
112. Such boundaries were not an essential criterion for nationhood and international legal and political institutions, as in the creation of the state of Israel. Yet this direct engagement with the uncertainty of boundaries stands against a background discourse of determinate boundaries. Thus when we are explicit about uncertain boundaries, this is also presented as involving exceptional circumstances, most particularly, perhaps, in saying that the sate in question is so strong that boundaries become irrelevant for it. All the other criteria for statehood are fulfilled so definitively that insisting on boundaries in that context is considered to be some old-fashioned rigidity. For instance the US permanent representative's defence of the state of Israel in the UN is quite striking in its 'flexibility' regarding the formal criteria for statehood. The formulation eases the territorial requirement in these cases but maintains it as a background norm.

The conception of mapping as objective representation is accompanied, then, by an instrumental deployment of mapping in aid of international law's conception of decolonization in terms of territorial boundaries. In contrast to Conrad, these instrumental goals are not condemned as tainting the project of objectivity; however, there is continued ambivalence about the relationship between the objective and the instrumental. The opinion begins with the idea of defined territory, with its project understood as simply declaratory; on the other hand its own articulation of that project is constitutive of territory. It is in this sense that the tension between geography's two faces persists in the opinion's invocation of *uti possidetis* and mapping, as an objective accumulation of precise scientific knowledge on the one hand, and as a vital, interest-oriented practice on the other. In the delineation of boundaries we see that 'mapgazing', to use Conrad's term, rides two horses, the objective and the inspirational, attempting, some may say paradoxically, to give 'precision to one's imaginative faculty'.[113]

3.1.2. Territorial panopticon

As we noted in the preceding section, *uti possidetis* is not without its critics. The symbolic purchase of *uti possidetis* is read as suggesting a neocolonial portrayal of independent Africa as always on the edge of chaos and disintegration, fraught with failed and failing states that need to be rescued through the recovery of imperial boundaries. There has been a strong repudiation of *uti possidetis* as extending the reach of ills wrought by colonialism into the postcolonial moment. Rejecting *uti possidetis* for imposing the arbitrary boundaries of colonial administration, many of these critics argue instead for more 'authentic' boundaries that track 'real' community, defined variously through ethnos, political allegiance, culture, language, religion, and so on.[114] Interestingly, however, while these approaches reject inherited criteria for boundaries, they do not reject the statist conception of bounded territory as such. Conceptualizing self-determination through bounded territory becomes naturalized and universalized in this debate. I am reminded here of Conrad's discussion of early European explorers in the era of 'Geography Militant', who assumed that the southern hemisphere had 'corresponding masses of land' that simply mirrored the northern hemisphere 'as a matter of good art or else of good science ... mighty is the power of a theory'.[115] Just as 'every bit of coastline discovered, every mountain-top glimpsed in the distance, had to be dragged

113. Conrad, *supra* note 5, at 256.

114. Against the spectre of 'natural' or permanently fixed borders, Martii Koskenniemi speaks in contrast of the 'wonderful artificiality of states'. M. Koskenniemi, 'National Self-determination Today: Problems of Legal Theory and Practice', (1994) 43 *International Comparative Law Quarterly* 241 at 22. It is indeed true that all borders may be arbitrary in the abstract, and therefore carry the potential for progressive change; however, this potential is in itself no safeguard against the entrenched injustices created by particular borders. Thus we need to keep pressing the really difficult questions about what processes of inclusion and exclusion are enabled or deterred by a particular line. Thus my own interest is in looking at the tensions internal to claims to a 'better line'. In the same article, Koskenniemi sees the recognition that law has given to *uti possidetis* as proof that the ethical conception of international law cannot overrule the sociological, or in his words 'the strong support that the law gives to *uti possidetis* in the delineation of territorial rights seems a clear recognition of this reality'. However, he also cites other aspects of international law to say that the reverse cannot be done either, in fact, 'either seems fully able to trump the other' (24).

115. Conrad, *supra* note 5, at 251.

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loyally into the scheme of the *Terra* Australis Incognita' – the great southern continent that was thought to stretch from New Zealand to South America – here every articulation of nationalism or self-determination is dragged into a regime of territorial boundaries.[116] While critics of *uti possidetis* may argue about what interests, agendas, and identities should determine how we draw lines parceling territory, the matter of lines itself is treated as an objective grid of the international landscape.

The terms of this debate suggests that the tension between objective and instrumental conceptions of mapping that we referred to earlier endures in the arguments of these critics, although now these two conceptions may be seen as respectively referencing external and internal sources of legitimation of the nation-state. On the one hand there is the invocation of the bounded administrative conception of territory as not merely a prerogative of the West but indicative of a more universal or objective grammar of international society. Here the project is aimed at asserting that African countries have the capacity to participate in territorial governance, and are legitimately counted into the society of states. In this vein the bounded territory characteristic of the modern nation-state is portrayed as an objective container.

On the other hand, the very hyphen that pulls together the nation and the state becomes an argument of territorial particularity, of the distinct national ethos that defines the 'self' seeking self-determination, the 'self' denied by colonialism. It is this particularity that is then expressed through the repudiation of 'artificial' boundaries. 'Authentic' boundaries are called upon to further the instrumental goals that arise out of national distinctiveness, be they the goals of community, of cultural self-realization, of political independence, of economic progress ... or any number of other agendas that Third World nationalism may pursue.[117] Here the image of the territorial state as an objective container recedes, to be replaced by the notion of the territorial state as carrying a very particular content. In the *uti possidetis* debate this is expressed as a claim that this specificity cannot be poured into colonial containers.

In sum, then, while invoking the vocabulary of an entity recognizable in international law as the nation-state, but yet insisting on the specificity of particular nation-states, territorial boundaries are constantly pulled between international legal respectability and defiance of the terms of that respectability. The compatibility of bounded territory with the self-determination of particular communities is presented in the idiom of objectivity, naturalizing the territorial state and making it available for 'Third World' nationalism. Simultaneously, however, the specific criteria for those boundaries are seen as particularistic and context-driven in the

116. *Ibid.*

117. Today these Third World nationalisms are often dismissed and criticized for holding on to primordial loyalties that are then contrasted with more modern, dynamic, and abstract notions of politics, community, and collective interests. Interestingly and ironically, however, as Appadurai points out, in an earlier era nationalism was zoned on the other side of this contrast between primordial loyalties of soil etc. and modern loyalties of more abstract solidaristic associations. Thus Third World nationalists leaders called for the triumph of national identity, as modern and abstract, over tribal and other more local identities that they dismissed as primordial and retrograde. A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (1996), 161–2.

idiom of instrumentality, emphasizing the goals of 'Third World' self-determination in breaking with the colonial legacy. We see the 'Third World' nation-state and 'Third World' nationalism as voiced by these particular critics, as pulled between external and internal legitimation narratives.[118]

Here the critics of *uti possidetis* are, like both Conrad and Judge Ammoun,[119] caught in the double bind of a historical moment that is 'after' colonialism. Just like Ammoun's invocation of 'territorial integrity', here the invocation of 'authentic' boundaries, of linkages between place and culture or ethnos, cannot be simply dismissed as regressive essentialisms. These motifs of modern statehood are better situated in the dilemmas of postcoloniality. In this sense I think they may be better understood not as epistemological 'mistakes', as philosophical blunders, but as 'failures of the imagination' that are sedimented into the vocabularies and institutions of our territorial visions.[120]

In this fashion, in the postcolonial context too, a conception of mapping, of boundaries as integral to self-determination, becomes internalized into the territorial nation as such, where territory becomes intelligible only through its boundaries. Critics of *uti possidetis* emerge as also having invested in the project of territorial inscription that we had earlier allied with the colonial legacy. Through this insistent inscription of territory, through the persistence of these spatial codings, we see not only how subjects produce territory but how technologies of the territorial produce subjects. Where once Africa was mapped, and in fact continues to be mapped, here we see Africa mapping itself. In a sense national territory emerges as if a subject in a Foucauldian panopticon, disrupting the opposition between seeing and being seen, between mapping and being mapped. With the normalizing of boundary drawing in the postcolonial moment, territorial disputes are already constituted through the constraints of bounded subjectivity. Boundaries may be situated in 'technologies of looking' at the national landscape, as the reigning optic through which territory can emerge on the canvas.

Like Conrad's European explorers who experienced the theory of the great Southern continent mirroring that of the Northern hemisphere as 'a commonsense notion', boundaries are also imprinted onto our territorial imagination as just common sense.[121] Conrad repudiates the explorers' 'chorus . . . all singing the same tune' that 'made them blind to the plain signs of the open sea' by citing geographical certitude

118. In this opinion the Court is also engaged in the difficult task of harnessing vocabularies that are zoned onto contrasting worldviews; thus on the one hand it speaks of boundaries in terms of precision and objective criteria, on the other hand it speaks of oral traditions etc.

119. See section 2.3 above.

120. Appadurai, who speaks of territorial nationalism per se as a failure of the imagination. Speaking of contemporary nationalisms (especially as contrasted with the territorial state as such), it may well be that, as Appadurai says, 'Territorial nationalism is the alibi of these movements and not necessarily their basic motive or final goal.' Rather than operating according to a 'sense of sacred territorial patrimony', the latter 'can be simply idioms and symbols around which many groups come to articulate their desire to escape the specific state regime that is seen as threatening their own survival'. For many contemporary nationalist movements, 'images of a homeland are only a part of the rhetoric of popular sovereignty and do not necessarily reflect a territorial bottom line . . . Although many anti-state movements revolve around images of homeland, soil, place, and return from exile, these images reflect the poverty of their (and our) political languages rather than the hegemony of territorial nationalism.' Appadurai, *supra* note 117, 165, 161, 166.

121. Conrad, *supra* note 5, at 251.

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and scientific knowledge.[122] In our case, however, the recognition that boundaries have been naturalized into territory, making us 'blind' to alternative territorial mappings, is not accompanied by any 'plain signs', no a priori criteria, according to which we either value or reject boundaries in the abstract. Rather, we need to work towards pulling territorial boundaries into their contingent historical genealogies, genealogies that indicate that boundaries are not 'merely' a question of form.[123]

These genealogies include the particular relation that boundaries have had with governance in the context of colonial administration as well as the modern post-colonial nation-state, the colonization of space worked through, and for, colonial governance. Ironically, while colonial explorers crossed so many territorial and other boundaries, here bounded territory can be marked as an enduring legacy of territorial expansion under colonialism.[124] Governance persists and proliferates in the postcolonial moment through the distribution and delineation of space.[125] As the modern nation-state emerged and entrenched itself as the predominant unit of measure, the fixity of its boundaries became more important. Boundaries have pulled territory into a statist paradigm making it available for administration. Through boundaries we have drawn lines of inclusion and exclusion, defined the possibilities and constraints of citizenship, and produced and inhibited identities, interests, and solidaristic associations. They have enabled technologies for engineering the territorial as constructed by an apolitical sphere of bureaucratic planning and positivist science. With continuities and discontinuities, from the colonial period to the present, an eclectic, yet powerful collection of work by geographers, explorers, surveyors, cartographers, soldiers, and others have given dimension to an administrative framework of bounded territory. The maps, surveys, 'discoveries', and conquests of these diverse disciplinary and institutional contexts have given geographical reach to a statist approach to territory. These have called upon an aerial view of territory, labelling, delineating, and classifying to produce maps of the region, classification of communities, taxonomies of the environment. Boundaries are produced, rendered knowable and determinate.

3.2. *Uti possidetis*: mapping boundaries, unmaking space

As the previous section recounts, the whole debate around *uti possidetis*, 'the frantic search for a "written legal title"',[126] provides the impetus for a legal discourse and an administrative project of fixing the juridical frontier through an objective determination of the boundary. This aspiration to precision is captured in the Court's characterization of *uti possidetis* as taking a 'photograph of the territory'.[127] The

122. *Ibid.*
123. Or at least this may be yet another instance that illustrates the relation between the 'form' of spatial representations and their substantive political implications.
124. In fact, Hannah Arendt has argued that 'bureaucracy' functioned as a pre-eminent device for 'political organization' under colonialism, integrally linked with territorial expansion. 'Bureaucracy was the organization of the great game of colonial expansion in which every area was considered a stepping-stone to further involvements and every people an instrument for further conquest.' Arendt saw 'race' and bureaucracy as the two modalities of colonial expansion: Arendt, *supra* note 94, 65.
125. Note broader resonance with Foucault here.
126. The phrase is that of Judge Abi-Saab, *Frontier Dispute*, *supra* note 4, at 661.
127. *Ibid.*, at 569.

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Court asserts right at the beginning that it is relying on this principle because it will offer precision, stability, and determinacy. However, there is a striking disjuncture between their defence of the principle through a discourse of objectivity, and their implementation of the principle through discussion of the confusion that attends it. Thus when the Court leaves behind the discussion of legal doctrine and moves to its application, to the actual drawing of the line to give effect to the principle of *uti possidetis*, the opinion calls attention to how much ambiguity, complexity, and arbitrariness characterizes this line-drawing process. 'The Chamber recognizes that it is hardly possible to arrive in this case at a solution capable of reconciling all the factors involved'.[128] As the Court chooses between conflicting mappings, fills in fragmentary evidence, and reconciles divergent boundaries, the mapping of Africa cannot be reconciled with a project merely of 'mirroring' territory. Rather, the project of ascertaining historical boundaries and frontiers, of 'simply' reading the photograph of territory at decolonization, emerges as a hands-on, politically engaged project negotiating the details of colonial and postcolonial history.[129]

The Court's own description of the 'evidence' it is dealing with itself undermines the claimed rationale of *uti possidetis* as enabling a clear and precise delimitation of the frontier.[130] For instance, the Court says that 'the cartographic documentation has assumed unaccustomed proportions in this case, to the point of creating a dual paradox. On the one hand, the Chamber is faced with a considerable body of maps, sketches and drawings for a region which is nevertheless described as being partly unknown; and, on the other hand, no indisputable frontier line is discernible from this abundance of cartographic materials.'[131] The map-making process, as much as the map-reading process,[132] is fraught with indeterminacy and arbitrariness.[133] Maps emerge not as scientific blueprints of the region, but as a series of methodological and political compromises, vague approximations, and a lot of guesswork. Note, for instance, the description of what the Court refers to as the IGN map, a map prepared between 1958 and 1960 by the French Institut Géographique National that becomes fairly important in the Court's project of ascertaining the frontier in accordance with the principle of *uti possidetis*. The map

128. *Ibid.*, at 607.
129. In fact, as I argued, even the naturalization of the categories of territorial representation as objective is itself a representation that is interpretive and instrumental; as I argued in the previous section, in this case the naturalization of the notion of determinate boundaries itself subscribes to particular conceptions of an administrative state.
130. The Court repeatedly finds that a clear mapping of territory remains elusive. Even when it has a description of a location that 'might be thought' to offer a 'firm and reliable' guide, its investigations suggest that 'paradoxically' it was that particular mapping 'which is the least authoritative'. When certain maps 'give an impression of precision' they soon find that 'that precision is nowhere warranted', *Frontier Dispute*, *supra* note 4, at 613, 630.
131. *Ibid.*, at 584.
132. At minimum these are not just problems about how to demarcate an 'administrative entity' from maps that refer to 'topographic elements', but about the assumptions regarding the precision that can be expected from colonial authorities, the comprehensiveness of the knowledge that can be attributed to the Geographic Service etc.; *ibid.*, at 611, 606 and 609. More significantly, however, each of these cartographic questions denote larger political assumptions, projections, and interpretations of the history and sociology of colonialism.
133. A fact recognized even by the colonial authorities; thus in 1935 one administrator criticizes an official map of the French Geographical Service as containing 'gaps and many inaccuracies'; *ibid.*, at 609.

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was itself drawn through a study of the topography informed by texts describing the region.

> With the help of the texts, the cartographers tried to locate the frontier in relation to the map base. Unfortunately, the inaccuracies of the texts made it impossible to draw a sufficiently reliable boundary in certain areas. Some names quoted in the texts could not be found, others referred to villages which had disappeared or been moved, or again the actual nature of the terrain (courses of rivers, position of mountains) appeared different from that described in the former itinerary surveys. The actual frontier was, therefore, recorded in the light of information supplied by the heads of the frontier districts and according to information gathered on the spot from the village chiefs and local people.[134]

The difficulties that accompany this particular map are symptomatic of the difficulties that attend the Court's broader project of determining the frontier in accordance with the principle of *uti possidetis*. The Court constantly despairs of linguistic indeterminacy in the interpretation of textual evidence,[135] contrasting accounts of regional topography,[136] cartographic ambiguities regarding who drew which maps,[137] with what evidence,[138] and motivated by what agenda,[139] gaps in the colonial archive,[140] questions about the colonial line of command, what constitutes colonial effectivities,[141] the probative value of guidance provided by native informants, collective memory and oral traditions,[142] the sociological and historical questions surrounding the impossibility of marking the boundaries of what constitutes a village for agricultural communities.[143] Thus where *uti possidetis* gave the Court the impetus to determine the question of what constituted colonial frontiers at the moment of decolonization in the name of precision, clarity, and

134. *Ibid.*, at 585–6.
135. For instance, the Court frets over the interpretation of a 1935 letter of the governor-general of French West Africa regarding changes in the delimitation between French Sudan and Niger. The parties disagree about whether this letter should be read as an intention to act, or in fact an act with administrative authority. Similarly the Court dwells on alternative interpretations of the word 'modifications' in a note by the director of political and administrative affairs of the governership of French West Africa entitled 'Territorial modification in the Sudan'; in another instance, it grapples with how to reconcile divergent colonial texts etc.; in yet another instance it tries to unearth the draftsman's intent through analysis of his description of a particular location; *ibid.*, at 595–601, 607, 644 and 624.
136. For example *ibid.*, at 591.
137. Or even the ambiguities arising from 'successive copying' of maps; *ibid.*, at 635.
138. The Court repeatedly grapples with distinctions between what 'appeared on the maps' and what 'existed on the ground'; *ibid.*, at 582–7 and 610.
139. The question of the 'neutrality of their sources'; *ibid.*, at 584.
140. Noting that 'the case file shows inconsistencies and shortcomings', the Court despairs that it cannot access 'a large body' of documentation 'from the French West Africa administration' that is likely to be 'dispersed among several countries'; *ibid.*, at 587.
141. For instance, the Court raises the question whether a lieutenant-governor's actions should be read as conveying an independent mapping of the region, or if in fact his cartographic citations merely reflect his deference to the mapping of his superior, the governor-general. Similarly there is a dispute about how to interpret colonial law regarding the delimitation of administrative boundaries; *ibid.*, at 596–7 and 602–3.
142. Thus the Court uses maps based on what it describes as 'ancient oral tradition'. For instance, it describes maps that relied on the narratives of 'older residents' carrying memories of forced labour laying railroad tracks for the colonial authorities. Given how 'important these operations were in the lives of the population under the colonial regime', the Court says that 'they had an accurate and reliable recollection of them'; *ibid.*, at 618–21.
143. Thus the Court ponders over 'the meaning to be ascribed to the word "village"' in a context where 'inhabitants of the villages in the region frequently cultivate land at a distance from the village itself ... taking up residence in farming hamlets which form dependencies of the main village'; *ibid.*, at 615.

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objectivity, in the end, the application of *uti possidetis* leads the Court itself to acknowledge in effect the imprecise, vague, and subjective character of this endeavour.

The project here is not about deconstructing *uti possidetis* from the outside through some alternative criteria, but examining how it self-deconstructs in its application. My view of the Court's stance here is very much like the image that Conrad draws of the episode in the life of the explorer Mungo Park that we have referred to earlier. Against the background portrait of exploratory zeal that inspired men like Mungo Park and Conrad himself to enter Africa, we have Conrad's 'vision of a young, emaciated, fair-haired man ... gasping painfully for breath and lying on the ground in the shade of an enormous African tree' seduced by the 'miraculous cure' offered by the African woman.[144] The principle of *uti possidetis* enters into judicial discourse, as it enters Africa itself, as the embodiment of imperial power. Like Mungo Park it penetrates the territory, crossing existing boundaries, and instituting new ones, but ends up emaciated and breathless as if the territory itself has taken over. In this vein, the maps charted by *uti possidetis* may reflect a broader theme characterizing the colonial adventure map, which Anne McClintock has described as simultaneously containing 'both delusions of grandeur and delusions of engulfment'.[145] These themes are exemplified by Conrad's double sense of thrill and foreboding regarding the European scramble for African wealth: 'I've seen the devil of violence, and the devil of greed, and the devil of hot desire; but by all the stars! these were strong, lusty, red-eyed devils, that swayed and drove men, men, I tell you. But as I stood on this hillside, I foresaw that in the blinding sunshine of the land I would become acquainted with a flabby, pretending, weak-eyed devil of a rapacious and pitiless folly.'[146] It has been argued that Conrad's writing projects this mapping, these delusions of grandeur and engulfment, through a particular feminization of colonial space.[147] The female body works as an allegory of colonial territory, a place for male penetration and masculine adventure, but also a place haunted by the fear of engulfment. There is then 'the presentation of remote and alien regions created as spaces of excess, spaces which threaten engulfment and a loss of demarcating boundaries'.[148] In its effort to recover and reinstate imperial boundaries, *uti possidetis* extends its reach into territory as an enduring trope of colonialism; yet its power of inscription is left fragmented and engulfed. While at first glance we see

144. Conrad, *supra* note 5, at 258. In this vein the Court engages in a detailed investigation of farming patterns, land rights, notions of community, political identity, economic interest etc. *Frontier Dispute*, *supra* note 4, at 616–17.

145. Quoted by Mongia in Roberts, *supra* note 49, 5. The essay referred to here is A. McClintock, 'Maidens, Maps and Mines', (1988) 87 *South Atlantic Quarterly* 147.

146. C. Watts, '*Heart of Darkness*', in J. H. Stape (ed.), *The Cambridge Companion to Joseph Conrad* (1996), 52. Ironically, it is this very portrayal of the colonial encounter that has brought his harshest critics. Thus Achebe argues that Conrad presents 'Africa as a metaphysical battlefield devoid of all recognizable humanity, into which the wandering European enters at his own peril'. *Ibid.*, 53. My own reading of it is closer to that of Parry and others in suggesting that Conrad's writing both 'exposes and colludes' in the colonial project. See Parry, *supra* note 2, 38.

147. Note Conrad's fear of engulfment reflected in his maintaining his distance, his criticism of Kurtz and the Lord Jim for their intimacy with local women, itself symptomatic of how they have 'lost' themselves in the colonial encounter (see Griffith, *supra* note 68). See also the discussion of geographical passion in section 2.2 above.

148. See Padmini Mongia, who develops this reading in her essay on Conrad's novel *Lord Jim*, *supra* note 49, 5. See also P. Mongia, 'Narrative Strategy and Imperialism in Conrad's *Lord Jim*', (1992) 24, 2 *Studies in the Novel* 173.

uti possidetis as pouring territory into frozen containers, we then find that this articulation of boundary disarticulates space. Spaces and places are engulfed in shifting and tenuous maps.

Edward Said has suggested that Conrad's experience as a writer had a similar trajectory. As Said notes, Conrad often recorded his impulse to write as motivated by an effort to use language to offer telescopic vision, to help people see what he saw in Africa, in the Far East, and so on. However, Conrad himself then seems to see his language as retrospectively recognizing the ambiguities and complexities of that vision, or even retroactively complicating the vision. He leaves Britain with an explorer's zeal, seduced by the manly heroism of seeing the world, and fixing its boundaries with his gaze, with knowledge over it. Yet the spaces and places he saw were always beyond his reach; in fact they transformed his own experience of the gaze.

As with principles of international law like *terra nullius* or self-determination, *uti possidetis juris* may be understood as an optic through which we see the territorial landscape. However, I suggest that we need to understand these scopic regimes through the notion of refraction, a term Conrad himself uses to describe the gaze from the sea. The concept of refraction explains how things look distorted because of the atmosphere through which light rays pass, distortions that implicate the viewer as much as the object. The principle of *uti possidetis* has worked in much the same way in refracting the Court's gaze; its colonial legacy of inscription distorted and fragmented through its very application. Thus if *uti possidetis juris* is a way of conveying international law's gaze on territory, then the concept of refraction usefully distorts the straight lines that we draw between this gaze and the political values that we associate with it. Refraction enables us to think of a plurality of values as internal to the gaze.

4. Conclusion

This article has looked at statist representations of territory by focusing on the *Western Sahara* case and the *Frontier Dispute* case. International law has a plurality of idioms through which it gives expressions to statist spatial representations. While these cases do not offer a comprehensive survey of the field, situated in the context of decolonization, they represent very specific and important moments in international law's conceptualization of territory. Moreover, these cases are themselves internally heterogeneous in the conceptions of territory they give voice to. Giving his opinion in the *Western Sahara* case, Judge Dillard argued that the Court's conception of sovereignty was one that was biased towards 'post-Reformation Western-oriented societies'.[149] However, the analysis of this article suggests that there is no single overarching vision of a statist representation of territory in either the *Western Sahara* case or the *Frontier Dispute* case; repeatedly we find that, as in Conrad's fiction, 'the established verities are not necessarily the winners'.[150]

149. Here Judge Dillard is particularly concerned with a tendency that would 'identify "legal" with deference to secular authority'. *Western Sahara*, *supra* note 3, at 125–6.
150. Parry, *supra* note 2, 4.

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Efforts to posit a stable territorial ground for action are invariably contested and unsettled. The Court indeed speaks in counterpoint: on the one hand it asserts a statist framework of territory, while on the other it gives emphasis to the nation as a counter to the state; on the one hand there is the effort to give voice to the nation itself in the name of popular sovereignty, while on the other the repertoire of choices offered the nation all work within the administrative paradigm; on the one hand it invokes colonial tropes such as *uti possidetis* to recover and reinstate colonial boundaries, while on the other its application of those tropes fragments and distorts colonial boundaries and the boundaries of colonialism; on the one hand it speaks of territory in the language of science, precision, and objectivity, while on the other hand it cannot but get its hands dirty negotiating the details of the colonial legacy and postcolonial nationhood; on the one hand it invokes the discourse of self-determination in the name of autonomy and emancipation, while on the other its articulation of self-determination remains trapped in a postcolonial problematic, a politics of despair that renders many voices of Third World nationalism ineffectual and impotent; on the one hand, it attempts to redeem international law as providing a heroic territorial solution in reparation for colonization, while on the other it replicates narratives of imperial passion in its treatment of colonial and postcolonial subjects.

If Conrad's treatment of colonialism is renowned for embracing 'intellectual and ethical ambiguities', international law's representation of territory through the nation works in strikingly similar ways.[151] Its approach to decolonization charts legal and normative continuities and discontinuities from colonial legacies to postcolonial aspirations. What emerges from these texts is that statist representations of territory are mobilized and negotiated in a fraught terrain of contested political visions. As we noted at the beginning, territory is spoken of in these opinions as something always already there to be declared rather than constituted by international law. The foregoing discussion suggests, however, that the explicit narrative of territory as distinct from the political[152] is laid over several politically charged narratives of territory that are implicit in the opinions. These are narratives that reference scale, place, and mapping. These territorial narratives function as both the grammar of analysis and its project. As suggested by the geographer James Duncan's discussion of discourse, place, and power, territorial imaginaries 'have a dual nature in that they simultaneously define the social framework of intelligibility within which practices are communicated and negotiated while they serve as resources to be used in the pursuit of power'.[153] Paraphrasing Duncan further, we may say that the landscapes adjudicated here are 'not merely' geographical sites 'where political struggle takes place',[154] they become constitutive of the heterogeneous voices that define conceptions of the nation.

151. *Ibid.*, 12.
152. For instance, each of the protagonists in the *Western Sahara* case, including the Court itself, legitimates its own position precisely by suggesting that their discussion of territory is removed from politics, that it is grounded in historical fact, geographical data, and legal rules, in contrast, of course, to the alternative position.
153. Duncan, *supra* note 86, at 233.
154. *Ibid.*