

## When politics darkens the independence of South African justice

By Mohammed Loulichki

### Summary

The decision of the South African High Court on June 15, 2017, ordering to seize the Moroccan phosphate cargo destined for New Zealand and to take the case to trial, has been considered by OCP and the Moroccan Government as an indignation and a law instrumentalization for political purposes.

In less than three weeks, two shipments of phosphates extracted from the subsoil of the Sahara region and exported by the company Phosboucraa were seized in Panama and South Africa respectively and were the subject of two verdicts of varying scope.

On May 1, 2017, following a request by the Polisario, the South African port authorities took advantage of the entry of the vessel "Cherry Blossom" into Port Elizabeth to seize the cargo of 55,000 tons of phosphates it was transporting to New Zealand and confiscate the ship's documents, pending a judgment.

*"This decision provoked strong reactions in Morocco and criticism even within South Africa."*

On May 17, 2017, a Danish vessel "Ulla Innovation" carrying 50,000 tons of phosphates on behalf of Agruim, a Canadian company, was the subject of an order by the Panamanian Maritime Court during its transit through the Panama Canal, bound for Vancouver.

In its decision of June 5, 2017, the Panamanian court declared itself not competent to rule on this case as it

concerns a political issue of international dimension, and dismissed the Polisario for failing to prove that it was the owner of the cargo.

Contrary to Panama's court decision, on June 15, the South African court stated that: "The Polisario represents most of the populations of the Sahara" and that the exploitation of phosphates in the subsoil of this region "does not benefit this population." In its forthcoming deliberations, the South African judge will need to determine the identity of the "Cherry Blossom" cargo's owner and whether or not the immunity from jurisdiction invoked by the Moroccan lawyers to divest itself of this matter is applicable.

This decision provoked strong reactions in Morocco and criticism even within South Africa. Indeed, in a comment made the day after the South African court's decision, the think-tank, Institute for Security Studies (ISS), based in Pretoria, rightly noted the "involvement of the Ministry of South African Foreign Affairs as a stakeholder in this case" and interpreted the decision as "a reaction to the success of Morocco within Africa" <sup>1</sup>.

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1. According to the article "Morocco's exports from Western Sahara hang in the balance," published by the Institute for Security Studies (ISS) on May 12, 2017.

The initial South African court's decision is contrary to the decision handed down by the Panamanian court two weeks prior. It comes in a context characterized by tension in the relations between Rabat and Pretoria, the most recent of which were the positions adopted by South Africa when Morocco applied to join the African Union last January.

*"The court departs from United Nations terminology or makes qualifications that are legally inaccurate."*

Pending the considerations and basis of the next decision by the South African court, it is already possible to note a few observations and to make some comments on the arguments put forward by the Court of Port Elizabeth to justify seizing the Danish ship's cargo and documents. This analysis will be based on the concepts used, the approach followed, the establishment of the Court's jurisdiction, and the content of its decision.

- At the conceptual level, the court departs from United Nations terminology or makes qualifications that are legally inaccurate. This is the case with the term "occupation" (paragraph 38, paragraph 40), which neither the General Assembly nor the United Nations Security Council uses in the context of efforts to find a political solution to the dispute over Morocco's recovery of its Sahara.

Moreover, the Court mentions a tripartite agreement allegedly signed between Morocco, the UN and the Polisario (paragraph 6), which would thus have constituted a de jure mutual recognition of the two parties when, in fact, it concerns proposals of August 1988 submitted by the Secretary General of the United Nations, accepted separately by the same parties, and incorporated into a document called a resolution plan<sup>2</sup>. The Security Council adopted this same document in its resolution 658 (1990) dated June 27, 1990.

*"Cherry Blossom" has not committed any infraction of South African rules or international rules."*

- As far as the approach is concerned, the Court seems to retain only the factual and historical evidence that corroborates South Africa's official position in all its concordance with the positions of Algeria and the

Polisario. As an example, neither the negotiation process under way since 2007 nor Morocco's development efforts in the region are found in the Court's reference system. The same is true of the requirement to conduct a census of the Tindouf camp populations, requested for the past six years by the Security Council and not adhered to by Algeria and the Polisario.

Another example is that the Court blamed Morocco for having rejected the referendum provided for in the resolution plan, whereas it was the United Nations that established this finding in 2000 because of the impossibility to conduct the identification process<sup>3</sup>.

Lastly, the court, instead of relying on objective evidence or on legal reasoning in order to construct its arguments, limited itself to unrelated statements, such as the first paragraph, which reads: "It is said that the Territory of Western Sahara is the only African territory that continues to be subject to the colonial regime."

- Concerning jurisdiction, South Africa is neither the customer nor the carrier nor the owner of the vessel in order to be entitled to an interest in bringing forth proceedings. Similarly, regardless of whether it is conventional law, customary law, or even South African law, the vessel "Cherry Blossom" has not committed any infraction of South African rules or international rules that could justify its detention and seizure of its cargo and its documents. Its entry into the Port of Elizabeth for supply was a routine act carried out in good faith, with no apprehension or doubt about the future behavior of the South African authorities. In addition, Morocco has not taken any action against South Africa that would be detrimental to the interests of that country, which could have justified reprisals on its part.

The vessel did not commit any violation within the waters under South African jurisdiction that would have triggered its responsibility in accordance with the United Nations Convention on the Law of the Sea. It was not accountable for any claim that would have justified its detention, in accordance with the Brussels Convention of 1952 on the Unification of Certain Rules on the Arrest of Sea-going Ships.

2. Documents S/21360 dated June 18, 1990 and S/22464 dated April 19, 1991.

3. Report by the General Secretary of the United Nations S/2001/613 date June 20, 2001.

In the absence of a treaty basis to justify its jurisdiction, the Court of Port Elizabeth relied on the South African Law called "Implementation of the Rome Statute of the International Criminal Court" dated July 12, 2002, which provides for universal jurisdiction. It is well known that this jurisdiction cannot be invoked for a commercial dispute and remains explicitly and exclusively reserved for crimes against humanity, war crimes, genocide and torture.

*"At the UN level, the Polisario is not considered as a "liberation movement" nor as a "sole and legitimate representative." "*

- Concerning the verdict's content, we note three fundamental points which seem to merit special attention: the representation of the populations of the Sahara, the status of Morocco vis-à-vis the Sahara region, and the legality of Morocco's exploitation of the region's natural resources.

#### a. Representation of the populations of the Sahara:

Throughout the judgment, the South African Court refers to the Polisario as "a national liberation movement ... representing the people of Western Sahara" and "recognized as such by the United Nations" (paragraphs 5 and 6). However, the United Nations, the African Organization nor the Non-Aligned Movement (NAM) have never recognized it as such.

On the African level, the granting of the status of "Liberation Movement" has always been the exclusive jurisdiction of the Organisation of African Unity (OAU) Liberation Committee. Thus, for example, the South West Africa People's Organization (SWAPO) and the African Nation Congress (ANC) were given recognition of this status, which provided them with the status of observer representation in the OAU and in the United Nations.

*"A factual and neutral reading of the history of the conflict could have informed the South African judge that the majority of the Sahara region's population lives in Morocco."*

During the Committee's existence, between 1963, the date of the creation of the OAU, and 1995, the date of the end of the Committee, the Polisario was never granted the

status of a liberation movement, presumably due to the existence of other movements which were Unionists<sup>4</sup> and the lack of support within the OAU for the granting of this status.

At the UN level, the Polisario is not considered as a "liberation movement" nor as a "sole and legitimate representative" but only as a petitioner in the Fourth Committee and the Committee of 24. For the purposes of the current negotiating process leading to a political solution, the Polisario is considered as a simple "interlocutor," with an ad hoc and functional status, with no legal implications, which enables it to be involved in the negotiations without being able to address itself, in any capacity whatsoever, to the Security Council, the General Assembly or its five other main committees.

*"The Green March, a peaceful and civilized means to pressure Spain to negotiate with Morocco for the surrender of the Sahara, did not give rise to any armed confrontation nor one of a military nature."*

This conclusion on the non-representativeness of the Polisario was also enshrined by the European Union Court of Justice in determining the territorial scope of the Fisheries Agreement between Morocco and the EU<sup>5</sup>.

In this respect, one is justified in questioning the reasons that prompted the Polisario to submit its application to the South African court on its behalf and on behalf of the Sahrawi Arab Democratic Republic (SADR), whereas the one presented to the European court was only in the name of the Polisario. The latitude thus given to the South African judge to play on the two statutes in order to guide his reasoning and decision could explain this alternative.

*"Morocco has recovered its Sahara by exclusively peaceful means."*

Another inaccuracy lies in the proportion of the Sahara populations located to the east of the wall and in the Tindouf camps in Algeria. The South African court asserts that it constitutes the majority of the total population originating from the Sahara region. A factual and neutral reading of the history of the conflict could have informed

4. In his book on the Western Saharan populations, Editions Karthala, 1993, Attilio Gaudio cites, as an example, MOREHOB, PUNS and FLU.

5. Decision dated December 21, 2016 noting that the Agricultural Agreement concluded between Morocco and the EU does not concern Polisario.

the South African judge that the majority of the Sahara region's population lives in Morocco, as has long been attested by the United Nations Identification Commission. This population cannot, therefore, accept to see its right to representation confiscated by the Polisario.

### b. Morocco's status vis-à-vis the Sahara region:

In its judgment, the South African court considers that Morocco has recovered the region of the Sahara, through the use of force (paragraph 19), that the populations of this region are distinct (paragraph 18) from the population of the rest of Morocco and that at most, Morocco can be considered as a de facto "administering power" for the purposes of the court's deliberations.

By invoking the general principle of international law on the illegality of the acquisition of territories by force, the South African court asserts that Morocco occupied the Sahara Region by force and that Spain "offered/gave" (paragraph 19 and paragraph 41) the territory to Morocco. Such assertions are far from reality and do not stand up to proven facts duly reflected in international legal instruments.

The reality is that Morocco has recovered its Sahara by exclusively peaceful means, without recourse at any time to armed force and that the Royal Armed Forces entered this region under an agreement negotiated with the former colonizer, registered with the United Nations and endorsed by a General Assembly resolution.

*"This demonstrates that not only is the phosphate extracted from the subsoil of the Sahara region and not exported "in contempt" or "to the detriment" of the local population, but that to a great extent it benefits these same population."*

Is it necessary to note that the Green March, a peaceful and civilized means to pressure Spain to negotiate with Morocco for the surrender of the Sahara, did not give rise to any armed confrontation nor one of a military nature.

It is also necessary to recall that Morocco's decolonization process is a sui generis case, because while the occupation of the Moroccan territory has taken place in stages, the recovery of the entire territory of Morocco has also taken place gradually and is awaiting completion. What has in fact been a constant feature of Morocco's approach is its determination to achieve its full territorial integrity

through negotiation and in harmony with international law.

Finally, it must be remembered that the International Court of Justice (ICJ) recognized allegiance bonds between Sahrawi tribes and Moroccan Sultans, and that the Green March led to the negotiation of the Madrid Agreement in November 14, 1975. This was followed by the final return of the ex-Spanish Sahara to the mother country, in conformity with international law and the United Nations Charter.

The same agreement was registered on December 9, 1976 with the United Nations Secretariat in accordance with Article 102 of the Charter<sup>6</sup> and endorsed by the General Assembly in resolution 3458 (B) dated December 10, 1979.

On these developments, the South African court decided to exclude the foregoing and went so far as to claim that the population of the Sahara is distinct from that of Morocco and that "Hassania is closer to Mauritania than to Morocco" (paragraph 18). Such an assertion completely ignores the history, sociology and demography of the entire Moroccan South, including the Sahara region, and particularly the degree of integration of the southern tribes into Moroccan society.

### c. Exploitation of the Sahara's Natural Resources:

Since Morocco presented its autonomy initiative in April 2007, Algeria and the Polisario have undertaken actions to neutralize the dynamics created by the autonomy proposal. There has been an attempt over these past eight years to include the human rights dimension in MINURSO's mandate. Then, faced with the failure of this process, the Polisario turned to the question of the natural resources in the Sahara, making its exploitation contingent upon consulting the Tindouf camps' populations or using the resulting income to exclusively benefit these same populations.

In reality, the Polisario's objective is quite different: Faced with the growing challenge of the humanitarian condition of the Tindouf camps' populations, the Polisario's objective is a race to the bottom, depriving populations in the Sahara region of benefitting from the exploitation of local natural resources in order to put them in the same precarious situation as the Tindouf camps' populations.

6. Compendium of Treaties, 1975, Volume 988, no. 14450 page 295



Indeed, thanks to family visits between the Sahara region and the Tindouf camps, visitors have been able to see for themselves the unprecedented development recorded over the last years within the region, which contrasts with the humanitarian situation they experience in the camps.

By adopting Polisario's thesis on the Tindouf camps' population size, the Court asserts that "those who can benefit from the extraction of phosphates are not the populations of the territory but more likely the Moroccan settlers" (Paragraph 48), and that "the ownership of the cargo belongs to the Polisario" (paragraph 49). In doing so, the South African judicial body relies essentially on the resolutions of the United Nations General Assembly and the opinion of its Legal Counsel to try to challenge the legality of Morocco's exploitation of the natural resources in the Sahara.

In this sense, it should be noted that the context in which these resolutions were adopted was characterized by the will of third world countries, supported by the socialist bloc, to regain their full sovereignty, including the means of ensuring their political independence and socio-economic development. This process resulted in a series of resolutions adopted by the UN General Assembly from 1952 to the end of the 1970s. The quintessence of these instruments can be synthesized into three parameters:

- Non-discrimination between the populations of the region,
- The development of the well-being of these populations and the promotion of the viability of their environment,
- The non-exploitation of the resources of the region in contempt or to the detriment of the interests of its population.

*"The real challenge facing the international community as a whole is the negative impact of such actions on trust between States, respect for the sovereignty of States, including immunity from jurisdiction and enforcement, and the imperative international cooperation."*

The insistence on these principles is explained by the historical context of decolonization characterized by the excessive exploitation of natural resources by the ex-colonial powers in their overseas territories, for the exclusive benefit of these same powers regardless of the interests of indigenous peoples or concern that the newly independent countries avoid any external influence.

As for the opinion of UN Legal Counsel Hans Corell in 2002, the UN official said: "An analysis of the dispositions of the United Nations Charter, the resolutions of the General Assembly, the jurisprudence of the International Court of Justice and State practices "indicates that" exploitation is illegal only if it is conducted in disregard of the needs and interests of the population of the territory in question "<sup>7</sup>.

By applying the 3 principles to the situation of the Sahara populations, it enables the following observations to be made:

- The development that the Sahara region has been able to experience does indeed show discrimination. However, this discrimination is rather positive in favor of local populations. It has been dictated by the need to compensate for the deficit accumulated since 1975 in all development sectors. Below is indicative data:
- The Sahara region currently has over 3,379 km road, compared to 850 km in 1975, an electrification rate of 92% while the national average is 71%, 74 educational establishments compared with 6 in 1975, 50 health facilities compared to 10, the Human Development Index (HDI) increased from 0.408 in 1975 to 0.729 currently (while the national index is 0.672).

A study undertaken by the well-known consulting firm KPMG in July 2015, focusing in particular on the role and impact of the company Phosboucraa in the socio-economic development of the Sahara region, revealed the following:

- Phosboucraa is the largest employer in the region with 2,200 employees, and the 50 subcontracting companies in the region have created 627 jobs
- Payroll is equivalent to \$177 million
- The percentage of employees from the region increased from 4% in 1975 to 76% in 2017.
- In 2016, the 500 people recruited were 100% locals
- In 2017, the company's top management has 20 senior employees from the region compared to one in 2003
- In terms of investment, all of Phosboucraa's profits are fully reinvested locally

7. Document S/2002/161 of February 12, 2002, containing a letter of January 29, 2002, addressed by the Security Council President to the deputy General Secretary of Legal Affairs, page 3.

- OCP plans to invest \$250 million between 2013 and 2022 in developing the region

This demonstrates that not only is the phosphate extracted from the subsoil of the Sahara region and not exported "in contempt" or "to the detriment" of the local population, but that to a great extent it benefits these same population.

Moreover, the State has allocated additional resources, for Morocco's duty of solidarity with respect to its Saharawi component, which go well beyond the phosphate and fishery revenues because each dollar of revenue generated from the region corresponds to seven dollars invested by the Moroccan public and private sectors.

To better understand the scope of the South African court's findings, it is important to link it to the context, which is characterized by the following determinants:

- Morocco's return to the African Union and the role it could play in boosting the Organization's structures and improving its capacities
- Morocco's place on a continental level and its concrete initiatives of co-development centered inter alia in phosphate-related activities
- The prospect of an upcoming resumption of the process to seek a realistic political solution under a new leadership by the United Nations
- The adverse bilateral relations between Rabat and Pretoria precisely because of the Sahara question.

It is undoubtedly these elements that the South Africa court considered when it repeatedly referred in its

judgment to the complexity and novelty of the case before it. However, unlike the Panama Maritime Court, which for the same reasons declared the Polisario's application inadmissible, the South African court decided to render a final judgment on the case of "Cherry Blossom."

This next step will give the South African court the opportunity to overcome the misstep dated June 15 and correct the damage done to relations between Morocco and South Africa. It will also be an opportunity to measure the degree of independence of this country's justice system and its impermeability to external pressures and influences.

That said, and beyond this case, the real stakes far exceed the seizure of 50,000 tons of phosphates. The real challenge facing the international community as a whole is the negative impact of such actions on trust between States, respect for the sovereignty of States, including immunity from jurisdiction and enforcement, and the imperative international cooperation, which guarantees the fluidity of commercial transactions and the safety of maritime routes. What is at stake is the security and predictability that are always attached to any rule of law and, a fortiori, to the rules of international law whose purpose is to regulate relations between sovereign States, and avoid arbitrariness, unilateralism and political manipulation.

It is to be hoped that the rule of law, the sense of responsibility, and common sense will prevail.

## About the author, Mohammed Loulichki

Mohammed Loulichki is Senior Fellow at OCP Policy Center. He has an extensive experience of 40 years in diplomacy and legal affairs. He assumed inter alia the functions of Head of the Department of Legal Affairs and Treaties in the Ministry of Foreign Affairs. He was also Ambassador of Morocco in Hungary, Bosnia – Herzegovina and Croatia (1995-1999), Ambassador Coordinator of the Government of Morocco with MINURSO (1999 – 2001), Ambassador of Morocco to the United Nations in Geneva (2006-2008) and New York (2001-2003 and 2008-2014), as well as President of the Security Council (December 2012).

Ambassador Loulichki was appointed President of the working Group on Peace Keeping Operations (2012), President of the Counter-Terrorism Committee of the Security Council (2013), Vice-President of the Human Rights Council (2006-2007), and President of the National Committee in charge of the follow up on nuclear matters (2003-2006).

## About OCP Policy Center

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